Chapter 6

Conclusions and Recommendations

"Sometimes as a leader, I wonder what kind of society I am living in; one where women no longer fear snakes or murdering dogs, but murdering men."

His Excellency Hifikepunya Pohamba, President of the Republic of Namibia, speech at launch of National Gender Policy, 8 March 2012

6.1 OVERVIEW OF RESEARCH FINDINGS

The research indicates that, on the whole, protection orders are being used as intended, and are proving to be useful interventions in many cases.

Both men and women are using the procedure successfully, although women (as the more prevalent victims of domestic violence in society) logically use the law more frequently.

Complainants tend to approach the court for serious domestic violence of multiple types, and not for small or trivial matters or single incidents of domestic violence. Most complainants who seek protection orders are successful in obtaining at least an interim order, containing many of the terms which they requested. Courts apparently scrutinise the requested terms and in most cases add or subtract provisions before issuing the order – indicating that magistrates are recognising instances where a complainant at risk needs more protection than he or she may realise, or asks for protection that is not justified by the evidence presented.

Both requests and orders for exclusive occupation of the joint residence are common, but these are primarily requested and granted in situations where the joint home is owned or leased solely by the *complainant*, or jointly by both parties. The belief in some quarters that the protection order mechanism is frequently abused to deprive 'innocent' respondents of their homes is clearly a myth.

One of the chief complaints encountered is that the application form needs to be simplified, without of course sacrificing the detail which magistrates need in order to grant an urgent *ex parte* order. We have identified several ways in which the forms and procedures set forth in the law could be simplified and streamlined.

The other chief complaint concerns the capacity of government personnel to assist complainants with protection order applications. Clerks, police and magistrates all claimed that this work overburdens then, and complainants generally have to approach both a clerk of court and a police station in order to complete an application form. While simplification of the forms and procedures will be of some assistance with this problem, the growing number of protection order applications is pointing to a need for specialised and dedicated personnel at courts and police stations – at least in Namibia's larger centres.

A related problem concerns service of protection orders, which is probably the weakest area of the law's implementation. New approaches to service of legal documents should be explored, but in the meantime police need to be encouraged to make time for this task as an important aspect of crime prevention.

Some intentional and unintentional misuse of protection orders was identified by key informants – particularly as "the poor man or women's divorce" – but the research indicates that this is the exception and not the rule.

Although many people complain about delays in the procedures, the typical case was not actually very protracted and most interim protection orders were granted promptly after application, although not usually achieving the ideal of being granted on the day of application.

One of the most worrying findings was the enormous attrition between interim protection orders and final protection orders – which seems to stem from a mixture of reconciliation between parties, abandonment of cases and confusion on the part of both courts and complainants

over how interim orders are converted into final orders. Such case disappearances may involve intimidation of complainants which the system is not picking up.

The research also worryingly suggests that domestic violence being directed against children is not being picked up or addressed; the vast majority of the cases involved adult complainants, with children featuring only incidentally.

Although the research provided little information on breaches of protection orders, anecdotal evidence, combined with the lack of cases on breaches, suggest that violations of protection orders may not be taken as seriously as they should be by police and sometimes even by complainants themselves.

High Court review of an interim protection order, 2011

While the Legal Assistance Centre was concluding this research report, the first High Court review of a protection order was conducted. This review points to some problems and issues which are instructive.

The parties in this case were an 89-year-old father and his 33-year-old son. The father had sought and obtained an interim protection order against the son on the basis that he had committed economic abuse. Threats of assault were alleged, but there was no allegation of actual acts of physical violence. The conflict seemed to be part of a family dispute which saw some extended family members siding with the son and some with his estranged wife. Father and son were residing on adjacent farms, and there were a range of underlying disputes between then about livestock ownership and alleged livestock theft, marked by the laying of various criminal charges.

1. BASIS FOR URGENT REVIEW

The Combating of Domestic Violence Act provides for appeals in respect of both interim and final protection orders.[1] However, the review in question was brought in terms of section 20(1)(d) of the High Court Act 16 of 1990, which authorises the High Court to review the proceedings of any lower court on various grounds, including where there is a "*gross irregularity in the proceedings*". The High Court found in the case at hand that there was sufficient basis for such a review despite the fact that the order in question was an interim order rather than a final order, and despite the fact that there were other options for redress including an appeal of the interim order or anticipation of the return date to accelerate a final decision on the matter: "*I find that the applicant was entitled to approach Court to seek the review and setting aside of the interim protection order granted by the first respondent, despite the fact that the proceedings have not as yet been concluded.*" Because the High Court found serious irregularities, it concluded that the order was reviewable "*both in terms of the inherent powers of this Court at common law and in terms of the express provisions of section 20 of the High Court Act. There is no basis in law to require that the applicant first exhaust his remedies before the Gobabis Magistrate's Court.*"

[1] Section 18 of the Combating of Domestic Violence Act 4 of 2003 provides for appeal from a "protection order", which is defined in section 1 to include both interim and final protection orders. It is possible to appeal against a court's decision to make or not to make an order, or against the inclusion or refusal to include a particular provision.

The matter was also one of urgency, by virtue of the fact that the party seeking the review alleged that *"his constitutional rights to the enjoyment of his property under Article 16 have been violated by the interim protection order and that the order itself falls to be set aside as having no basis in law"*.

2. DOMESTIC RELATIONSHIP

One domestic relationship covered by the Combating of Domestic Violence Act is *"parent and biological or adoptive child"*.[2] However, the Court found that since the definition of a child in the Act is a person under the age of 18 years, this provision could not be the basis for finding a domestic relationship between the parties. However, they could show a domestic relationship in terms of the provision of the Act which covers *"family members related by consanguinity, affinity or adoption"* who have *"some connection of a domestic nature"*.[3] While there were no specific factual representations on this point, the Court found that this provision covered the issue:

> *On my reading of the Act, the legislature intended by the enactment of section 3(1)(e) to bring within its reach a very broad spectrum of familial relationships of a domestic nature, with the purpose that protection orders may be sought by aggrieved family members without having to seek recourse to more expensive and less expeditious civil or criminal proceedings to keep the family peace. Whilst the relationship between the applicant and the second respondent is one of acrimony, the facts put up by the second respondent… suggest that there is some financial dependency between the applicant and the second respondent… .*

3. POOR UTILISATION OF FORMS

In assessing the case before it, the Court remarked upon problems with the forms utilised under the Act. Our research suggests that the problems identified by the Court here are not unusual:

> *The pro forma nature of the Forms is presumably to assist the complainant in making application for the protection order and at the same time assists the Magistrate in that Form 5 sets out the full range of the orders that the Court may hand down as part of the interim protection order. The Magistrate can simply indicate in the appropriate spaces on Form 5 which of the broad standard form orders shall become operative should he or she grant the order. As with any form the danger exists that the person completing it may not take care to do so clearly and with full regard to all the sections which require attention. The end result is that the pro forma form, instead of facilitating clarity in the administration of justice and the orders of Court, becomes a sloppy administrative process with little attention being given to crucial details. This is precisely what happened when the Magistate filled in the Form 5 in granting the interim protection order in this matter.*

Some of the problems identified by the Court relate to the nature of Form 5 itself, which perhaps encourages confusion – the form's failure to direct the magistrate to delete the

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[2] Combating of Domestic Violence Act 4 of 2003, section 3(10(d).

[3] *Id*, section 3(1)(e).

pro forma provisions which do not apply as opposed to merely ticking the ones which do, and the superfluous provision on the form which orders the respondent "*to refrain from all acts of domestic violence and in particular from the types of violence indicated*".

Other criticisms made by the Court related to sloppy use of the form in the case at hand. The form includes a provision directing the Clerk of the Court to forward a copy of the protection order to the station commander of a specific police station (a directive which is peremptory in terms of section 8(6) of the Act), but there was no indication by the magistrate of the relevant police station in the blank provided for this information. Furthermore, the stamp of the clerk of the court appeared beside the signature of the magistrate, where one would expect to find the magistrate's stamp.

The Court found that these flaws, taken together, constituted "*a strong indication of the complete failure by the [magistrate] to apply his mind to the matter and to hand down an order that is clear, unambiguous, and indeed intelligible to the person subject to its ambit*".

4. IRREGULAR AMENDMENTS

On the return date for the interim protection order, the father's legal representative was present but the son's legal representative was not available. The magistrate postponed the enquiry. At the same time, the magistrate extended and amended the interim protection order. Several problems arose at this stage.

Firstly, the magistrate stated in court that the respondent had been ordered by the terms of the interim protection order not to trespass on a particular farm. But, in fact, the form containing the interim order did not contain any indication of this. Furthermore, the Court found that no such order would have been competent since there was proof that the respondent owned the farm in question – and that it was not a residence shared by the parties. While there were claims that this ownership arrangement was designed merely to facilitate financing, even if this were so, the Court noted that the owner named on the deed nevertheless enjoys all the rights of ownership and cannot trespass on his own property.

Secondly, the amended order contained broad "no contact" provisions which effectively removed the son from his own home on the farm in question, together with his personal belongings, and stated that he could not enter or come near this farm. (There was no question of an order for exclusive occupation of a joint residence, as the parties resided on different farms but were involved in overlapping farm operations.) As the court noted, the broad "no-contact provisions" constituted "*a considerable deprivation*" of the son's rights as the owner of the property in question, and constituted "*a curtailment of his property rights entrenched by Article 16 of the Constitution*". The son alleged that he had effectively been evicted from his own property without just cause. However, the Court found it unnecessary to take this issue further, because of its finding that there had been procedural irregularities which invalidated the no-contact provisions.

In procedural terms, the magistrate stated that he was amending the order to include the no-contact provisions in question, pending the forthcoming enquiry, to correct an "oversight". However, the Court found that the far-reaching amendments in question were clearly proposed in court by the legal representative of the father (who was the original applicant for the protection order), without any formal application. However, section 17 of

the Act requires that any requests for modification of a protection order must be made in writing, in the prescribed manner, and accompanied by a supporting affidavit. The High Court concluded:

> *It is evident from the record that there was not the slightest attempt by the first respondent to require that the second respondent comply with the peremptory provisions of section 17(2) of the Act when he granted the modification or amendment to the interim protection order. There was no application together with an affidavit deposed to by the second respondent. An application from the bar simply does not constitute compliance with the Act. That the interim protection order was amended in this arbitrary manner in contravention of the procedure provided for in the Act amounts, in my view, to a gross irregularity in the proceedings.*

5. BASIS FOR OVERTURNING THE INTERIM PROTECTION ORDER

In summary, the High Court set aside the interim protection order on two grounds: 1) "*the impugned order was inept*" and (2) "*the 'amendment' thereof was granted in contravention of the peremptory provisions of section 17 of the Act*". It set aside the interim protection order in its entirety.

6. COSTS

The son who initiated the review proposed that the costs of the review should be borne by the magistrate. However, the magistrate was not a party in respect of the merits of the review, but was involved only for the purpose of opposing the requested order for costs. Furthermore, the Court cited authority for the proposition that a magistrate should only be liable for costs where there was malicious intent as opposed to correction of an error. The Court found that the irregularities in question "*resulted from the first respondent's lack of attention to the detail in filling in the Form constituting the interim protection order and his overlooking the provisions of section 17 of the Act*" – both of which were insufficient to justify an order of costs against the magistrate. Instead the normal rule that the costs follow the case result was applied, with the costs of the review being awarded against the father who had originally applied for the protection order.

Katjivikua v Magistrate: Magisterial District of Gobabis and Another **(A 208/2011) [2011] NAHC 340 (4 November 2011)**

As with any form, the danger exists that the person completing it may not take care to do so clearly and with full regard to all the sections which require attention. The end result is that the pro forma form, instead of facilitating clarity in the administration of justice and the order of court, becomes a sloppy administrative process with little attention being given to crucial details.

Katjivikua v Magistrate: Magisterial District of Gobabis and Another (A 208/2011) [2011] NAHC 340 (4 November 2011)

6.2 GENERAL RECOMMENDATIONS

6.2.1 Amendments to the Act and regulations

Almost all the key informants interviewed felt that Combating of Domestic Violence Act is good, and pointed to problems with the law's implementation rather than with the law itself. However, the current research has identified a few areas where the Act and the regulations need to be fine-tuned.

- **Fine-tune the Act and regulations in light of the research findings, as detailed in sections 6.3.1 and 6.3.2.**

6.2.2 Revision of the forms

Many key informants found the application forms complex, cumbersome, repetitive and time-consuming to complete. The forms used for protection orders are in need of simplification in terms of language, length and organisation to make them more user-friendly. The lack of clarity and completion in a large number of forms we reviewed, and observations from magistrates and clerks of court, all indicate that the forms are often not properly completed. According to one magistrate, their current complexity creates a perception that "*the Act does not accommodate ordinary citizens, or laymen. It is more for legally trained people.*" This magistrate recommends that "*we need to make it easier for an ordinary man on the street to understand it and avoid the legal jargon. Make it in a form that anyone could read*".

There are two possible ways to simplify the application form: (a) Incorporate improved check-lists to streamline the process so that applicants can check their responses rather than composing an affidavit in narrative form. (b) Reduce the questions by encouraging complainants to answer guiding questions in narrative form. This could help to avoid confusion in cases where questions with checklists might be misunderstood. It would also avoid some of the repetition which the forms currently exhibit. Magistrates consulted on this question at a 2011 training session were almost evenly divided. We endorse the second approach.

- **Simplify the forms with more emphasis on narrative accounts within a context of open-ended guiding questions, to eliminate the need for both an application form and a separate affidavit. Detailed proposals for changes to the forms are contained in section 6.3.3.**

6.2.3 Training of service providers

It seems almost trite to recommend training, but there is no substitute for thoroughly-trained personnel when it comes to effective implementation. Several key informants interviewed thought that training for magistrates, police and clerks should be "*mandatory*". We feel that it is not so important whether training results from law or policy, as long as it takes place.

- **We suggest that in-service training for key role-players should be undertaken annually on a regular basis, as well as being part of pre-service training programmes where these exist.**
- **We also suggest the development of more specialised training materials for clerks of court, magistrates and police, such as domestic violence cases with examples of correctly completed forms and model affidavits as the basis for practical exercises. Training of key service providers needs to become more specialised and participatory in order to be more effective.**
- **It would be useful to create training manuals for police, clerks and magistrates, and to provide a checklist to help ensure that all necessary forms and signatures are in place.**

(a) Magistrates

Most magistrates who were interviewed reported that they had received past training on the Combating of Domestic Violence Act from the Legal Assistance Centre, with some having received training from the government. Even if they had not received specific training, most seemed to feel that their understanding of the law was adequate – although as one magistrate said, "*You can never have enough training.*"

Our research identified the following areas where at least some magistrates lacked clarity or could benefit from additional training and discussion:

- **Civil and criminal options:** Further training is needed on how the protection order procedure fits together with the option of seeking a formal warning from police or laying criminal charges – as alternative remedies *or* as options which can be pursued simultaneously, at the victim's choice.
- **Enquiries:** Because an inconsistency between the Act and its subordinate regulations on who may be present at enquiries has caused confusion, future training should explain that the Act's rules take precedence, meaning that all protection order enquiries are supposed to take place in closed court.
- **Emotional or economic abuse**: Our researchers observed that many magistrates were somewhat reluctant to issue protection orders for emotional or economic abuse which was not accompanied by physical abuse, and so could perhaps benefit from training on the impact of these less obvious forms of domestic violence.
- **Children:** The research revealed that very few cases are being referred to the Ministry of Gender Equality and Child Welfare for social worker monitoring of children affected by domestic violence. The importance of this measure for preventative purposes should be emphasised, along with sensitisation of magistrates on the impact of domestic violence on children in the household.
- **Temporary maintenance:** The research revealed a few cases where the provisions on temporary maintenance seem to have been misapplied by courts. It would be useful to emphasise in future training that this option is available only where the respondent has a pre-existing legal liability to maintain the person in question. Another problem encountered was that some protection orders exceeded the six-month maximum period set by the Act for provisions on maintenance, pointing to a need for further training on how such temporary maintenance orders differ from, and interact with, the procedures in the Maintenance Act.

