

DOMESTIC VIOLENCE: PROPOSALS FOR LAW REFORM

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**Breast bruised, brains battered,
Skin scarred, soul shattered
Can't scream -- neighbours stare,
Cry for help -- no one's there.
Nenna Nehru, India (1989)**

This paper was commissioned by the **Law Reform & Development Commission (LRDC)**, which has been investigating the problem of domestic violence for the last three years. In 1996, the LRDC commissioned several empirical studies of domestic violence to provide information on the extent and profile of the problem in Namibia. During 1996 and 1997, the LRDC worked together with NANAWO to convene workshops on violence against women and children in every region, followed by regional and national public hearings. The information gathered through this extensive consultation process, which was funded by GTZ, has been used to guide the law reforms proposed here.

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I. BACKGROUND

1. INTRODUCTION

This paper was prepared by the Legal Assistance Centre at the request of the Law Reform & Development Commission. It proposes law reforms on domestic violence which can be further discussed by the Commission and by members of the public. These proposals will be refined in light of the additional input, and then prepared for introduction into Parliament. The research has been funded by the US Embassy, which also funds an ongoing Multi-Media Campaign Against Violence Against Women and Children.

It may be argued that some people find certain levels of violence within the family acceptable, or that the law should not intervene in private family affairs. These are the arguments for taking government action against domestic violence:

- **Domestic violence is against the law:** Domestic violence has been condemned by international treaties to which Namibia is a party. It is contrary to the Namibian Constitution, and a violation of existing criminal laws such as those on assault, indecent assault and child abuse.
- **The state has a responsibility to protect all of its citizens against violence wherever it occurs:** Recent international statements on domestic violence have emphasised this state responsibility as being an important aspect of human rights.
- **Domestic violence is harmful to the victim:** The victim may suffer serious injury or even death, as well as a range of psychological problems.
- **Domestic violence is harmful to the children in the family:** Children growing up in a violent family can experience emotional and behavioural problems, even if they do not experience the violence directly.
- **Domestic violence is harmful to the perpetrator:** The perpetrator may lose the respect of his family and his own self-respect. He may then try to compensate for his feelings of shame and inadequacy with more violence, or with a retreat into alcoholism.
- **Domestic violence is harmful to the family:** It often leads to a complete breakdown of the marriage.
- **Domestic violence is harmful to the community:** It can upset the neighbours and set a bad example for the children. It may cause other women in the community to feel intimidated.
- **Domestic violence is harmful to society at large:** It creates a general atmosphere of disrespect for women. It maintains a high level of violence in society, by teaching

children that force is acceptable. It leads to lost working hours, results in extra expenditure on health services and wastes energy that could go into development.

The societal impact of domestic violence justifies treating it as a public problem. ¹

2. DOMESTIC VIOLENCE IN NAMIBIA

Basic facts about domestic violence

Violence against women and children undoubtedly ranks as one of Namibia's most severe human rights problems. **Preliminary data indicates that domestic violence may affect at least 50% of Namibian women and children.** It is enormously challenging to combat because it is so often hidden from view. Domestic violence can incapacitate its victims physically, emotionally, financially and socially. Children suffer from domestic violence even when they are not direct victims, as it teaches them that violence is an acceptable method of dealing with problems -- a lesson which can have dire consequences for society at large. Domestic violence is also expensive -- its costs include the costs of state medical care, overall levels of crime and violence, social problems such as alcohol and drug abuse, lost productivity and the resulting impediments to the overall development of the nation.

Domestic violence is often misunderstood. The following are a few basic facts which are supported by research from both developed and developing countries. Preliminary research carried out in Namibia indicates that these facts are equally applicable to our society.

- Although women can be violent, most violence that causes injury is perpetrated by men against women.
- Women are most at risk of violence from men that they know.
- Domestic violence occurs in all socio-economic groups.
- The injuries caused by domestic violence are at least as serious as those caused from assaults by strangers, and sometimes more serious.
- Violence within relationships tends to escalate over time.
- Most violent men are not mentally ill. Many are exercising what they see as their natural right to dominate women.
- Emotional and psychological and psychological abuse can be as damaging as physical abuse.
- Alcohol abuse exacerbates violence, but does not cause it.
- Men who abuse women in the home are likely to abuse their children as well.

- There are societies in which domestic violence does not exist.²

When it comes to **child abuse**, the following general facts apply:

- Child abuse takes the form of sexual abuse, physical abuse, emotional abuse and neglect.
- Most sexual abuse of children is perpetrated by the child's family members.
- Both men and women commit sexual abuse of children, but the majority of perpetrators are men.
- Both boys and girls experience sexual abuse in the family, but the vast majority of victims are girls.
- Children who grow up in a violent environment are more likely to engage in crime or to form violent families when they grow up.³

Domestic violence in Namibia

In the last three years, there have been at least three empirical studies of domestic violence in Namibia, as well as a survey of existing services.⁴ Most of these studies were commissioned by the Law Reform & Development Commission to provide information that could guide law reform efforts. Additional information about domestic violence was collected during the course of regional and national hearings convened by the Law Reform & Development Commission.

How much domestic violence occurs in Namibia? No one knows for sure. Since there is no specific crime of "domestic violence", cases which are reported to the police are hidden within larger crime categories such as rape and assault. However, medical personnel interviewed in a recent study estimated that *almost half* of all the women and children whom they treat show signs of being victims of domestic violence.⁵

We also know that 400-500 children are removed from their homes each year in terms of the Children's Act because of various forms of abuse and neglect.⁶ We know that Namibia has a population of some 2000 street children, many of whom live on the streets because of neglect at home.⁷

Information on child sexual abuse in the Swakopmund area has been compiled by the local Unit for Sexually Abused Children (USAC). During 1991-92, as a result of an intensive awareness campaign, 27 cases of child sexual abuse were reported to the organisation from the Swakopmund district. Since then, approximately 40 cases of child abuse have been reported to the organisation each year, involving children aged between 4 and 16. As of August 1996, not a single one of these cases had been reported to the police or taken to court. The organisation did not report how many of the incidents involved family members, but according to USAC:

*In many cases the community is aware of the abuse taking place as well as the identity of the abuser, but nothing is done as people are afraid of the consequences for the victim, the abuser, and their families.*⁸

Most domestic violence in Namibia is perpetrated by men against women. It happens among rich and poor, in every ethnic group, in both rural and urban areas, and across all levels of education. The range of physical abuse includes hitting, burning, punching, beating, biting, and even murder. One example is the notorious 1998 Florin case in Swakopmund, in which a man killed his wife and then dismembered her body, cooking some body parts and throwing others into the sea. Women and children also experience sexual abuse, which can include rape, sodomy and genital mutilation. Abused spouses interviewed in Lüderitz, Karasburg and Keetmanshoop reported a range of sexual abuse, with 25% of those interviewed saying that they had been raped by their husbands.⁹

Women are most often beaten by their husbands or boyfriends, although other family members are sometimes the culprits. Children are most often subjected to physical abuse by step-parents. For example, a three-year-old girl in Gobabis was subjected to regular beatings by her step-mother. When she accidentally angered the stepmother one evening while the family was sitting around the fire, the stepmother took a burning log from the fire and scorched her private parts.

Physical abuse is often accompanied by mental and emotional abuse, which can range from insults to threats to forcing the victim to perform degrading acts, such as cutting up her favourite dress or licking dishes clean with her tongue.

Children sometimes experience abuse in the form of deliberate neglect -- not being fed, not being given proper medicine or clothes, not being sent to school, being left to fend for themselves, or falling into alcohol or drug abuse without any parental guidance. For example, the Red Cross Society reported to the LRDC National Hearings that many children from homes of parents with adequate means are sent to Red Cross day care centres without proper food or clothing. There are also instances of children not being picked up after school, so that they must be taken home to spend the night with the teacher.¹⁰

Another form of abuse is financial abuse, where women and children are denied the basic necessities of life. For example, one woman told how her husband refused to work to support the family, but instead forced her to steal food. He beat her with a pipe if she refused to steal food for him and the children, and she ended up with more than one stint in gaol.