- **Temporary custody and access:** Protection order provisions on temporary custody and access were not always applied correctly. The intention of these provisions should be a target for training, along with discussion of the different legal procedures which address custody and access, and which are appropriate in which situations.

- **Provide ongoing in-service training for magistrates, with more-experienced magistrates participating in training new magistrates. The training should target the areas identified by the research as being problematic at some courts.**

(b) Clerks

The need for training of clerks of court is urgent. Most clerks interviewed felt that they did not adequately understand the law and wanted additional training, citing the fact that the clerks, not the magistrates, are the ones on the front lines helping applicants to fill in the forms and answering questions from both complainants and respondents. Some did not feel that they clearly understood what actions were encompassed by the term "domestic violence".

One clerk of court emphasised the need for training in effective use of the application forms, saying that she does not understand the reasons behind many of the questions on the form, but that if she understood why the questions were important she could help the complainants provide appropriate answers. Another clerk said, "*Interpreting the Combating of Domestic Violence Act is a very subjective process and everyone reads the Act differently. There should be training on the correct interpretations of the Act.*" We encountered two clerks who did not understand what an interim protection order was.

Several clerks noted that clerks are often neglected in training programmes, with one saying:

> *When the law was passed people were told about it, but there was not enough guidance or information given to the clerks. They were not educated about the laws. The paper law was only circulated. The prosecutors and magistrates went to a training, but the clerks did not study the law. How am I going to interpret something that I don't know or understand? Most people at the grassroots level are not seen – only the prosecutors and magistrates. I am always afraid that someone can come back and blame me for not understanding. I am very vulnerable and can be sued.*

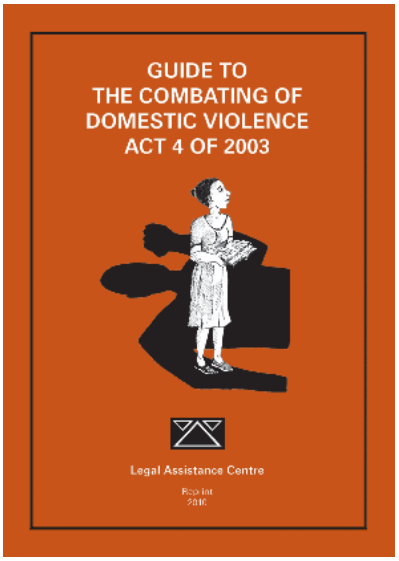
> ***The clerks are the ones doing the work, but we have no training, only the prosecutors and magistrates get training.***
>
> clerk of court, Tsumeb

One female magistrate emphasised the need for training of clerks in how to treat complainants of both sexes sympathetically and to avoid gender bias, in addition to training on the law:

> *Training of male clerks is important. This is because female applicants are not comfortable to report their issues to a male clerk. A male clerk needs to be able to make the female applicants comfortable enough to tell their story to them. Also police tend to take complaints from men seriously, but not so when it comes to women.*

They will readily listen to what a male complainant has to say and even have the offending female charged with assault and battery but will refer female complainants to obtain protection orders.

Many requested educational materials from the Legal Assistance Centre which could help them digest the law. The *Guide to the Combating of Domestic Violence Act* produced by the Legal Assistance Centre was cited as an example of useful interpretative material.



It would be useful for training sessions to focus on practical exercises which demonstrate how to properly assist complainants and respondents, with examples of correctly-completed application forms.

- **Provide ongoing in-service training for clerks of court, with practical exercises on how to complete application forms, including information on the purpose of the various questions. Clerks should also be provided with simplified material on the Combating of Domestic Violence Act.**

6.2.4 Unsympathetic police response

Many clerks expressed concerns about the lack of understanding of domestic violence on the part of police. They said that the police often seemed to be at a loss as to what to do with complainants who appeared at their stations complaining of domestic violence.

Police who were interviewed welcomed the idea of additional training. Some emphasised the need for ongoing training, such as police in Oshakati who said, "*When we get new members they also need to be trained. New officers need to be trained as well as the old ones were. There should be a workshop once a year to maintain the level of knowledge.*" If police are going to continue to be involved in assisting complainants with affidavits to support protection order applications, then they need more intensive training on the information which is required to support protection orders.

However, training alone does not seem sufficient. Although the first Woman and Child Protection Unit was established in Namibia in 1993 with a view to providing more gender-sensitive police services, complaints are still received about insensitive police response on domestic violence and other matters at these units – despite the fact that multiple training initiatives have already targeted the relevant personnel.

Some key informants also cited problem with police attitudes; for example, one magistrate complained that "*police are reluctant to do what the Act says and carry out their duties to the letter of the law,*" saying that "*police should understand their powers and implement them*".

Other key informants alleged that police sometimes fail to act when the respondents are friends or acquaintances, but police who were consulted vehemently denied that this happens.

- **Ongoing pre-service and in-service police training should be combined with closer supervision of service at the Woman and Child Protection Units, with periodic efforts to survey members of the public directly about their experience at the Units and targeted action on the feedback received.**
- **Police should adopt a formal policy on procedure for handling cases involving parties who are known to police involved in the case. Police who were consulted thought that this would be a good idea, as it would give the public an idea of what they should expect as well as giving police a defence against false allegations of favouritism if they have followed the policy.**

6.2.5 Dedicated and specialised staff

A magistrate in Rundu said, "*It should be mandatory for every court to have one or more clerks dealing specifically with protection orders because we are understaffed and the clerks are overworked.*" A magistrate in Oshakati thought that it would speed up final orders if there were also a specific magistrate assigned to this duty. A clerk at the Katutura Magistrate's Court suggested that there should be staff available to handle protection orders 24 hours a day, seven days a week.

One clerk worried that the courts were too inaccessible to those in outlying areas – for example, she noted that the Swakopmund Magistrate's Court serves outlying areas such as Arandis and Henties Bay. She suggested that there should be more use of mobile courts, with clerks accompanying them, to assist people in these areas with protection order applications.[4]

One magistrate innovatively suggested that clerks of court should ideally be social workers who would be equipped to solve many relationship problems without involving the magistrate. This magistrate also suggested that more female clerks of court should be employed to deal with domestic violence applications, which are usually brought by women. A clerk made a similar proposal:

> *…clerks handling protection orders should be trained in counselling because some of these people just want counselling. Most do not really want to go to court. They just want someone to talk to the respondent. They are not interested in having the respondent jailed for breaching a protection order or for assault… because in most cases the respondent is the breadwinner. If the respondent is locked away, the complainant will starve.*

Two key informants pointed to the need for counselling for clerks, to help them handle the stress of a job which involves exposure to harrowing tales of domestic violence.

Despite the existence of the Woman and Child Protection Units, some key informants felt that there should be further specialisation, with dedicated police being trained in how to work with domestic violence and the implementation of the Combating of Domestic Violence Act.

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[4] The distance from Swakopmund to Arandis is approximately 60km by road. The distance from Swakopmund to Henties Bay is approximately 80km by road.

- **Resources are always a constraint, but the number of protection order applications nationwide is steadily increasing. Specialised clerks, police officers and magistrates should be assigned to handle protection orders where possible, at least at the busiest courts and police stations. At large courts, there could be clerks and magistrates who specialise in family matters including domestic violence, maintenance and custody and access issues. This might provide greater efficiency in the handling of this group of cases which would ultimately produce some savings in resources.**
- **As the goal of attaching social workers to every Woman and Child Protection Unit is progressively realised, these social workers should also liaise with clerks of court to provide counselling and follow-up monitoring as appropriate in specific domestic violence cases.**

6.2.6 Links to support services

(a) Counselling for couples or abusers

Several clerks thought that some couples involved in protection order applications would be better served by couples therapy or individual counselling for abusive respondents. For example, many clerks thought that the court should ideally have a therapist on staff, who could handle the cases which would benefit more from this channel than from a court proceeding. Another suggestion was that government should employ more community-based counsellors to speak to couples who have problems with violence.

Some clerks were already sending couples to speak to pastors or counsellors. A clerk of court in Keetmanshoop suggested that complainants should always be referred to a social worker or a psychologist to speak about their abusive situations before the clerks assist them to complete the application for a protection order, which would support the complainants more effectively and free up some of the time that the court clerk spends trying to calm down the complainant to allow for more focus on the application itself. Of course, this approach should be treated with caution, and with careful deference to the victim's fears and wishes.

A related problem is the "revolving door" syndrome. Many clerks and magistrates said that complainants often withdraw their complaints when the abusive partner apologises, only to return the following month with another complaint. They cited this as a drain on court resources and felt that the cycle would just continue until the respondent underwent lasting behavioural changes which protection orders on their own were unlikely to produce.

In the absence of some procedure for providing therapy, respondents are being removed from the system with no support and complainants who find that the protection order on its own has not resolved the problem may fail to return to court to seek help.

A magistrate in Lüderitz thought that the protection order process should be coordinated with a separate institution which could provide counselling: "*The court only offers the protection order but there are some things, such as domestic violence, that people believe are culturally acceptable. Counselling would help this. You can teach people that violence is not acceptable.*"

Tsumeb was observed to have a successful program involving close cooperation with a social worker who counsels respondents. Clerks are diverting some cases to this programme rather than proceeding with the protection order process, and it is reportedly very successful.

- **It is vitally important for Namibia to establish more counselling programmes for abusers to enable meaningful behavioural change. We recommend amending the law to provide for court ordered-referrals to such programmes as part of protection orders. Even without such an amendment, magistrates should be encouraged to make such referrals where services are available under the authority of *"any other provisions that the court deems reasonably necessary to ensure the safety of the complainant or any child or other person who is affected"*[5] – although we do not believe that it would be appropriate for the court to make such an order *ex parte*, but only after discussing this option with both the complainant and the respondent.**

(b) Support for complainants

Some police interviewed from the Oshakati Woman and Child Protection Unit were sensitive to the difficulties faced by complainants: "*The problem is that women are still dependent on men, and they are not able to make their own decisions and we have to explain that we are here to only guide them and can not make decisions for them. Especially here with the villagers, their lack of education, culture and poverty makes it very difficult for them to get help.*" Rural communities should be targeted for greater support, to make it possible for victims of violence in such communities to consider the possibility of applying for protection orders or seeking other forms of help.

Some key informants felt that complainants who have already approached the courts need support for more lasting solutions beyond protection orders, which are only meant to provide temporary, emergency relief. For instance, one clerk suggested that support is needed to help complainants obtain a divorce, or to help them judge whether it will be safe for them to reunite with erstwhile abusers. This clerk also noted that complainants may need assistance with obtaining maintenance orders under the Maintenance Act 9 of 2003 to replace the short-term maintenance which protection orders can provide.

The lack of shelters for victims of domestic violence was cited as a shortcoming by some key informants, although some found creative solutions. For example, one female police officer and her female colleagues selflessly invite women at risk of violence to stay in their homes until a more permanent solution could be found. A social worker in Oshakati said: "*The shelter for the victims is necessary. Sometimes they report the case but the abuser is still in the house, and so these victims need a place to stay.*" The Ministry of Gender Equality and Child Welfare is in the process of establishing more shelters nationwide, but as these are rolled out it will be necessary to ensure that they form part of an integrated service on domestic violence.

- **There is an urgent need to provide more services for victims of domestic violence, especially affected children. This should include follow-up monitoring by the social workers who are designated to work with the various Woman and Child Protection Units.**
- **The government initiative to establish more shelters is welcome, but it will be important to ensure that shelter accommodation is combined with counselling and other support services for victims of domestic violence.**

[5] Section 14(2)(k).

- **It is also important to ensure that all role players are aware of local services available, and to implement monitoring by control social workers and senior police officials to ensure that appropriate referrals to support services are taking place.**
- **In the longer term, we recommend the establishment of volunteer-staffed victim support programmes with components of counselling, information and networking with others in similar positions.**
- **Rural communities should be particularly targetted for information and support, by facilitating the establishment of community support groups and by regular visits from government personnel who can support and inform such groups.**

6.2.7 Closer cooperation between service providers

One of the keys to making the process work smoothly appears to be cooperation between different service providers. For example, one magistrate spoke of the difference she noticed when a male station commander who was sympathetic to male respondents as a matter of "*male solidarity in a chauvinist society*" was replaced by a new station commander with a very different attitude. This personnel change opened the door to local meetings between court personnel, police and social workers to discuss different strategies to deal with issues of domestic violence in the area.

A clerk of court pointed to the confusion which inconsistent understandings of the law and procedures can create:

> *There is no uniform understanding of protection orders by the police, WCPU, magistrate and clerk. This is due to lack of common training. As a result, applicants often get confused (as a result of differing advice given by police, clerk and WCPU) regarding the right procedure to follow when seeking a protection order.*

Another clerk emphasised the need for "*more interaction and communication between the police, magistrates and court clerks responsible for the protection orders*", while yet another emphasised the positive impact of effective cooperation between the different service providers.

At a 2011 training session attended by 30 magistrates from all over Namibia, a senior control magistrate noted that magistrates have already been directed to hold minuted monthly meetings with other service providers in their areas – such as police and social workers. However, the vast majority of the magistrates in attendance conceded that they do not actually do this.

- **We suggest that the existing directive mandating monthly meetings between magistrates, police, social workers and other relevant local service providers should be repeated and strictly enforced, as closer cooperation would be likely to improve service delivery on domestic violence as well as a range of other gender and family law issues.**

6.2.8 Material resources at courts

One clerk reported that administrative obstacles sometimes slow down the protection order process, such as when the photocopier does not work or the office runs out of photocopy paper. Our researchers also observed this problem, and many key informants reported that they had insufficient copies of the necessary forms or lacked capacity to photocopy them. A senior magistrate confirmed this problem, and complained about the general inefficiency of obtaining offices supplies for magistrates' courts, including storage boxes to facilitate filing as well as forms and photocopy supplies.

This problem may seem small, but it can have large consequences. An endangered victim of domestic violence may not find the courage to return when the necessary forms are in stock. Administrative inefficiencies can also waste the time of court personnel and increase their sense of being overburdened.

- **It should be possible to supply magistrates' courts regularly and promptly with the necessary supplies for protection order applications. We suggest that government take advice from successful businesses with branches throughout Namibia on how to improve the efficiency of supply distribution and storage, as well as measures to reduce wastage.**

6.2.9 Application process

Most clerks interviewed gave similar accounts of the process by which a complainant applies for a protection order: If the complainant comes to the court to apply, the clerks send him or her to the police station to make a sworn statement to the police. Then the complainant must return to the clerk, who helps him or her fill in an application for an interim protection order. The sworn affidavit and any other evidence are given to the magistrate, who determines whether or not to grant the interim protection order. The clerk then sends the interim protection order to the station commander of the police, who is responsible for serving it on the respondent.