Abused women and children may be threatened with further violence if they try to seek help. For example, one Namibian woman told how she tried to pick up the telephone to call the police after her husband beat and raped her. But he prevented her from seeking help by breaking the telephone and injuring the smallest child. A neighbour who heard the commotion phoned the woman's parents, who did manage to summon the police. The police came but said that they could not interfere with a married couple, despite the fact that the woman had a broken nose and a black eye. After the police left, the woman's husband raped her.

A study of spousal abuse in the South indicated that victims endure abuse for long periods before seeking help, with almost three-fourths of the victims interviewed saying that they first reported the abuse to someone else after it been going on for at least four

years. Victims who find the courage to speak out tend to approach other family members first. They may also turn to ministers of religion, social workers or friends. Victims are likely to turn to the police at some stage, but they complain that police response is unsympathetic. Some say that the police side with the abuser, asking questions like “What did you do to provoke your husband?” Because police response is often unhelpful, victims tend to approach the police only in cases of severe assault. The Woman and Child Protection Units are apparently not yet widely known or understood.

Police who were interviewed balanced the picture by explaining some of the problems they encounter. They are sometimes handicapped by legal constraints on their powers of arrest. They find that the complaining party sometimes teams up with the abuser to turn against a police officer who tries to intervene. They also experience frustrations when a victim decides to withdraw a charge, often because of fear or hopes of reconciliation.

Some victims are reluctant to seek help from anyone because of feelings of shame. They are sometimes afraid that they will be blamed for the abuse, or they feel guilty because they believe that they are the ones at fault. They are also reluctant to risk social rejection by their communities, and they do not want to disgrace the family name. Many victims carry on hoping that the relationship can be preserved -- because of emotional or financial dependency on the abuser, because of the children, because of concerns about social status and the family reputation, or because they are persuaded by the abuser’s promises to reform. About one third of the victims interviewed in the South were reluctant to seek help because of their fear of the abuser’s reaction.

About half of the victims interviewed in the South felt intimidated by the legal process and wanted to avoid a court appearance at all costs. For example, some said that they would be willing to turn to the courts only if they could do so without having to undergo the trauma of being questioned about the violence. This is a clear sign of the need for more appropriate legal responses and more sympathetic treatment of domestic violence victims.

It is also noteworthy that more than half of the domestic violence victims interviewed in the South reported that they are physically abused in public, suggesting that abusers are confident that their behaviour will be accepted by others, or even admired, rather than being condemned or stopped.

More research is still needed to understand family dynamics and pinpoint the causes of domestic violence in Namibia. However, there appears to be a relationship between domestic violence and other social problems such as unemployment and poverty. Alcohol abuse is frequently identified as one of the most common contributing factors to violent behaviour. Namibia’s violent history also contributes to perceptions of violence in a post-independent society.

Some people in Namibia believe that certain levels of violence are acceptable ways for a man to exert control over other family members, or acceptable techniques for “disciplining” children. Furthermore, some men feel threatened by changing gender roles in modern Namibia. Men who feel insecure about their status and role in the family and in society may resort to violence in an attempt to reassert a dominant

position. In addition, men's traditional roles as family providers are undermined by poverty and unemployment -- a problem that looms even larger since independence because of the gap between higher expectations and practical realities.¹¹

Domestic violence under customary law

There is no comprehensive study of the treatment of domestic violence under customary law. However, it is interesting to note that there are reportedly words for domestic violence in most Namibian language other than Oshiwambo – such as “ondatumisire ponganda” in Otjiherero and “upika” (making your wife or child a slave) in Rukavango. It has also been reported that headmen and chiefs are consulted about cases of repeated domestic violence in rural areas.¹²