The procedure is similar if the complainant approaches the police station initially: "*In cases where a complainant is seeking a protection order in terms of the [Combating of] Domestic Violence Act, the police at the WCPU take a statement from her, and either accompany her, or direct her to the nearest magistrate's court to apply for an interim protection order. The clerk of the court will assist her to complete the application form.*"[6]

A few clerks were not (or thought they were not) Commissioners of Oaths and so could not assist with affidavits. Even where this technicality was not the issue, many clerks did not feel authorised or competent to take the statements. For example, one stated that "*the police is the one who must write a declaration*" because "*clerks are not allowed to*", while another said that clerks could not take sworn statements because "*we don't know how.*" But the bigger problem was that clerks were usually too busy to assist with a statement and consequently sent complainants to the police.

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[6] Ministry of Safety and Security, "The Development of Effective Law Enforcement Responses to Violence Against Women in Southern Africa", 11 June 2009 (mimeo).

One clerk suggested that police should have the capacity to complete the protection order applications at the police station at any time, so that they could then go directly to the magistrate and get the respondent out of the house immediately if there was any danger.

The current system of involving both clerks and police in the completion of applications for protection orders seems inefficient for service providers and difficult for complainants. We would suggest that clerks of court should be trained to fill out a protection order application form *and* take an accompanying sworn statement if necessary. If the application form is simplified, as we propose, then the total time involved should not increase substantially. If police are called upon less frequently to assist with statements for protection order applications, then this might free up more of their time for service of process. Furthermore, since the application form is designed to serve as a *pro forma* affidavit, if it is improved then there may be no need for supplementary affidavits from complainants.

One clerk of court suggested that complainants who come to the court or the police to apply for a protection order "*should be given some privacy instead of having to do everything in public with every passerby listening to them*". This is a good suggestion, which we endorse.

- **Application forms should be simplified and streamlined so as to be less time-consuming to complete.**
- **The Ministry of Justice should issue a circular to clarify the fact that clerks of court are authorised to act as Commissioners of Oaths for protection order applications. Some applicants may still be referred to police or other Commissioners of Oaths because of time pressures on clerks, but such referrals should not take place because of lack of clarity on the legal position.**
- **The Ministry of Justice should also issue a circular setting forth standard procedural guidelines for dealing with protection order applications to ensure adherence to the law and consistency across courts.**
- **Clerks should gradually be trained and empowered to complete the application form as well as any supplementary sworn statement which may be required, and police should be freed from this duty insofar as possible to focus more of their attention on service and enforcement of protection orders. However, all police personnel at Woman and Child Protection Units should also be competent to assist complainants with the entire process, particularly after-hours.**
- **We also suggest that courts and police stations should both, insofar as possible, identify private spaces where complainants can relate their stories without an audience.**

6.2.10 Procedure for after-hours applications

It is clear from the research involved that there is no consistent approach to after-hours applications. Courts and Woman and Child Protection Units (WCPUs) are open only during office hours. Police are supposed to be on call for each WCPU, but are not always easy to identify or locate. Many magistrates we spoke to expressed willingness to be approached after-hours to consider protection order applications, but this is not sufficient unless there is someone to assist the complainant in completing the forms and preparing a statement.

> *The Act itself is okay really. One issue however is what should happen during the weekends and after hours if one needs to make an application... what should members of the public do?*
>
> clerk of court, Okahandja

- **The Ministry of Justice together with the Ministry of Safety and Security should establish a clear and uniform after-hours procedure for protection order applications and make this known to the public.**
- **All charge offices should know the identity and contact details of the WCPU police personnel on call. After-hours contact numbers for WCPUs should be clearly posted at each WCPU and each police station, and dispatchers who answer 10111 should also know this information.**
- **The WCPU person on call should be equipped to complete both the protection order application form and any supplementary sworn statement, and should know how to contact the duty magistrate for the local court.**
- **If it is not possible for the application to be dealt with after-hours for some reason, then the WCPU person on call should take appropriate steps to secure the safety of the complainant, including referring him or her to a shelter or place of safety if necessary.**[7]

6.2.11 Investigation

Several key informants cited the need for some form of investigation to guide the decision on the protection order application. For example, one clerk made this recommendation: "*Before the order is made the court should get a proper investigation done to make sure the violence is taking place. It breaks the morale of the defendant if it is a lie.*"

One magistrate specifically suggested social worker investigations between the interim and final protection orders.

Two clerks suggested that police should conduct some sort of investigation. One of them said: "*Some* [complainants] *are serious but you don't know the truth. WCPU needs to go to their houses, this will make it easier to know the truth. Now we are just comparing two different stories.*" The other suggested: "*The WCPUs should investigate these complaints first, before they come to court.*"

A magistrate made the same suggestion, but acknowledged that this would probably not be realistic given that the current shortage of police resources.

This magistrate mentioned the idea of having dedicated domestic violence investigators "*who can look into the information, to see if it is true*". However, this seems unlikely

[7] Places of safety are places established under the Children's Act 33 of 1960 where children who have been removed from their homes or are awaiting trial can be held temporarily in safety. A similar system will remain in place under the forthcoming Child Care and Protection Act. In many cases, such places of safety would be appropriate as temporary shelter for a child or adult complainant who is at risk.

given that no maintenance investigators have yet been appointed in Namibia, even though the Maintenance Act 9 of 2003 makes explicit provision for them.

The problem with a more investigative approach would be that the time required would undermine prompt response in the form of an interim protection order, and a prompt opportunity for the respondent to oppose this order. Most key informants thought that the system of listening to evidence from both parties at the enquiry was sufficient to allow the court to determine the truth of the allegations.

- **While limited state resources are unlikely to permit investigations as standard procedure, we suggest that the Act should specifically provide the option of ordering a social worker investigation between the interim and final orders in cases where the court feels that this is necessary.**

6.2.12 Service of interim protection orders

The most commonly-mentioned problem with the current system is service of interim protection orders. Several key informants interviewed thought that there is a need for service providers who work only on domestic violence cases to ensure prompt service in these matters. However, one jurisdiction which tried this did not report much success; the clerk said, "*if the two police officers who are in charge of domestic violence happen to be on leave then nobody takes responsibility for the serving during their absence. The orders just lie around the station.*"

One clerk said, "*The law should tell us whose job it is to serve the protection orders. It should be the police, who are armed, because some of these respondents are armed and dangerous.*" A magistrate similarly stated: "*We force the police to serve. The law needs to state whose duty it is to serve the order.*" This concern is misplaced. The regulations are in fact very clear on the duty to serve the order. Regulation 5 states:

> *(1) **Service of any documents which are required to be served under the Act or these regulations must**, subject to subregulation (2), **be served by a member of the Namibian Police as part of that member's duties**…*
> *…*
> *(3) **Where documents cannot be served by the police** as contemplated in subregulation (1), **service must be effected without delay by the clerk of the court** by –*
> *(a) handing or presenting a certified copy of the document to the person on whom the document is to be served;*
> *(b) sending a certified copy of the document to that person by registered mail and endorsing the original document to this effect; or*
> *(c) directing the messenger of the court to forthwith serve the document on the person to be served.*

We heard again and again from clerks that police lack adequate resources to serve protection orders. Some police stations reportedly lack adequate transportation to serve protection orders on the respondents, resulting in long waits before interim protection orders granted by the court actually come into force. For example, a clerk of court in Okahandja reported that "*transport for the police to go to court or to serve protection orders is a problem… Sometimes they have to borrow the court vehicle which should not*

be the case." Another clerk said, "*Maybe the police need for cars to be donated to them to enable them do their job of serving protection orders.*"

The shortage of resources is a concern, but not an excuse for failing to exercise a clear legal duty. Because the context is one of violence, we believe that police should continue to be the first choice for service of process under this law. If police do not have transport available for service of process, then the task should be promptly passed, through the clerk of the court, to the messenger of the court. However, station commanders should be charged to ensure that police do not simply pass this duty off to court messengers without good reason. Because different ministries are involved in the two optional approaches, it is important to ensure that operational and not budgetary concerns are the deciding factor.

As discussed in section 5.14, some key informants reported instances where complainants were asked to deliver protection orders to the respondents – which is both inappropriate and potentially dangerous. It may be acceptable for a complainant to accompany police to assist in identifying or locating a respondent, but only where the complainant is genuinely willing to do so.

Several magistrates pointed to the need for a formal return of service. For example, one magistrate said, "*There is need to design a return of service. There is none in the Act.*" Several clerks echoed the same concern. Some thought that there must be a return of service signed by the respondent, while others indicated that this could create problems because respondents might refuse to sign (presumably thinking that they could avoid the protection order that way). In fact, a return of service need not be signed by the respondent, but only completed and signed by the person who served the document on the respondent. The return of service which is used in respect of the Maintenance Act 9 of 2003 is reproduced in the box below as an example.

PART C
RETURN OF SERVICE

I, ..., certify that I have –

*(a) delivered a copy of the summons to ..... personally (regulation 28(1)(a)); or

*(b) offered a copy of the summons for delivery to ..... personally (regulation 28(1)(a)); or

*(c) *delivered a copy of the summons to ....., person apparently not younger than the age of 16 years and apparently residing or employed at the *residence/place of employment/place of business of ....., since *he/she could not be found (regulation 28(1)(b) or (c)); or

*(d) *affixed/placed a copy of the summons to/in the *outer/principal door/security gate/post box of the *residence/place of employment/place of business of ....., since *he/she prevented the service by keeping *his/her *residence/place of employment/place of business closed (regulation 28(4)).

Dated at ..... this ..... day of .....

*Maintenance Investigator/Messenger of the Court

* Delete whichever is not applicable

- **Police, clerks and court messengers need to be alerted to their duties under the Act. The clerk should take responsibility for monitoring the situation to ensure that the order is promptly served by either police or the court messenger.**
- **The regulations should provide a mechanism which determines when the duty of serving a protection order passes from police back to the clerk for service by the court messenger.**
- **Police and court directives should make it clear that a complainant should never be forced to participate in the service of an interim protection order on a respondent.**
- **The regulations should include a specific form to serve as a return of service, similar to that used in respect of the Maintenance Act 9 of 2003.**

6.2.13 Case withdrawals

The issue of case withdrawals was a concern for many service providers we interviewed. Some felt frustrated by the wasted effort caused for the courts by case withdrawals, while others seemed more sympathetic to the difficulties complainants experience in trying to break away from a long-standing violent relationship, particularly where they are financially dependent on the abuser.

For example, a clerk of court in Keetmanshoop said:

> *Most applicants have a valid reason for seeking a protection order. However, the abused woman often goes back to her old lifestyle of abuse after a week or so. For this reason, most interim protection orders are not finalised. For many of the abused women, they feel that their husbands and boyfriends are showing love and affection to them when they are abused. They are also very afraid of kicking the husband out for economic reasons. How will they live and who will feed the kids?*

A prosecutor who regularly assists complainants to fill in application forms spoke of the concerns complainants express when making protection order applications:

> *For most people, their minds are in two. On the one hand they don't want to do it – they love the person and they want a miracle to rescue the relationship – but they also understand that once they make the application the law must take its course and the man will usually need to move out. So, most of the questions from complainants are concerns about the relationship – "Will he divorce me?". But, there are also questions such as "Can he get a lawyer and fight this and win?", "Can he come to my work?", "How long will he stay away?", "How long will it take to get a protection order?". First I like to listen to their story, before I start writing. It's very heartbreaking sometimes. Sometimes the person has been abused for years and they are just quiet. People notice marks and things and think the complainant may have been beaten but she never confirms, sometimes due to children or* [financial] *support from the husband.*

One clerk of court said, "*Sometimes the complainants are not sure of their rights and they are afraid that it might cost them their marriage in as much as they understand the need to apply for protection orders… Most of the applicants still want to hold onto their marriages, especially for financial support.*"

- **Clerks, magistrates and police should be given training and information which will help them to understand the reasons why case withdrawals are common in the context of domestic violence, and encouraged to keep documents on file in abandoned cases and to support complainants in going forward with their cases instead of criticising them for wishing to withdraw or seeming ambivalent.**
- **As noted above, we recommend the establishment of volunteer-staffed victim support programmes with components of counselling, information and networking with other persons who have dealt with domestic violence. Such support could be invaluable to complainants who are hesitating about the way forward in addressing domestic violence.**
- **The Act should be amended to provide clearer procedures for case withdrawals and improved safeguards to protect complainants who may be intimidated or threatened to withdraw a case. Detailed proposals on this issue are discussed in section 6.3.1.**
- **There is a need for more counselling services for complainants, including assistance with "exit strategies" for leaving a violent relationship – such as referrals to shelters or assistance with locating alternative housing and advice on divorce and maintenance procedures.**

6.2.14 Role of clerks at enquiries

There was a difference of opinion amongst key informants on whether or not clerks of court should attend enquiries to assist complainants, in the same way that maintenance officers do to assist with applications for maintenance. Current practice differs at different courts. Those in favour of attendance by clerks felt that this helped to elicit evidence that would be helpful to the court. Those opposed worried about maintaining the impartiality of the clerk and about workload.

- **The Ministry of Justice should decide on a policy on the attendance of clerks of court at protection order enquiries and direct clerks accordingly, to ensure a consistent approach in all courts.**

6.2.15 Protecting children

The law requires that the Ministry of Gender Equality and Child Welfare be put on notice to provide social worker monitoring where a protection order "*involves*" children – but it seems that this provision is seldom if ever utilised.

One clerk described this worrying case:

> *…it was a marriage where the child was molested by the father and the mother had to open a case with the police. Before the husband had been granted bail she came in to apply for a protection order. Bail was granted thereafter and the interim order instructed that the father must keep away from the child. But it did not happen because the mother and the father started to drink together. The child in question was 12 years old… I was at a loss of what to do when this happened.*

This is a case where the protection order should have been sent to the Ministry of Gender Equality and Child Welfare for monitoring of the child involved by a social worker, who could have instituted proceedings to remove the child from the home if necessary.

- **Clarify the mechanisms intended to protect children, by using clearer language in the Act for determining that a protection order "involves" children and providing criteria for this test in the regulations.**
- **Amend the forms to remove the provision on this issue (since the notification is a responsibility of the clerk and not of the respondent) and provide a separate form for notification of the Ministry of Gender Equality and Child Welfare by the clerk of the court.**
- **Communicate with clerks of court and magistrates about the importance of taking steps to protect children at risk in circulars and training sessions.**

> ***It has in this country become a common phenomenon that partners, usually women, become victims at the hands of their male partners due to jealousy and that this too often leads to the death of one or both partners. This is completely unnecessary and must be censured in the strongest terms.***
>
> ***S v Aibeb* (CC 10/2010) [2011] NAHC 338 (21 November 2011)**

6.2.16 Enforcement

Lack of effective enforcement of protection orders seems to be a serious problem. For example, a clerk in Okahandja reported that "*after the police have been authorised to remove a respondent from a residence, they don't always act immediately… I feel the police are not serious.*" A magistrate in Walvis Bay reported similar concerns:

> *Our clerk personally takes the protection order to the police, but often the police don't serve it because of transportation problems. For example, I issued a protection order for the police to remove some children from the custody of their father and give them to the mother, but the police just threatened the father and didn't do it and I had to almost force the police to remove the children. This weakens the Act.*

A clerk in Oshakati was also very concerned about the lack of effective police action:

> *Police don't know how to handle these cases. They have to be trained… After the order is granted and given to the police officer, if the respondent has disobeyed the rule, the complainant comes to us and wants to know what the next step is. The police are supposed to make a final warning or a warrant* [of arrest] *and they do not do that. If the person is supposed to pay maintenance* [in terms of the protection order], *the police aren't making them pay. They don't understand about domestic violence.*

A magistrate from Rundu gave a similar report: "*There are times when male respondents disobey the final order by subjecting the applicants to physical abuse. The police on many occasions do not react. They are supposed to arrest the respondent for being in breach of a court order but instead they tell the applicants to go and explain to the magistrate.*"

A social worker in Oshakati similarly said, "*People are not taking the protection orders seriously and sometimes the situation is just beyond the police capacity.*" However, this social worker also acknowledged the challenges involved, saying that "*removing a man from his own house is so difficult, even though it is the law*".

Other key informants reported that police lack the resources to enforce protection orders, particularly in remote villages far from the nearest police station. According to the clerks, this results in a lack of confidence on the part of the public, who think 'What's the point of getting a protection order if it won't protect me?'. A few clerks told us that some complainants are afraid to apply for a protection order which might anger the abusive partner, since they cannot count on police protection afterwards.

A clerk in Omaruru felt that lack of enforcement seriously undermines the effectiveness of the system: "*The protection order is not effective. It does not mean that you are protected while you have that piece of paper. Sometimes you call the police but they do not have the cars to come.*" This clerk recommended that "*where the protection order is granted there should be a physical appearance of protection of this person, not just a piece of paper*". A clerk in Otjiwarongo expressed similar concerns: "*Something needs to be done about the safety of the abused applicant. She cannot change her residence overnight. The respondent knows where she lives. We cannot provide a 24-hour police guard. So she is still at risk from the perpetrator of the domestic violence.*"

It must be recognised that there are some cases where protection orders will never be adequate to protect the victim. A clerk recounted a case where a woman was granted a protection order against her husband, and was then accompanied by police to the common home to collect her things. Her husband stabbed the police officer and was then shot. In another incident related by the same clerk, the husband reportedly said, "'*Who are you to issue me a protection order? You weren't there when I married her. I don't care about the protection order. Do whatever you want, I won't listen, it doesn't matter if it is issued.*'" The many murder-suicide cases which have taken place in the domestic context in Namibia are a testament to the fact that the threat of legal consequences is sometimes no deterrent to violence.[8]

However, there are other cases where protection orders are reportedly effective, and their usefulness can only increase if they are consistently and effectively enforced.

> ***By the time the police get there, the man has already committed the crime. Police have no car at the station, so they don't go to the villages.***
>
> clerk of court, Outapi

- **Police should be made aware of the importance of enforcing protection orders as a crime prevention measure which may sometimes save lives.**
- **Supervisory personnel at the WCPUs should ensure that protection orders are not given low priority.**
- **The government should ensure that WCPUs have sufficient staffing to carry out their tasks.**

[8] See recent examples amongst the press clippings cited in Chapter 4, footnote 233 at page 129.

PEACE BONDS

One senior control magistrate suggested that the Combating of Domestic Violence Act should be supplemented with the use of an old but surviving procedure known as "peace bonds" as a way of giving it "more teeth".

Section 370 of the Criminal Procedure Ordinance 34 of 1963, which is still in force, deals with the binding over of persons to keep the peace.[a] Where it is shown that a person has threatened violence or injury to some other person, that person can be arrested and brought before the court. After enquiring into the matter the court may require the offender to provide surety to the court as a form of pledge not to breach the peace. If there is further misbehaviour, the money is forfeited to the state. The deposit is kept by the state for six months, and essentially serves as a guarantee of good behaviour.[b]

A slightly updated version of this provision appears in the Criminal Procedure Act 25 of 2004, which has been passed by Parliament but not brought into force:

> ***369. Binding over of persons to keep the peace***
>
> *(1) When a complaint on oath is made to a magistrate that a person is conducting himself or herself violently towards, or is threatening injury to the person or property of another or that that person has used language or behaved in a manner towards another likely to provoke a breach of the peace or assault, the magistrate may, whether such conduct occurred or such language was used or such threat was made in a public or private place, order that person to appear before him or her and, if necessary, may cause that person to be arrested and brought before him or her, and thereupon the magistrate must enquire into and determine on such complaint and may place the parties or any witnesses thereat on oath and may order the person against whom the complaint is made to give for a period not exceeding six months recognizances, with or without sureties, in an amount not exceeding N$5 000 to keep the peace towards the complainant and refrain from doing or threatening injury to the complainant's person or property.*
>
> *(2) The magistrate may, on any such enquiry, order the person against whom the complaint is made or the complainant to pay the costs of and incidental to the enquiry.*
>
> *(3) If a person after having been ordered to give recognizances under this section refuses or fails to do so, the magistrate may order that person to be committed to prison for a period not exceeding six months unless such security is sooner found.*
>
> *(4) If the conditions on which the recognizances were given are not observed by the person who gave the same, the magistrate may declare the recognizances to be forfeited to the State, and such declaration of forfeiture has the effect of a judgment in a civil action in the court of that magisterial district.*

It seems possible that some respondents might find the threat of a financial loss to be a stronger motivation for good behaviour that the more remote threat of criminal sanction,

although peace bonds (like bail) would have to reasonably related to the means of the respondent.

Magistrates and members of the public should be reminded of this legal alternative to protection orders for use in appropriate cases.

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a These sections are the South West African counterparts of sections 319(3) and 384 of the *Criminal Procedure Act 56 of 1955* applicable in South Africa.

b ***370. Binding over of persons to keep the peace***

(1) Whenever a complaint on oath is made to a magistrate that any person is conducting himself or herself 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 may, whether such conduct occurred or such language was used or such threat was made in a public or private place, order that person to appear before him or her and if necessary may cause him to be arrested and brought before him, and thereupon the magistrate shall enquire into and determine upon such complaint and may place the parties or any witnesses thereat on oath and in his discretion may order the person against whom the complaint is made to give recognizances with or without sureties in an amount not exceeding fifty rand for a period not exceeding six months to keep the peace towards the complainant and refrain from doing or threatening injury to his person or property.

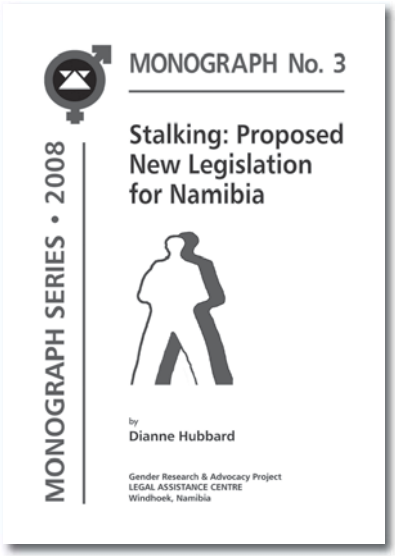
(2) The magistrate may, upon any such enquiry, order the person against whom the complaint is made or the complainant to pay the costs of and incidental to the enquiry.

(3) If any person after having been ordered to give recognizances under this section refuses or fails to do so the magistrate may order him to be committed to prison for a period not exceeding one month unless such security is sooner found.

(4) If the conditions upon which the recognizances were given are not observed by the person who gave the same, the magistrate may declare the recognizances to be forfeited, and any such declaration of forfeiture shall have the effect of a judgment in a civil action in the magistrate's court of the district.

6.2.17 Harassment and stalking

Harassment is one form of domestic violence which can serve as a basis for a protection order, but it is not adequately covered by any criminal law. Stalking behaviour, either by strangers or in a domestic context, can be extremely traumatising for the victim and can in some instances lead to more serious crimes such as property damage, assault, rape, or even murder. A clerk of the court in Keetmanshoop noted the need for legal protection against such harassment regardless of the relationship between victim and perpetrator.



The Legal Assistance Centre has published a monograph containing a detailed discussion of this issue, including an assessment of the shortcomings of the current law, examples of laws from other countries and a proposed bill.

- **Law reform to provide better criminal remedies for stalking should be considered.**

6.2.18 Raising public awareness of the law

Several key informants felt that public awareness of domestic violence is increasing, and that this was partly attributable to the law – such as the clerk in Oshakati who said: "*Before protection orders, people used to be abused too much. Now most of them are aware about domestic violence.*"

Police in Oshakati agreed that "*as time goes on the villagers hear* [about the law] *from radio talks which are aired*", but worried that the public has acquired only "*a very shallow knowledge of what is available*" rather than a genuine understanding. A clerk in Usakos was of the opinion that members of the public think that protection orders are available only after physical violence has occurred, and are unaware that they can use protection orders for stalking, harassment or financial abuse.

We heard from a number of clerks and magistrates that the "right" people were not using the system, in the sense that those who need the protection most are afraid to come forward while those who seek to abuse the system can access it all too easily. Some clerks and magistrates interviewed noted that many individuals who most need help are reluctant to speak out because of shame or fear of social stigmatisation.

Others worried that awareness was still insufficiently broad. A magistrate in Rehoboth commented, "*Some people here have been abused for a long time and they do not know that they can go to court and get a protection order.*" A magistrate in Rundu said: "*I think people are not aware that they can go to court to get a protection order. They are ignorant about the Domestic Violence Act's provisions. And even among those who are aware, there are some who prefer not to expose the fact that they are subjected to domestic violence.*"

> ***They should broadcast the information on the radio in all languages, not just on TV. Some people in villages don't have a TV and can't read billboards.***
>
> clerk of court, Ondangwa

One clerk urged the broadcast of more information about domestic violence on radio, which would be the most accessible form of media for those in outlying rural areas. Another suggested public outreach targetting church groups and traditional leaders. A magistrate suggested general community awareness campaigns.

A magistrate in Oshakati cited Legal Assistance Centre materials and radio programmes as effective educational tools in her area. Several key informants suggested that the law and educational materials should be provided in local languages – something which the Legal Assistance Centre has already attempted. Clearly, the reach of such broadcasts and materials needs to be intensified.

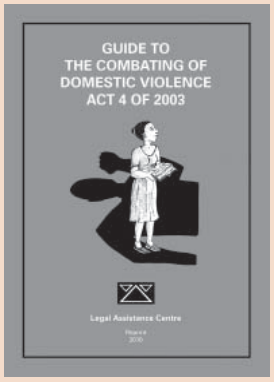
- **We suggest continued efforts to raise public awareness of the Combating of Domestic Violence Act through outreach in the form of workshops, television programmes, printed materials and radio broadcasts in local languages.**
- **Because protection orders are rarely sought by persons who reside in rural areas, the Ministry of Gender Equality and Child Welfare and other role-players should hold information sessions on the law in rural areas in particular, to discuss specific obstacles to utilisation of the law by rural communities.**
- **Government should involve traditional leaders in popularising the law in rural areas.**

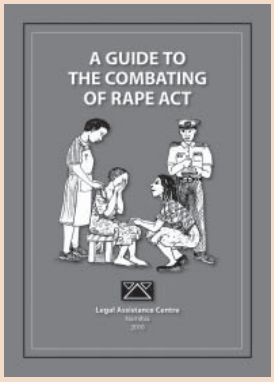
EDUCATIONAL MATERIALS ON DOMESTIC VIOLENCE AVAILABLE FROM THE LEGAL ASSISTANCE CENTRE

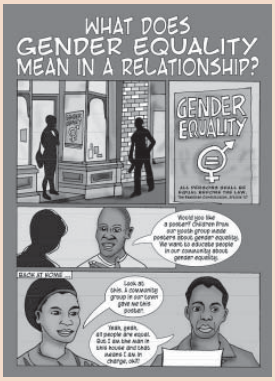
These are just some of the publications of the Legal Assistance Centre which are relevant to domestic violence. All have been produced in multiple languages. Please contact the Legal Assistance Centre to check availability.

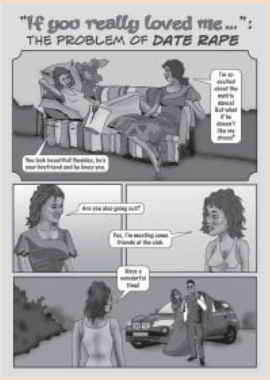
4 Marien Ngouabi Street
(former name Körner Street)
PO Box 604
Windhoek
Namibia
264-061-223356
264-061-234953
Email – info@lac.org.na
Website – www.lac.org.na

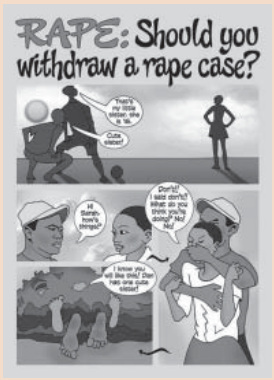
Digital versions of these publications are available on the Legal Assistance Centre website.

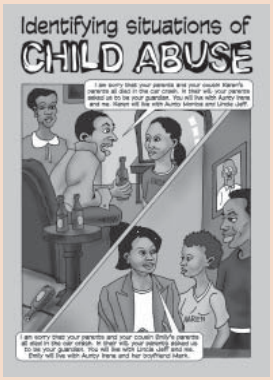


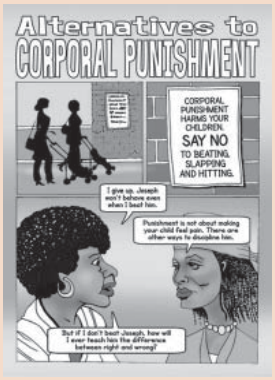


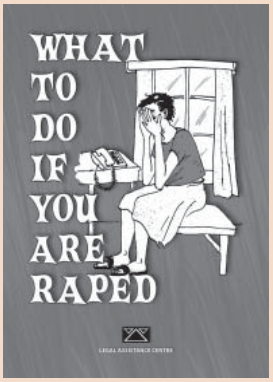


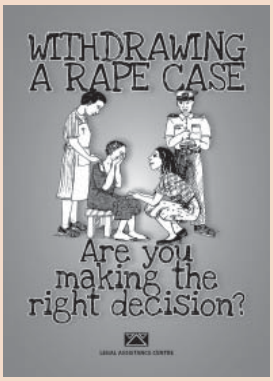


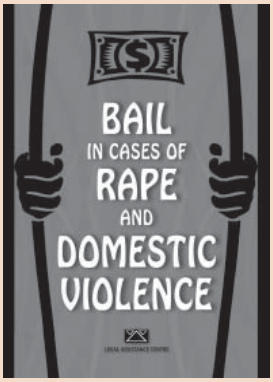


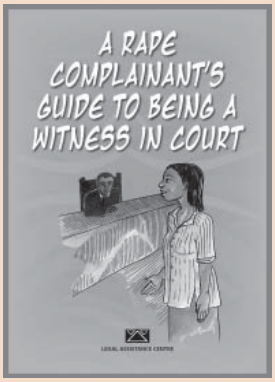












6.2.19 Mobile courts

Protection orders are used more by urban residents than by rural residents. There are probably many reasons for this, but one concern is whether magistrates' courts are sufficiently accessible to isolated rural residents.

- **We suggest that the operating schedule of mobile courts be examined to see if it would be possible for such courts to handle protection order applications. This would require that the courts return to the site where an interim protection order was issued sufficiently regularly to allow for a return date which is consistent with the Act's requirements.**
- **Once the operation of community courts in terms of the Community Courts Act 10 of 2003 has properly established and assessed, the Ministry of Justice should consider whether such courts should be given jurisdiction to issue protection orders, or at least interim protection orders.**

6.2.20 Record-keeping

The current research was hampered and in some instances prevented by non-existent or incomplete records. Court files were often missing or incomplete, and it proved impossible to locate information on complaints that protection orders had been breached.