Preliminary research on traditional attitudes about domestic violence indicates that in some communities, there is a belief that the male head of household has the power to exert control over other family members. For example, some persons interviewed in Windhoek and Mariental for research commissioned by the LRDC felt that a husband has a “right” and even a duty to discipline a wife who does not fulfil the expected domestic responsibilities. What is considered violence in one community may be culturally acceptable in another, but excessive violence is not acceptable in any community.¹³

It is important to approach cultural justifications for any level of violence with caution, however. Interviews with domestic violence victims in Lüderitz, Karasburg and Keetmanshoop revealed that cultural attitudes may not be consistent within a single community. For example, while some of the victims interviewed acknowledged that there was a general cultural acceptance of some level of violence, they were adamant that *they themselves* did *not* find abusive behaviour within a marriage culturally acceptable.¹⁴

Some additional information on attitudes about domestic violence in different communities can be found in the “self-stated customary laws” collected by the Centre for Applied Social Studies (CASS) during 1993 and 1994. These “self-stated customary laws” come from documents provided by various traditional authorities as stating some aspects of their customary laws.¹⁵ Thus, the documents may not be an accurate reflection of all the issues covered by customary law, or of the practices which are actually followed by the community. Nevertheless, these documents have been examined as one source of information about domestic violence under customary law.

The most recent written collections of customary laws from the various Owambo communities do not make specific mention of physical violence within the family. The Kwaluudhi laws of 1984 provide for fines for husbands who beat their wives and children who beat their parents. The one who engages in the violence can also be ordered to pay damages to the injured party. However, this rule is not mentioned in the more recent Kwaluudhi laws of 1993. The self-stated customary laws of Kwanyama give some protection against financial abuse by providing that any spouse who misuses or wastes the accumulated family income “shall be judged accordingly and be made to restore the misused or wasted property”. No cases were brought to customary courts during a period of court observations in Uukwambi and Ondonga in 1995.¹⁶

The self-stated customary law of Kwangali includes a reference to family disputes, such as a quarrel between husband and wife, but violence is not explicitly mentioned. Such matters are heard by the traditional court to decide on guilt and assess damages. However, it is noted that on a first hearing a warning is given, with emphasis on trying to “cure the relationship”. A second hearing can result in a fine, and a divorce procedure is also provided. The laws of Gciricu discuss divorce due to alcohol abuse, but make no specific mention of domestic violence.

The self-stated customary laws of Fwe provide for specific fines for specific injuries resulting from domestic violence. They also contain a number of specific rules governing marital relations. Anyone who fights with his wife and breaks her hand or leg shall be fined 5 head of cattle, 1 for the Khuta. If the injury to the wife is a broken tooth or teeth, the fine is 4 head of cattle. Anyone who “gives his wife something to eat from his body” shall be fined 6 head of cattle, 1 for the Khuta. Anyone who “cuts the body of his wife and gives her medicine by paying to protect her without her consent” will be fined 6 head of cattle, and a woman who gives her husband “medicine to make him stupid” is likewise fined 6 head of cattle, 1 for the Khuta. Husbands who do not work but are married to women who work can be subjected to a fine for misusing their wife’s money or property, or for spending her money on a second wife who does not work. A person who is “left free by the Khuta and goes back to her husband” shall be fined 2 beasts. Other Fwe rules relate to relations between other family members. Parents who “leave their children to be outcasts” shall be fined 4 head of cattle, 1 for the Khuta. A person who sleeps with his daughter or sister shall be fined 8 head of cattle, 2 for the Khuta. Anyone who insults his or her parents-in-law shall be fined 4 head of cattle, 1 for the Khuta. Insulting one’s own parents brings a fine of 4 head of cattle.

There was no discussion of domestic violence in the “self-stated laws” of the Herero collected by CASS. However, it was reported in one of the research papers prepared for the Law Reform & Development Commission that a Herero community leader who presides over a traditional court in the Gobabis area stated that violence inflicted on a woman by her husband is not grounds to request a divorce, because the woman is subordinate to her husband, with the result that the husband has a right to use any means he feels is appropriate to discipline her.¹⁷

In terms of the customary laws of Kaoko, if a wife is subjected to ill-treatment by her husband she may report this to the parents of the husband or to any member of the husband’s family. It is then the family’s responsibility to call on the one who has engaged in the abuse and tell him not to do it again. The laws further state that “the wife also has the rights together with the husband to decide everything related to the management of the household”, including the right to be consulted about the husband’s decision to take another wife.