Another problem is that police generally do not keep or compile the records which are mandatory under the Combating of Domestic Violence Act: the incident reports which are supposed to be completed for each domestic violence case brought to the attention of the police, with statistics from these reports to be annually compiled by the Inspector-General and included in an annual report which is tabled in Parliament.

Good record-keeping at courts and police stations is crucial to keep track of the progress of cases, to be prepared for possible reviews or appeals, to facilitate monitoring and supervision and for statistical purposes.

- **We suggest that clerks of court need training in record-keeping skills and file management, and that control magistrates should monitor court files to ensure that a high standard of record-keeping is maintained.**
- **We also suggest the implementation of improved file management systems at all magistrates' courts to safeguard against lost or misplaced files.**
- **The Inspector-General of the Namibian Police should insist upon systematic adherence to the record-keeping requirements set forth in the Combating of Domestic Violence Act and include relevant statistics in the annual report tabled in Parliament as the law requires.**

6.3 PROPOSED AMENDMENTS TO THE ACT, REGULATIONS AND FORMS

6.3.1 The Act

We propose the following amendments to the Combating of Domestic Violence Act. In some cases, the proposed amendments would entail accompanying amendments to the regulations.

For the sake of clarity, this research report has used the term "complainant" to mean the person who is the victim of the domestic violence and "applicant" to refer to a third party who makes a protection order application on behalf of the victim. It should be noted that the Act uses the term "complainant" to mean the person who is the victim of the domestic violence, but uses the term "applicant" to mean any person who makes an application for a protection order, whether it is the victim or someone acting on the victim's behalf.[9] The Act's approach allows for simplified wording of various provisions.

Definition of domestic relationships

Section 3 of the Act defines "*domestic relationship*". A person can apply for a protection order against another person only if they are in a domestic relationship. Also, a crime becomes a "*domestic violence offence*" which is subject to certain special procedures under the Act if it is committed within a domestic relationship.

(a) The literature review in Chapter 4 noted a worrying incidence of child abuse by parents and caretakers of children who stand in the place of parents. To help combat this, **the definition of domestic relationship should include children and their primary caretakers, even where they are not immediate family members**.

(b) Section 3(1)(d) provides that a domestic relationship exists between a parent and a biological or adoptive "*child*". Section 1 defines "*child*" to mean "*a person who is under the age of 18 years*". Thus, a parent would be in a domestic relationship with offspring over the age of 18 only if the relationship could be brought under section 3(1)(e) which covers "*family members related by consanguinity*" if they "*have some connection of a domestic nature*", such as sharing a residence or having some degree of financial or other interdependency.[10] In contrast, the parents of a

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9 Section 1 states:

> *"applicant," depending on the context, means –*
> *(a) a person contemplated in section 4 who makes an application for a protection order;*
> *(b) any person who, after an application for a protection order has been made under this Act, takes over or continues with any subsequent legal proceedings in connection with or relating to the protection order, as long as that person is the complainant or a person contemplated in section 4; or*
> *(c) the complainant if he or she makes the application for a protection order; …*

10 This issue was brought to light by the case of *Katjivikua v Magistrate: Magisterial of Gobabis and Another* (A 208/2011) [2011] NAHC 340 (4 November 2011).

child are in a domestic relationship "throughout the lifetime of that child or for one year after the death of the child" – which would seem to mean that their domestic relationship automatically continues into the adulthood of their offspring, even if they no longer live together or remain in regular contact. The theory here is that the existence of a child in common ties pe ople together to some extent regardless of the absence of any other connection. This same theory would seem to hold equally true for the relationship between parent and child. Thus, the definition of "child" in these provisions is the source of some confusion and inconsistency.

We recommend clarifying the Act on this point to make it clear that

(a) parents and their offspring automatically remain in a domestic relationship throughout their lives, even after the "child" becomes an adult; and

(b) the parents of a child automatically remain in a domestic relationship throughout the life of their offspring, even after the "child" they have in common becomes an adult, and that this relationship continues for one year after the death of the offspring (whether that death occurs while the "child" is still a minor or after the "child" has become an adult).

We suggest that the best way to do this, mindful of the fact that the age of majority in Namibia is expected to be lowered to 18 in 2012,[11] is to change the terminology of the Act to differentiate between "child" and "minor child", with "child" meaning "a person of any age who is the issue of a particular parent" and "minor child" meaning "a person under age 18". The current usage of the term "child" should then be clarified and substituted with one of the re-defined terms as appropriate.

(c) **The Act should be amended to correct a current discrepancy between the description of present and past domestic relationships.** Section 3(1)(f) of the Act identifies persons of different sexes who "*are or were in an actual or a perceived intimate or romantic relationship*" as one category of domestic relationship. However, section 3(2) states that "… *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 one year after the dissolution of the marriage or engagement, the cessation of cohabitation or the end of any* ***other intimate relationship***".[12] The two sections read together have been interpreted to mean that a past romantic relationship falls within the definition of "domestic relationship" only if is proved that the relationship was "*intimate*".[13] This reading creates an internal inconsistency, since section 3(1) refers to both current and past "intimate or romantic relationships" ("*are or were*"). Thus, **section 3(2) should be amended to contain the same wording – "*actual or perceived intimate or romantic relationship*" – as section 3(1).** [14] This would avoid any requirement of proof of the degree of sexual intimacy of a past relationship, which could be intrusive for the complainant and is not really relevant to the purposes of the law.

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[11] The age of majority in Namibia at the time of writing is 21. Age of Majority Act 57 of 1972. It is expected to be lowered to 18 by the forthcoming Child Care and Protection Bill which was not yet before Parliament.

[12] Emphasis added.

[13] *S v Muruti* (CC 10/2011) [2012] NAHC 8 (27 January 2012).

[14] In internal discussions within the Law Reform and Development Commission during the drafting of the law, it was the theory that a reference to actual "*or perceived*" romantic relationships would cover the situation where the two parties to a relationship have different understandings of the nature of their connection, thus preventing courts from having to get involved in evidence of the degree of intimacy or romance between a couple.

(d) **We would strongly urge the removal of the language which now excludes same-sex couples from the Act's coverage.** This restriction is, in our opinion, unconstitutional. The 2001 *Frank* case decided by the Namibian Supreme Court refused to recognise a lesbian relationship for permanent residence purposes and stated that "*[e]quality before the law for each person does not mean equality before the law for each person's sexual relationships*"; but it also 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*".[15] Furthermore, Namibia is bound by the prohibition against sex discrimination in the International Covenant on Civil and Political Rights, which has been held to encompass discrimination on the basis of sexual orientation.[16] The current exclusion of same-sex relationships constitutes unfair discrimination and should be rectified.[17]

(e) One clerk of court suggested that the Act should apply to friends and neighbours, instead of just to "domestic relationships", as many of the considerations in such situations are similar. She noted, "*Friends often fight one another and one ends up stabbing the other.*" We disagree with this proposal. The theory behind the domestic violence law is that the closest personal relationships – marriage and other intimate partnerships, and relationships between family members – raise unique emotional and financial issues which call for special treatment. We worry that making protection order procedures more broadly applicable might lead to a watering down of the provisions designed to protect parties in such close relationships.

However, some consideration should be given to the inclusion of a spouse or intimate partner of a person who is in a domestic relationship with the complainant. One clerk advocated such coverage: "*Sometimes people not in a domestic relationship want to apply for a protection order but cannot do so. For instance, there are instances where a wife is harassed by her husband's girlfriend. The wife cannot get a protection order against the husband's girlfriend. Such a woman should be able to get a protection order.*"

The court, in considering the need for a protection order, is directed by the Act to note that "*a respondent who encourages another person to commit an act which would amount to domestic violence if engaged in by the respondent must be taken to have committed such an act personally*".[18] Similarly, a respondent "*who intentionally causes another person to engage in behaviour that would amount to a violation of a protection order if engaged in by the respondent is deemed to have breached such order*".[19] Some instances of abuse by a new girlfriend, boyfriend or spouse could be addressed through these provisions – but these provisions might not always be sufficient to cover such abuse, as the respondent could be uninvolved. We suggest that consideration should be given to expanding the definition of domestic relationship to include a spouse or intimate partner of a person who is in a domestic relationship with the complainant, and any close family members of that spouse or intimate partner.

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15 *Chairperson of the Immigration Selection Board v Frank and Another* 2001 NR 107 (SC) at 156.

16 *Toonen v Australia* Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994).

17 As point of comparison, consider the definition of vulnerable witness in section 158A(3)(c) of the Criminal Procedure Act 52 of 1977; it includes a person "*against whom any offence involving violence has been committed by a close family member or a spouse or a partner in any permanent relationship*". This reference to "*a partner in any permanent relationship*" would appear to encompass intimate relationships between persons of the same sex.

18 Combating of Domestic Violence Act 4 of 2003, section 7(5).

19 *Id*, section 16(3).

There are pros and cons to such an expansion of the concept of domestic relationship. The information gathered for this study indicates that spouses and intimate partners of persons who are in a domestic relationship can sometimes be involved in domestic violence. Such spouses or intimate partners are only indirectly connected to the complainant, but they are not in the same position as a friend or a neighbour. For example, some might be a step-parent to a child of the complainant. Such connections would be an argument in favour of expanding the definition to cover such persons. The main counterargument is the special features of a domestic relationship – some emotional and financial connection—are less likely to be present in respect of such spouses or intimate partners than in other relationships covered by the definition. A second counterargument is that a request for a protection order by an ex-spouse or partner against the person who has 'taken his or her place' could be motivated by jealousy or a desire for revenge, thus encouraging abuse of the law. We suggest that this proposal should be tabled for further discussion and debate.

Protection orders and criminal charges

It is not clear that all service providers or members of the public are aware that protection orders and criminal charges can be pursued as separate options, or simultaneously. The Act could be amended to state this explicitly, or this could be clarified by means of a circular to relevant service providers.

Withdrawals and safeguards against intimidation of complainant

The Act has safeguards which are supposed to apply if a complainant does not appear at an enquiry. However, there are several weaknesses with this approach which need to be addressed.

(a) Unless the court is satisfied that a 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.[20] 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. 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 a withdrawal form or a procedure for withdrawal.

One magistrate suggested that case withdrawals should be allowed only where a withdrawal statement is made in court before the magistrate. One clerk also mentioned that he forces complainants to go to the police and make a sworn statement if they want to withdraw the case.

This concern should be addressed in section 12(14), which should be amended to cover a formal withdrawal statement from the applicant or complainant. The regulations would then need to provide a form and a withdrawal procedure which incorporates the existing safeguards against undue pressure.

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[20] Section 12(15).

(14) If at the time fixed for the enquiry, the respondent appears in court, but neither the applicant nor the complainant, as the case may be, appears either in person or through the representative contemplated in subsection (7), the court may –

(a) if it is in receipt of a properly executed withdrawal statement from the applicant or complainant, as the case may be, or is otherwise satisfied that the applicant or complainant no longer wishes to pursue the matter, dismiss the application; or

(b) after having received a reasonable excuse for such non-appearance, postpone the enquiry on reasonable terms; or

(c) if it is satisfied, having regard to the material before it, that it is appropriate for evidence to be given by affidavit, the court may, on the application of any other party, order the attendance for cross-examination of the person who made such affidavit.

(b) **A second problem relates to early case withdrawals or abandonments.** There are no safeguards which apply if the application is abandoned by the complainant at an earlier stage, before a non-appearance at the enquiry. For example, some complainants abandon their applications before an interim protection order is granted – particularly where a decision on the interim protection order is not made on the same day as the application. **The clerk of the court should be tasked by the law with a duty to contact police or a social worker to investigate such situations.**

(c) **A third problem relates to implementation of the existing safeguard.** Respondents who have been served with an interim protection order may use threats or intimidation to 'persuade' complainants to withdraw their cases, or to prevent them from returning to court. This is the situation which the Act's existing safeguard is intended to address. However, our research uncovered little evidence that courts are in fact sending requests to the relevant station commander to investigate the reasons for the complainant's non-appearance, and even less evidence that station commanders are conducting investigations and reporting back to the court on their results. **The Act should be amended to provide for a reliable follow-up mechanism, perhaps by requiring that the court remand the enquiry to consider the station commander's report, and summon the station commander if no written report has been received one week prior to the remand date.**

Procedure for opposing interim protection orders

Our research indicates that the current procedure whereby the respondent is expected to file a notice of opposition if he or she wants to oppose an interim protection order is not working well. Respondents do not understand the procedure. Many forms are not returned, and those which are returned are completed in a confusing fashion. Key informants report that respondents often come to court for more information or attend the enquiry even if they are not clearly opposing the order. One clerk expressed concern that "*people… do not know what they are supposed to do after being served with an interim protection order*" and suggested that the law should require that the respondent should always be summoned to come to court before a final protection order is issued. In light of the information which emerged in this study, we agree that this would be a better approach than the current one. We suggest that this aspect of the process should be simplified in the following way: **The "notice of intention to oppose" should be eliminated. The respondent should be served with the interim protection order and simply ordered to come to court on the return date.**

Where a respondent fails to attend court on the return date, the court can confirm the interim protection order as a final protection order provided that there is a satisfactory return of service.

The complainant should also be directed to come back to court on the return date at the time the application for the interim protection order is considered. This could result in a small degree of extra inconvenience for the complainant. However, although the current procedure allows for automatic confirmation of an unopposed interim order, this does not seem to be working well in practice. It appears that some complainants (and even some clerks of court) also fail to understand the distinction between an interim order and a final order. Requiring both complainant and respondent to attend court on the return date would be a reasonable way to simplify the current procedure and to ensure that all parties are clear on the terms and duration of the protection order.

The respondent could be directed to contact the clerk of the court if he or she wishes to enquire about an accelerated enquiry, or the option of an accelerated enquiry could simply be eliminated – since the simplified procedure should make it possible to hold enquiries on the return date (instead of one week later, as is the current norm) and so shorten the time period for *all* protection order proceedings.

These amendments would require some consequent adjustment to the regulations.

Using medical records as evidence

Section 212 of the Criminal Procedure Act 51 of 1977 (as amended by the Criminal Procedure Amendment Act 24 of 2003) provides that medical records prepared by a medical practitioner who treated a victim may be used in a criminal case as *prima facie* proof that the victim suffered the injuries recorded in the documents, even if the medical practitioner in question does not testify personally[21] – but such records are not admissible as evidence of any opinions stated unless the medical practitioner is available to testify. The court has the power to subpoena the medical practitioner who prepared the report to appear in court or to submit replies to written interrogatories if necessary.[22]

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[21] Criminal Procedure Act 51 of 1977, section 212(7A):

> *(7A) (a) Any document purporting to be a medical record prepared by a medical practitioner who treated or observed a person who is a victim of an offence with which the accused in criminal proceedings is charged, is admissible at that proceeding and prima facie proof that the victim concerned suffered the injuries recorded in that document.*
>
> *(b) The Minister may in consultation with the Minister responsible for Health, make regulations requiring medical practitioners to record such information as may be prescribed in such regulations, if he or she treats a person that he or she has reason to suspect is the victim of such crimes as may be prescribed in such regulations.*
>
> *(c) Regulations contemplated in paragraph (b) may prescribe the manner in which medical practitioners shall deal with records produced in pursuance of the duties imposed under paragraph (b) and may also impose duties upon medical practitioners to make such records available when he or she is aware of investigations or criminal proceedings for which those records may be relevant.*

[22] Criminal Procedure Act 51 of 1977, section 212(12):

> *The court before which an affidavit or certificate is under any of the preceding provisions of this section produced as prima facie proof of the relevant contents thereof, may in its discretion cause the person who made the affidavit or issued the certificate to be subpoenaed to give oral evidence in the proceedings in question, or may cause written interrogatories to be submitted to such person for reply, and such interrogatories and any reply thereto purporting to be a reply from such person, shall likewise be admissible in evidence at such proceedings.*

Provisions to the same effect are also contained in the Criminal Procedure Act 25 of 2004, which has been passed by Parliament but is not yet in force.[23] **It would be useful to amend the Combating of Domestic Violence Act to make this evidentiary provision applicable to protection order proceedings in the same way as to criminal cases.**

Protections for vulnerable witnesses

In criminal proceedings, there are certain procedural innovations which can be utilised to reduce the trauma of the court appearance for vulnerable witnesses.[24] A vulnerable witness for this purpose is defined to include a person "*against whom any offence involving violence has been committed by a close family member or a spouse or a partner in any permanent relationship*".[25] This would cover most, but not all, domestic relationships; for example, it would exclude ex-spouses and ex-intimate partners – who are considered to be in a domestic relationship for at least one year after they part.

The Child Care and Protection Bill proposes that these vulnerable witness provisions be applied to any proceedings in a children's court. Similarly, **we propose that the existing vulnerable witness provisions be applied (where relevant) to all proceedings relating to protection orders (application, substitution, modification or breach) and to all domestic violence offences as defined in section 21 of the Combating of Domestic Violence Act**.

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[23] Criminal Procedure Act 25 of 2004, section 238(9) and (14):

> *(9) (a) In criminal proceedings in which the injuries suffered by a person towards or in connection with whom an offence prescribed by regulation under paragraph (c) was committed or allegedly committed are relevant to the issue, a medical record containing the information likewise prescribed and accompanied by a document purporting to be an affidavit made by a registered medical practitioner who in that affidavit alleges –*
>
> *(i) that, on a date and at a time specified in the affidavit, he or she examined and treated the person named in the affidavit; and*
>
> *(ii) that the person named in the affidavit suffered the injuries set out in the medical record that is attached to the affidavit,*
>
> *is, on the mere production thereof at such proceedings, prima facie proof that the person concerned suffered the injuries set out in that medical record, but the medical practitioner who may make such affidavit may issue a certificate instead of such affidavit, in which event this paragraph applies with the necessary changes in respect of that certificate.*
>
> *(b) A person who issues a certificate under paragraph (a) and who in that certificate wilfully states anything that is false, commits an offence and is liable on conviction to a fine not exceeding N$4 000 or to imprisonment for a period not exceeding one year.*
>
> *(c) (i) The Minister may, in consultation with the Minister responsible for health, make regulations requiring every registered medical practitioner to record such information as may be prescribed in those regulations when treating a person whom that medical practitioner has reason to believe is a victim of any such offence as may be prescribed in those regulations.*
>
> *(ii) Regulations made under subparagraph (i) may prescribe the manner in which registered medical practitioners must deal with medical records kept in compliance with any duty imposed in terms of those regulations and may also impose a duty on such medical practitioners to make those records available when becoming aware of criminal investigations or proceedings in respect of which those records may be relevant.*
>
> ***
>
> *(14) The court before which an affidavit or certificate is under any of the preceding subsections produced as prima facie proof of the relevant contents thereof, may cause the person who made the affidavit or issued the certificate to be subpoenaed to give oral evidence in the proceedings in question, or may cause written interrogatories to be submitted to that person for reply, and such interrogatories and any reply thereto purporting to be a reply from that person, are likewise admissible in evidence at such proceedings.*

[24] These were the result of additions to the Criminal Procedure Act 52 of 1977 by the Criminal Procedure Amendment Act 24 of 2003.

[25] Criminal Procedure Act 51 of 1977, section 158A(3)(c).

This would entail amendments to the Combating of Domestic Violence Act as well as to the Criminal Procedure Act 51 of 1977 (currently in force) and the Criminal Procedure Act 25 of 2004 (which may replace it).

Investigations

Where the court feels that it has insufficient information to make a final decision on a protection order at an enquiry after hearing both sides of the story, **the court should have the authority to remand the enquiry and request a social worker (or another appropriate professional) to investigate and report back to the court**. An interim protection order which has been issued should remain in force during this period. A short time period should be set for such an investigation, to avoid unfairly disadvantaging the respondent. [26]

Procedure for making interim protection orders final

The study has shown that different courts seem to have different understandings of the appropriate procedure for making interim protection orders final, and that many complainants abandon their cases because of real or perceived reconciliation with the abuser. In light of this, we recommend a simplified procedure which is altered and clarified by amendments to the Act. This proposal follows on our proposal above that the notice of intent to oppose be eliminated in favour of a notice which simply requires the respondent to come to court on the return date if he or she does not want the order to be made final.

We propose the following procedures:

(a) **Both parties are present on the return date:** The court should make a final decision on the protection order application.
(b) **The respondent is absent but the complainant is present**: The protection order can be made final if the court is satisfied that it was properly served on the respondent, since the respondent did not oppose it.
(c) **The complainant is absent and has not submitted a formal withdrawal statement:** Regardless of whether the respondent is present or absent, the court should remand the case and direct the station commander of the relevant police station to cause an investigation to be made into the reasons for the complainant's absence (by police or a social worker). This procedure would ensure that the complainant has not been prevented from attending court by abuse or intimidation. The results of this investigation must be reported to the court on the remand date. (The same safeguards should apply in respect of a complainant's absence on the return date if the magistrate did not issue an interim protection order, but deferred the decision until the return date.)

Format of protection orders

The Act states that both an interim and a final protection order "*must be in the prescribed form*".[27] **However, some magistrates seem to prefer drafting the order themselves instead of trying to fit the order into the pre-printed format.** The pre-printed format

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[26] As a point of comparison, the draft Child Care and Protection Bill allows a court to order a social worker to investigate the situation of a child in proceedings before the court. The Bill specifies that this investigation should normally be completed within five court days. Child Care and Protection Bill (dated November 2011), section 42(2)(g) and 43.

[27] Sections 8(3)(a) and 13(1).

was designed to save time, and to ensure that magistrates were aware of all the possible provisions which can be included in protection orders. However, if the forms are not proving useful in this regard, magistrates should not be obliged to utilise them.

We suggest that the Act and regulations should be adjusted to make the option of departing from the pre-printed forms clearly acceptable. Consideration should be given to eliminating the pre-printed forms for protection orders, in light of indications that they tend to be utilised carelessly.

"Physical violence" as a criteria for an order for exclusive occupation of a joint residence

The Combating of Domestic Violence Act provides that a protection order may include a provision granting the complainant and dependents of the complainant "*exclusive occupation of a joint residence*" – but only "*if an act of physical violence has been committed*".[28] The Act does not indicate whether "*physical violence*" is limited to "*physical abuse*" as defined in the Act,[29] or if it has a broader meaning. **To avoid confusion, the term "*physical violence*" should be defined as including physical abuse, sexual abuse and physical acts of intimidation or harassment.**

Provisions in protection orders pertaining to property

Section 14(2)(c) of the Act as it now stands makes certain property provisions ancillary to orders for exclusive occupation of a joint residence.

> *(c) if an act of physical violence has been committed,* ***a provision granting the complainant and dependants of the complainant exclusive occupation of a joint residence****, regardless of whether the residence is owned or leased jointly by the parties or solely by either one of them,* ***which may also include if appropriate*** *–*
>
> *(i) 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;*
>
> *(ii) a provision directing a police officer to remove the respondent from the residence;*
>
> *(iii) a provision authorising the respondent to collect personal belongings from the residence under police supervision…*

However, in practice, the "ancillary" provisions in question were often applied for, and granted, independently of an order for exclusive occupation of a joint residence. The linkage in the Act appears to underestimate the fluidity of living arrangements and property-sharing.

It may not be "illegal" for courts to have granted such provisions independently. It is possible that some of the property-related terms encountered in protection orders would fit under the umbrella of "*a provision granting either party possession of specified personal property…*"[30] – although there may be a question as to whether household items qualify

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[28] Section 14(2)(c).

[29] "*Physical abuse*" includes "*(i) physical assault or any use of physical force against the complainant; (ii) forcibly confining or detaining the complainant; or (iii) physically depriving the complainant of access to food, water, clothing, shelter or rest*". Section 2(1)(a).

[30] Section 14(2)(f).

as "*personal*" property. Furthermore, courts have a broad power to include in protection orders "*any other provisions that the court deems reasonably necessary to ensure the safety of the complainant or any child or other person who is affected*"[31] – however, it is possible that provisions aimed at safeguarding a victim's *property* may not be considered be necessary to protect that victim's *safety*.

Therefore we suggest that this provision of the Act be re-conceptualised to de-link from exclusive occupation the provisions on

- **contents of a past or current joint residence**
- **police protection to remove a respondent from a joint residence or**
- **police protection to accompany the respondent to collect personal belongings from a joint residence.**

This would give courts greater flexibility to tailor protection orders to fit the situation at hand, while also preventing challenges to such orders on appeal.

Provisions in protection orders pertaining to firearm licences

The possibility of suspending a firearm licence is seldom invoked – probably because if the firearm has been removed, suspending the firearm licence for that specific weapon is of little use. It would make more sense to **amend the Act (and the Arms and Ammunition Act if necessary), so that a magistrate could in appropriate cases combine a protection order enquiry with a consideration of whether the respondent should be declared unfit to possess arms in terms of the Arms and Ammunition Act. This could disqualify the respondent in question from possessing *any* firearm for a period of up to two years.**[32]

Provisions in protection orders pertaining to custody and access

These provisions appear to be causing particular problems in practice and would benefit from substantial re-working.

(a) **There is an anomaly in the provisions on temporary custody and restriction of access rights, as the first covers a broader group of children than the second; complainants may request temporary custody of "*any child of the complainant or any child in the care of a complainant*", while the provisions for forbidding or restricting access may be requested only in respect of "*any child of the complainant*".** The purpose of making such a distinction is not clear, and we recommend harmonising the two provisions. **We would suggest that the provisions on custody and access in section 14(2) should be applicable only to children of the complainant and the respondent, as otherwise the court's decisions could have ramifications for persons who will not have notice and an opportunity to be heard.** Other provisions in the protection order (such as third-party no-contact provisions) could be applied to protect other children.[33]

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[31] Section 14(2)(k).

[32] Arms and Ammunition Act 7 of 1996, section 10-11.

[33] We suggest the following wording:

> **14.** *(2) A protection order may, at the request of the applicant or on the court's own motion, include any of the following provisions –*
>
> ***
>
> *(i) a provision granting temporary sole custody of a child of the complainant and the respondent to the complainant or to another appropriate custodian –*

(b) The best interests of the child are paramount in assessing the safety and well-being of children and justify protection of a child from abuse or the risk of exposure to acts of domestic violence. However, **in order to deploy consistent policy regarding the protection of children, the various laws relating to parental rights and responsibilities toward their children should be harmonised**. The Act (or regulations) should include **clear directions on how the temporary custody and access provisions fit in with other proceedings which can address custody and access – such as applications under the Children's Status Act, Rule 43 proceedings or divorce proceedings in the High Court, or other High Court applications**, to give guidance in cases where the same issue is brought before different courts in different contexts. This would be useful to give courts guidance for consistent action, and to prevent parties from "forum-shopping".

More specifically, the Act should firstly define the kind of custody and access which it refers to in section 14(2)(i) and (j) – which we understand to mean the custody and access rights which are incidents of parental rights and responsibilities. If it is determined that the Act should refer rather to some form of purely physical custody and access – without affecting any of the legal custody and access rights of any parent or other custodian – then this should be made clear.

If it is clarified that section 14(2)(i) and (j) of the Act are addressing custody and access rights as incidents of parental rights and responsibilities, then the Act should state that such temporary custody and access orders may not be included in a protection order if a divorce action is pending, in which case the parties have an interim procedure for custody and access available under Rule 43 of the High Court Rules.

The Act should also authorise the court to order that a request for temporary custody and access in a protection order be treated as an application under the Children's Status Act 6 of 2006 if appropriate. This is important because an application under the Children's Status Act provides for notice and opportunity to be heard on the part of various interested parties (such as a primary caretaker who is someone other than a parent), as well as for child participation.[34]

Clerks and magistrates should be trained on the intersection and overlap between these various procedures, and encouraged to insist that the parties use the legal procedure that is most appropriate to their circumstances.

~~*(i) of a child of the complainant to any appropriate custodian other than the respondent; or*~~

~~*(ii) of any child of the complainant or any child in the care of a complainant to the complainant or to another appropriate custodian;*~~

if the court is satisfied that this is reasonably necessary for the safety of the child in question;

(j) a provision temporarily –

(i) forbidding all contact between the respondent and ***any child of the complainant*** *and the respondent;*

(ii) specifying that contact between the respondent and ***a child of the complainant*** *and the respondent, must take place only the presence and under the supervision of a social worker or a family member designated by the court for this purpose; or*

(iii) allowing such contact only under specified conditions designed to ensure the safety of the complainant, any child who may be affected, and any other family members,

if the court is satisfied that this is reasonably necessary for the safety of the child in question

[34] It is anticipated that the Children's Status Act 6 of 2006 will be repealed and re-enacted as part of the forthcoming Child Care and Protection Act. This step would not affect our recommendation.

(c) As a related point, **legal practitioners have reported that some parents are abusing the Combating of Domestic Violence Act as a channel to seek custody of children when there is no real violence**. To prevent such misuse, **the Child Care and Protection Bill expected to come before Parliament in 2012 proposes an amendment to section 14(2) of the Combating of Domestic Violence Act, which would limit orders for temporary custody under the Act to situations where "*there is serious and imminent danger to the child in question*". The amendment would also require a court which makes an interim protection order including a temporary provision on custody to refer the matter to a social worker for investigation and report before the order is made final.**[35] This amendment would prevent parties from abusing the protection order proceedings to try and circumvent the normal safeguards, without compromising the court's ability to respond quickly in cases of danger. **If this amendment is for some reason not made by the Child Care and Protection Act, then it should be made alongside the others suggested here.**

(d) A number of complainants requested that an order for temporary custody of their own children be included in a protection order against a respondent who did not have any parental rights over the children. This suggests that **there is a need for an additional option in protection orders: directing respondents "not to interfere with" the complainant's exercise of legal custody over specified children, or with the complainant's exercise of a role of primary caretaker over specified children**. This additional option should be added to section 14.

Magistrates should also be trained that any order pertaining to child custody should be preceded by a finding as to who actually has custody of the child at the time of the application for the protection order.

Court-ordered counselling

An early draft of the Combating of Domestic Violence 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 a complainant to participate (although this does not preclude the complainant from voluntarily choosing to participate in counselling sessions). However, this possibility was not retained in the final bill because of government's concern that there were insufficient programmes available.

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[35] The provision in the Child Care and Protection Bill as it stands in November 2011 reads as follows:

Section 14 of the Combating of Domestic Violence Act, 2003 (Act No. 4 of 2003) is hereby amended by the substitution for paragraph (i) of subsection (2) of the following paragraph:

(i) a provision granting temporary sole custody –
  (i) of a child of the complainant to any appropriate custodian other than the respondent; or
  (ii) of any child of the complainant or any child in the care of a complainant to the complainant or to another appropriate custodian,

if the court is satisfied that [~~this is reasonably necessary for the safety of~~] there is serious and imminent danger to the child in question, in which case the court must refer the matter to a designated social worker, as defined in section 1 of the Child Care and Protection Act, 2012 (Act No. X of 2012), for an investigation to be completed within the period specified by the court, upon which the court may, notwithstanding the absence of a party to the proceedings, make a final order regarding sole custody".

We recommend that this option should be added to the Act, as a way to strengthen preventative measures – particularly in light of the research finding that so many complainants attempt reconciliation with the abusive respondents. However, it should not be available *ex parte*, but only in final protection orders, after both the complainant and the respondent have had an opportunity to give input on the potential referral.

Duration of provisions pertaining to communal land

Section 15(a) of the Act sets out the maximum time periods for orders for exclusive occupation of a joint residence, in respect of residences owned or leased by the complainant or the respondent, or jointly. However, this section 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 be corrected by setting time periods which correspond to those for land ownership: six months where the land is allocated to the respondent, and one year 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 prescribed maximum time period – the length of the order can be left to the discretion of the court. This would make it clear that in the case of communal land, as in the case of land which is owned by the parties, no permanent right is being affected.[36]

Safeguards for children

In terms of sections 8(7) and 13(4), **where an interim or final protection order "involves" children, the clerk of the court is supposed to give notice of the order to the Permanent Secretary of the Ministry responsible for child welfare, for consideration of appropriate action as provided for in legislation relating to the care and protection of children**. This could include, for example, social worker investigation and monitoring, or prevention or early intervention services which could assist the family. There are several problems which hamper the application of this provision.

(a) **The reference to a protection order which "involves" children seems to be narrowly interpreted by most courts to refer to a protection order where a child is the complainant. The intention of the law was broader, to provide extra protection for any child who might be at risk from the domestic violence – which could include children who witness violence or grow up in a violent environment, as well as children who are the direct targets of violence.** Furthermore, who decides if the interim protection order "involves" children? This is another argument for clarifying the statutory condition attached to the duty to communicate with the Ministry about children at risk so that no judgement call is required to see if it is invoked or not, or alternatively

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[36] The wording of the proposed amendment could be as follows (underlining indicates new wording, words in brackets to be deleted):

> ***15.*** *Unless the court decides otherwise, a final protection order has the following durations –*
> *(a) a provision granting the applicant exclusive occupation of a residence owned by, or situated on communal land allocated to, –*
> *(i) [~~by~~] the complainant, remains in force for any period set by the court*
> *(ii) [~~by~~] the respondent, remains in force for any period set by the court up to a maximum of six months*
> *(ii) [~~jointly by~~] the complainant and the respondent jointly, remains in force for any period set by the court up to a maximum of one year.*

amending the Act to clearly require that courts issuing interim protection orders take responsibility for indicating whether the Ministry should be notified of potential risk to specific children. **We suggest that the wording of the relevant sections be made clearer, by referring to any protection order involving violence "*which may in the court's view put children at risk of physical or emotional harm*".** (The ideal would be a broader standard for invoking social worker monitoring, but this is probably not feasible given the burden of work on Namibia's social workers.) The regulations could set forth factors to consider in applying this standard.

(b) **Section 8(7) of the Act provides for communication with the ministry responsible for child welfare in respect of all children involved in *interim* protection orders. However, there is no reference to *final* protection orders – which can be issued in cases where they were not preceded by an interim order. This omission should be rectified.**

(c) **The regulations need to provide for a form and a procedure for giving the requisite notice to the Permanent Secretary.** The duty is now incorporated into the protection order *pro forma*, which does not really make sense since the duty falls on the clerk of the court and not on the respondent who is bound by the protection order. In fact, this duty is not dependent on the court order, but arises from the statute itself and is conditional only on the fact that the protection order "*involves children*".

Enforcement of temporary maintenance orders

The Act should be amended to provide that temporary maintenance orders may be enforced, amended or substituted in the same way as maintenance orders under the Maintenance Act. Otherwise, there is no effective method of enforcement, as an arrest for breach could mean a loss of income that would be detrimental to the issue of maintenance.

Breaches of protection orders

(a) **The courts which issue protection orders need to be notified of breaches of such orders, as this could be relevant to a request for amendment or withdrawal of such an order. Thus, there appears to be a need for some regulatory guidance on how the court which issued the protection order should be notified of charges laid with police for breach of the order, and how this information should be recorded in the file.** We suggest a specific form for this purpose, to be completed by police and transmitted to the clerk of the court to be added to the relevant file. The file number of the criminal case should be recorded on this form for future reference.

(b) Some clerks thought protection orders would be a more effective deterrent if there were stronger penalties for their violation. However, we suggest that the current focus should be on improved enforcement rather than increased penalties.

> *Men who are really abusing their wives, they deserve a much more serious punishment. There should be better penalties.*
>
> clerk of court, Ondangwa

Domestic violence offences

The **crimes which qualify for special treatment as "*domestic violence offences*" 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, common assault, assault with intent to do grievous bodily harm, kidnapping, trespass, pointing a firearm, malicious damage to property and *crimen injuria (*criminal insult).

(a) There is a **small technical problem with the wording of the offence of pointing a firearm**, which inconsistently refers to both the "victim" and the "complainant"; this should be harmonised to avoid any potential confusion.[37]

(b) The **offence of culpable homicide should be added to the list**, in light of the fact that several persons in Namibia have been convicted of this offence in domestic violence contexts (often as a competent alternative to a charge of murder).[38]

(c) Section 25 of the Act, which requires that complainants or their next of kin be afforded an opportunity for input on the appropriate sentence for domestic violence offences, seems to be seldom observed in practice – at least based on the cases on sentencing which could be located for analysis.[39] Nevertheless, one High Court case recently emphasised the important of such input.[40] No amendments are necessary to address this problem, but the Magistrate's Commission and the Judge President of the High Court should consider sending presiding officers a circular calling attention to section 25 and the High Court's statement on its significance.

Erroneous cross-reference

Section 9(3) has an erroneous cross-reference: "*(3) An interim protection order has the same legal effect as a final protection order and, once it has been served on the respondent, it is enforceable under section 17.*" This should refer to section 16, which makes it a criminal offence to violate a protection order, and not section 17 which deals with modification or cancellation of protection orders.

6.3.2 The regulations

Multiple respondents

The regulations should state that in the case of multiple respondents, **a separate application form should be provided for each respondent** as well as **a separate protection order for each respondent**.

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[37] ***First Schedule***

5. *The offence under section 38(1)(i) of the Arms and Ammunition Act, 1996 (Act No. 7 of 1996) where the fire-arm is pointed at the ~~victim~~ complainant or someone else in the presence of the complainant*

[38] ***First Schedule***

9. *Murder or culpable homicide.*

[39] See Chapter 5, pages xxx

[40] *S v Amunyela* (CR 22/2011) [2011] NAHC 224 (27 July 2011) (review of sentence) at paragraphs 4-5.

Service

The **intention of the Act was that the respondent must be served with a copy of the interim protection order *and* with copies of the application form and any statements made in support of it, so that the respondent will have a fair opportunity to oppose the final order**. Section 9(1) of the Act 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*." But there is something of a gap here. The regulations do not directly prescribe any information in terms of this provision. The regulations are silent on what information must be served on the respondent along with the interim order, although Form 5 (the interim order itself) 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.*" **The information which should be served on the respondent along with the interim order should be set forth clearly in the regulations.**

Furthermore, the regulations should provide a clear procedure for determining when the duty of serving the order passes from the police to clerks for service by the court messenger as a fall-back option. The regulations should set a time limit by specifying that the duty of service must be passed from police to court messengers if service has not taken place within a set time period – perhaps 48 hours, unless the court has set a shorter time limit based on safety concerns. The station commander should be required to give reasons why police were unable to serve the protection order within the time limit provided, with the penalty for failure to provide a good reason being that police will be billed for the court messenger's services.

Who may be present at enquiries

Section 12(8) of the Act indicates that "*except with the permission of the court*", the courtroom is to be closed to all non-essential persons except the two support persons which the complainant and respondent are each entitled to have accompanying them if they wish. In contrast, the regulations state that the court "*may order that the public or press be excluded from a domestic violence enquiry*" if the court considers this "*appropriate in the interests of the moral welfare or safety of the applicant*".[41] The Act would take precedence over the regulations, but the discrepancy appears to have caused some confusion. **The regulations should be harmonised with the Act to make it clear that domestic violence enquiries should be automatically closed to the public.**

Documentary evidence for enquiry

Regulation 4 (10) provides that, at the enquiry, **a statement in writing by any person (other than one of the parties) is admissible as evidence to the same extent as oral evidence to the same effect by the person concerned, but, a copy of the statement must, at least 14 days before the date on which the statement is to be submitted as evidence, be served on the other party and he or she may, at least seven days before the commencement of the inquiry, object to the statement. Service is already such a problem that this procedure should probably be eliminated in favour of allowing a respondent to dispute such evidence at the enquiry, and to ask for a postponement for this purpose if necessary**. There is, in any event, no indication that this procedure is used in practice.

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[41] Note that the Act uses applicant to refer to anyone who has applied for a protection order. See definitions of "applicant" and "complainant" in section 1.

Format of protection orders

The rules regarding the formats of protection orders need clarification. Regulation 6 states that an interim protection order "*must be in a form substantially corresponding to Form 5*." Regulation 10 states that a final protection order "*must be in a form substantially corresponding to Form 9A, accompanied by Form 9B where appropriate*". To be internally consistent, this regulation should have stated that a final protection order "*must be in a form substantially corresponding to Form 9A, accompanied by* ***a form substantially corresponding to*** *Form 9B where appropriate*" (with added words in boldface). We also suggest trying to simplify the format of these order forms. These regulations should be amended to indicate that is also acceptable for the protection order to be drafted by the magistrate without the use of the forms provided, if this is more appropriate in the circumstances of the case.

Clarification of unclear wording

Regulation 4(11) indicates that the court can be requested to summon relevant witnesses for either party, but retains the power to limit the number of witnesses summoned, This is because unrepresented parties may not understand clearly what type of evidence will be relevant, and because of the expense of summoning large numbers of witnesses. The current wording, however, is somewhat unclear:

> *(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 import of this regulation is correct, but the wording and punctuation are confusing and should be clarified as follows:

> *(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, provided that where the court considers it necessary, it may [~~however~~] limit the number of persons to be called as witnesses.*

Breaches

There should be a regulation detailing the **procedure for keeping records on breaches**. The police should transmit information on the criminal charge against the respondent to the clerk of the court to be included in the file with the protection order, on a form recording the date and nature of the breach. If the breach is reported to the court initially, then the clerk should file the same form and refer the complainant to the police.

Transfers

The regulations under the Act should include a **procedure for transferring files from one court to another**, similar to that contain in the Maintenance Act and regulations.[42] This would help to guard against lost or misplaced files.

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[42] In terms of the Maintenance Act if the complainant moves beyond the area of jurisdiction of the court, the clerk must transfer the file to the new court, specifying that the clerk of the original court must retain copies of orders, judgements and records of payments and send the original documents to the clerk of the new

Typographical error

Reg 5 has two subsections numbered (3).

6.3.3 The forms

We have suggested above that the application forms should be shortened and simplified, with the use of more guiding questions designed to elicit answers in narrative form. With that overarching recommendation in mind, we have noted some specific problems with the current forms.

(a) FORM 1 – APPLICATION FORM

Description of types of domestic violence

(a) The summary of economic abuse on the form is inaccurate because it omits the reference to family members which is contained in the Act in the latter three clauses.

ECONOMIC ABUSE

- **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 a 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 a 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 a dependant of the complainant) has an interest or a reasonable expectation of use.**

(b) In the summary of trespass, there is a typo which reads "he" where it should read "the".

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.

court by hand or by registered post. The clerk at the new court must number the case with the following consecutive number for maintenance cases for the year during which it was received. The regulations for the Maintenance Act (contained in Government Notice 233 of 2003, Government Gazette 3093) include a form to notify the defendant when the file is transferred. (See section 24 of the Maintenance Act and accompanying regulation 15.)

Sharing joint residence

Complainants often misunderstand the two questions on residence in section A (questions 15 and 16), with many of them indicating that they were both currently sharing a residence with the respondent and had also previously shared a residence with the respondent. The intention of the two questions is to differentiate between two different situations. The form should be reworded to be more clear.

15. Do you (the victim) currently share a residence with the respondent (the person who committed the domestic violence)? If you (the victim) have temporarily moved somewhere else for safety, this does not change your normal place of residence.

..... no
..... yes

If yes, state how long the residence has been shared: .....

If yes, explain who else lives in the residence: .....

16. ~~Did you (the victim) previously share a residence with the respondent (the person who committed the domestic violence)~~?
If you (the victim) are not currently sharing a residence with the respondent (the person who committed the domestic violence), have you previously shared a residence with the respondent?

..... no
..... yes

If yes, provide the approximate dates that you (the victim) shared a residence with the person who committed the domestic violence: .....

Injuries and medical treatment

The question on the form in section D(a) about injuries and medical treatment in respect of the most recent incident of abuse may have caused some confusion. Question 4 is: "Were you (the victim) physically injured?" Question 5 asks: "Did you (the victim) see a doctor or a nurse or other health practitioner?"

(a) The reference to physical injuries in Question 4 may be too narrow, as some complainants may have suffered psychological harm as a result of the abuse which may be relevant to the protection order application. (The same problem arises in connection with question 8 in section D(b) about physical injuries from past abuse.)

(b) The intention of Question 5 is to find out if the victim got medical treatment *for the injuries suffered from the most recent incident of domestic violence*, although this is not explicitly stated. Some complainants seem to have misunderstood the question as referring to their general medical history. The second question should be re-formulated to clearly indicate that it refers to medical treatment relating to the most recent incident of abuse. (The similar question in the section on past abuse clearly ties the medical treatment to the domestic violence by asking. "*Did you (the victim) see a doctor or a nurse or other health practitioner* ***because of the abuse*** *in the past*?")

Typographical error

In section D(b), Question 3 reads "Has the respondent (the person who is committing the abused) ever been convicted of any crime?" The word "abused" should be "abuse", This is seemingly minor but could cause confusion to non-native English speakers in particular since the person "committing the abuse" and the person "abused" are two very different things.

Questions about witnesses

There are two questions about witnesses in both the section of the form on the most recent incident of abuse (section D(a)) and on past abuse (section D(b)) – "*Did anyone else see or hear this incident of abuse?*" and "*Did any children see or hear this incident of abuse?*" The form then asks for names and some other details about the witnesses.

The second question in this set was intended to elicit answers about "children" in the sense of children under the age of 18, because the Act states that causing or allowing children to see or hear domestic violence against someone with whom the child has a domestic relationship is in itself a form of domestic violence.[43]

(a) These two questions caused several kinds of confusion: Some complainants included children in their responses to the question about witnesses in general and again in their responses to the next question about children in particular, while others separated the two categories as intended. Some complainants understood the term "children" to mean "offspring" and so listed their adult sons or daughters under the question about children. If the questions about witnesses are retained then they should be re-written to eliminate the confusion which is evident.

(b) Most magistrates consulted felt that these questions were not particularly helpful and suggested that they be eliminated. Most complainants and respondents bring witnesses to the enquiry without needing any help from the court to summon them, and information about children who are being exposed to or affected by the violence could be elicited in other ways. We suggest eliminating these two questions in respect of both recent and past abuse. There could be a separate form for requests to the court to summon witnesses who are not prepared to attend the enquiry voluntarily – a situation which is apparently rare.

Question on weapon ownership

Question 6 in Section D(b) on past abuse asks "*Does the respondent (the person who commits the abuse) own a weapon?*" This question should be in the general section on the respondent, as it does not necessarily relate to past abuse.

Question on previous convictions of respondent

Question 13 in section D(b) on past abuse asks whether the respondent has ever been convicted of any crime. This question should be in the general section on the respondent, as it does not necessarily relate to past abuse.

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[43] Section 2(2). The Act defines "child" for this purpose to mean a person under the age of 18. Section 1 (definition of "child").

Question on alcohol and drug abuse

Question 14 in Section D(b) on past abuse is confusingly worded. The details which would logically go with a "yes" answer are listed under "no" – a matter which could be corrected simply by reversing the order of the "yes" and "no" answers on the form. Furthermore, this question should be in the general section on the respondent, as it does not necessarily relate to past abuse.

> **14. Does the respondent (the person who is committing the abuse) use or abuse alcohol or drugs?**
>
> ..... **not to the best of my knowledge**
> ..... **yes**
> ..... **no**
> ..... alcohol
> ..... drugs
> ..... alcohol and drugs
>
> **give details:** .....

Types of domestic violence selected for special emphasis

All protection orders direct the respondent to refrain from *all* acts of domestic violence. Therefore, selecting particular acts of domestic violence for "*special emphasis*" may be redundant or even confusing. Since this mechanism is in any event not usefully or consistently utilised, we suggest that this element should be deleted as a way of simplifying the application forms and the protection order forms. (This issue is relevant to Form 1, Form 5 and Form 9B.)

Third party consents

In Section E, where the application form makes reference to the necessary consent forms, it would be useful to identify the consent form clearly by adding a reference to the form number.

> ..... **The respondent must not enter or come near the following place or address. (This can include the residence, workplace or educational institution of a child or dependant, a family member's residence, a temporary shelter or residence, or a place which is often visited.)** Consent from the relevant persons must be attached if the respondent is going to be restricted from someone else's private residence. (Form 2)
>
> ..... **The respondent must not communicate with the following person(s) in any way, except under the following conditions** (if any). Consent from the person named (or from the parent or guardian in the case of a child) must be attached. (Form 3)

Requests for no-contact provisions – request for a restriction from an address other than the respondent's home, workplace or educational institution

These requests were not generally well-motivated. Some complainants misunderstood the purpose of this option, and failed to justify the request to prohibit the respondent from being

at an address with no immediately obvious connection with the complainant. An amendment to the form or an explanatory note here might help elicit the information necessary to support no-contact provisions pertaining to addresses other than those obviously associated with the complainant.

Requests for no-contact provisions and restrictions on child custody and access

There was a substantial degree of overlap between requests for no-contact provisions covering third parties early in Form 1 and requests concerning temporary custody and restrictions on access to children coming later in Form 1. Some named the same children in both places, while others cited adults in both places. The forms should be re-formulated on these points. Custody and access should be explained as referring specifically to parental rights and responsibilities, and would thus normally be relevant only in cases involving children of the complainant and respondent together.

Property provisions

The various possible provisions concerning property were confusing to complainants and resulted in a great deal of overlap and repetition. These various questions need to be streamlined and harmonised.

Requests for temporary maintenance

The form should clearly state that maintenance normally ends for children at age 18 unless they are continuing in education or have some disability which prevents them from being self-supporting. This should help discourage respondents from wasting time requesting maintenance in inappropriate situations not covered by the law.

Questions about other court orders and pending court cases

In order to help prevent overlapping court actions, the application form should ask if the complainant –

- is aware of any court orders against the respondent, including protection orders and maintenance orders;
- has any court orders against himself or herself in favour of the respondent, including protection orders and maintenance orders; and
- is involved in any other court cases with the respondent, including divorce proceedings and proceedings under the Children's Status Act (or the forthcoming Child Care and Protection Act).

Signature

The application form functions as a *pro forma* affidavit, and therefore should be signed on the last page and initialled on all other pages by the complainant and the Commissioner of Oaths. However, some forms are not being properly executed. The application form should be modified to include signature blocks on each page where initials or signatures are required, to serve as a visual reminder for applicants and court staff.

(b) FORM 4 – NOTICE TO ATTEND ENQUIRY

Title

There are two titles for this form, with the second one being an obvious error.

> **FORM 4**
>
> **(Regulation 3)**
>
> NOTICE TO ATTEND ENQUIRY
>
> Section 11(1) of the Combating of Domestic Violence Act, 2003
>
> ~~CONSENT TO BE COVERED BY A NO-CONTACT PROVISION~~

(c) FORM 5 – INTERIM PROTECTION ORDER

Duration of orders pertaining to exclusive occupation and alternative accommodation

It is not possible for an interim protection order to have more than a temporary duration. However, it would be useful to a respondent who must decide whether or not to oppose the order to know the *contemplated* duration of an order for exclusive occupation of a joint residence or an order to pay rent or otherwise provide alternative accommodation. Thus, it would be useful to provide a place on the form where magistrates could indicate the likely duration of the provision if the order is confirmed without opposition. The current wording of the form does not really allow for this, since it refers to the length of time that the provision will "*remain in force*", which is technically only until the return date or until the interim order is confirmed or replaced by a final order. The wording of the form should be revised to allow the magistrate to indicate the duration for which key provisions will be operative if the respondent fails to oppose the interim order.

Duration of orders for temporary maintenance

The same concern regarding the potential duration of the temporary maintenance applies here, as discussed above with reference to the potential duration of orders pertaining to exclusive occupation of the joint residence or alternative accommodation. The interim order is of limited duration, but if it is confirmed, a provision on temporary maintenance may remain in force up to a maximum of six months.[44] The form should allow for a statement which will put the respondent on notice as to the possible duration of the order for temporary maintenance if it is not opposed.

Notice to relevant police station

Section 8(6) of the Combating of Domestic Violence Act requires that *all* interim protection orders must be sent to the station commander of the police station named in the application,

[44] Section 15(e).

who must arrange appropriate police protection for the complainant until the interim order is made final and served on the complainant. This is a duty which falls on the clerk, not on the respondent. Furthermore, the clerk's duty does not depend on any provision in the protection order itself, since it is applicable in respect of *every* interim protection order in terms of the Act. However, Provision 5.1 of Form 5 was seldom completed with the name of the relevant police station. This provision should be removed from Form 5 and replaced with a separate form directed to the clerk of the court.

(d) FORM 5 – INTERIM PROTECTION ORDER and FORM 9B – PROTECTION ORDER

Temporary maintenance

The Combating of Domestic Violence Act authorises a provision for temporary maintenance for *the complainant or any child of the complainant* where the respondent is legally liable to support the complainant or the child.[45] Form 5, however provides a space only for child maintenance and not for maintenance for the complainant. This omission should be rectified. Point 4.1 on Form 9B contains the same error.

Notice to Ministry of Gender Equality and Child Welfare of children possibly at risk

Very few interim protection orders had any indication next to this provision, even though many children were cited as being witnesses to violence or persons affected by the violence. The duty to give notice of children involved is automatic, so the provision on Form 5 may be confusing – particularly since it is the duty of the court and not the respondent (to whom the order is directed) to take this action. We suggest that the provision on Form 5 and Form 9B on the clerk of court's duty to communicate with the Ministry should be removed and replaced with a separate form for the clerk.

(e) FORM 6 – NOTICE OF INTENTION TO OPPOSE CONFIRMATION OF PROTECTION ORDER

Change of approach

Our proposals for simplifying the procedure for opposing an interim protection order have been explained above. If implemented, Form 6 would require a complete re-working.

(f) FORM 9A – FINAL PROTECTION ORDER

Notice to relevant police station

Section 11(3) of the Act states: "*The clerk of the court **must** send a copy of the final protection order to the station commander of the police station named in the application and that station commander has the duty to put all police personnel at that station on notice that the complainant and any other person protected by the order in question are at particular risk*" (emphasis added). Form 9A accordingly includes a provision directing the clerk of the court to forward the final protection order to the indicated police station,

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[45] Section 14(2)(h).

"*who must put all police personnel at that station on notice that the complainant and any other person protected by the order are at particular risk*".

This provision is not discretionary; it requires only that the court indicate which police station is the relevant one. However, as in the case of interim orders, many of these final orders failed to indicate a police station in this provision, making it unlikely that the Act's requirement on this point would be obeyed. Furthermore, this is a statutory duty of the clerk of court and so should not appear at all in the body of the court order directed at the respondent. The requirement to forward the protection order to the relevant police station should be removed from Form A and replaced by a separate form directed to the clerk.

(g) FORM 10A – APPLICATION FOR MODIFICATION OR CANCELLATION OF PROTECTION ORDER

Signature

As in the case of the application form, this form functions as a *pro forma* affidavit, and therefore should be signed on the last page and initialled on all other pages by the complainant and the Commissioner of Oaths. Blocks or spaces for this will help encourage proper completion.

(h) ADDITIONAL FORMS NEEDED

Return of service

There should be a simple form for return of service, as in the forms which accompany the Maintenance Act 9 of 2003. This form should be completed upon successful service of the protection order on the respondent and returned to the protection order file. This will enable magistrates to have clear proof that an interim protection order has been served on the respondent if the respondent does not appear at the enquiry, so that the interim protection order can be made final even in the absence of the respondent.

Form requesting court to summon witness

As suggested above, the witness lists should be removed from the application form and substituted with a form which either the complainant or the respondent could complete, requesting the court to summon a witness who will not come voluntarily. It should be noted that this mechanism is rarely utilised.

Form for clerk of court to use to notify relevant police station of protection order

As already discussed, this task should be addressed in terms of a separate form directed to the clerk of the court rather than being incorporated into the protection order aimed at the respondent.

Form for notifying Ministry of Gender Equality and Child Welfare of children to be monitored

As already discussed, this objective would be better served by a separate form aimed at the clerk of court, to be transmitted to the Permanent Secretary of the Ministry of Gender Equality and Child Welfare.

Breaches

There should be a form for recording information about any report of a breach made to the police or to the court. This form should then be placed in the complainant's file for future reference and monitoring.

Checklist

There is a need for some mechanism which will help ensure that all the required forms are included with the application – such as consent forms in cases where someone is applying on behalf of the complainant or where there is a request to make a no-contact provision applicable to a third party. It would be useful to develop a checklist to assist clerks with the task of ensuring that the application is complete.

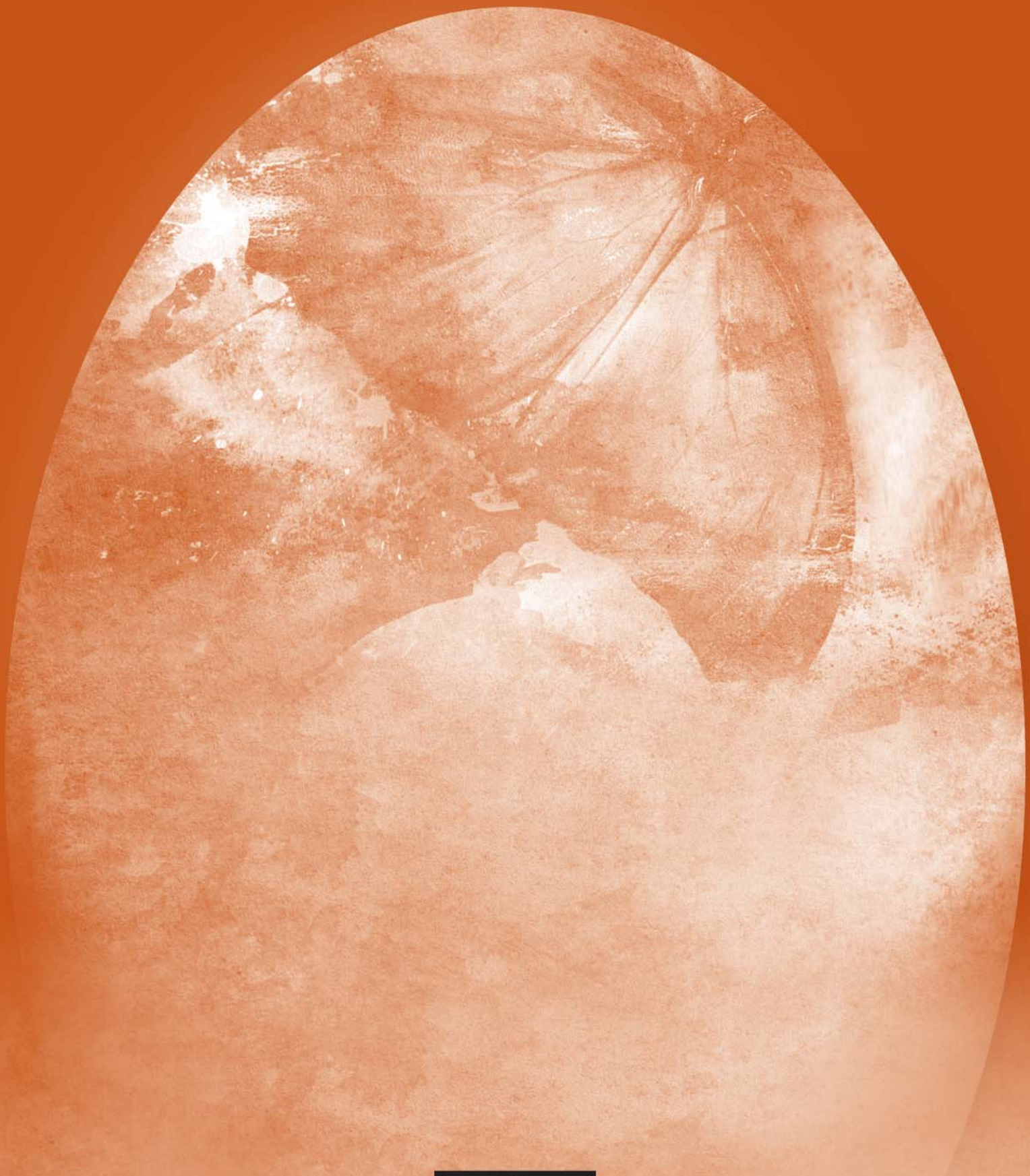
6.4 CONCLUSION

Knowledge can indeed be power. We hope that this report will serve as a useful reference document which advances understanding of the problem of domestic violence in Namibia and what we can all do about it. Our overarching aim is to contribute to a violence-free Namibia.

SOME OF THE KEY FINDINGS OF THIS STUDY

- More people in Namibia apply for a protection order each year than die in road accidents.
- Nine out of ten victims of domestic violence who bring protection order applications are women.
- Four out of five applications for a protection order are based on physical abuse, often combined with other forms of domestic violence.
- About 1 in 4 applicants for a protection order reported that the abuser used a weapon or threatened to use a weapon.
- One in two victims of domestic violence receives a death threat from the abuser.
- More than one out of five victims of domestic violence said that their children had been harmed or threatened by the abuser.
- For every victim of domestic violence, six other people are affected. Four are children.
- One out of four abusers named in protection order applications have already been convicted of a crime.
- You could travel from Windhoek to Katima Mullilo and back at least 13 times in the average time it takes to serve an interim protection order on the abuser.
- One out of every five persons who apply for protection orders withdraws the application before receiving a final protection order. Some reconcile with their abusers, and some are afraid.


STOP
DOMESTIC
VIOLENCE!



Gender Research and Advocacy Project
LEGAL ASSISTANCE CENTRE

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