The “self-stated customary law” of the Damara notes (in the context of a discussion of family relationships) that a woman who is ill-treated by her husband should take refuge in the man’s parental home rather than in her parental home.

The Statutes of 1874 of the Rehoboth Baster community provide in section 52 that any man who ill-treats his wife to the extent that it leads to the laying of a complaint shall be

fined. If the ill-treatment results in “grievous bodily harm”, it shall be treated as a criminal offence.

It has been reported on the basis of recent interviews with women from the Hai//om, !Xoo and !Kung communities that San community leaders punish a husband who engages in domestic violence by allowing the wife to live with her own family until the husband promises to change his behaviour. No further details on this point were provided.¹⁸

The total pool of available information on domestic violence under customary law is somewhat sketchy. But what is clear is while certain forms of family “discipline” are acceptable in many communities, domestic violence can reach a level which requires intervention and must be condemned. And those who have personally been on the receiving end of violence tend to say that no level of violence is “acceptable”.

Ongoing research in Namibia

Namibia has been selected to participate in a major multi-country research initiative coordinated by the World Health Organisation (WHO) of the United Nations. This extensive two-year research project, scheduled to begin in 1998, will collect quantitative and qualitative data from selected regions. This study will provide further information about

- the incidence of family violence against women
- the social and cultural dynamics which produce such violence
- the physical and psychological consequences of domestic violence
- the perpetrators of abuse
- the extent to which those who abuse women abuse other family members
- the coping strategies of women who experience violence
- the attitudes and practices of police and other law enforcement agencies towards family violence.¹⁹

In addition to the WHO project, several individual researchers are proceeding with studies of specific aspects of domestic violence, several of which will focus on the perpetrators of violence against women and children.

Existing legal options

There is no Namibian law aimed specifically at domestic violence. At present, a person who is experiencing domestic violence has the following legal options under the general law.

- (1) **The victim can lay an appropriate criminal charge**, under a common-law crime such as assault or trespass, or under a statutory crime such as ill-treatment or neglect in terms of section 18 of the Children’s Act 33 of 1960.
- (2) **The victim can obtain an interdict from the High Court.** This involves a relatively complicated and costly procedure.
- (3) **The victim can obtain a peace order** in terms of section 384 of the Criminal Procedure Act. A complaint is made under oath to a magistrate that the

person in question "is conducting himself violently towards, or is threatening injury to the person or property of another or that he has used language or behaved in a manner towards another likely to provoke a breach of the peace or assault". The magistrate can summon the person, or order the person to be arrested and brought to court, and conduct an enquiry into the complaint. The magistrate can then issue a peace order which is valid for up to six months, and order the respondent to give "recognizances" -- a deposit of money which will be forfeited if the order is disobeyed. There is no automatic arrest or prosecution if the peace order is disobeyed, but the person in question may be committed to prison for up to 6 months if he refuses to give any recognizance at the initial hearing. This remedy is virtually never used in practice.

(4) **A victim who is married to the abuser can seek a formal end to the relationship by means of a divorce.**

(5) **A victim can bring a civil action against the abuser for damages** such as medical costs, loss of wages and pain and suffering stemming from the abuse. This is ordinarily a relatively expensive process involving lawyers. It is also not very helpful in situations where the finances of the abuser and the victim are interconnected.

3. THE INTERNATIONAL AND CONSTITUTIONAL SETTING

International standards

Many of the international documents on domestic violence focus on this problem as a manifestation of violence against women and children, since women and children are the predominant victims of such violence worldwide. For the same reason, domestic violence is also viewed internationally as a manifestation of discrimination against women.

UN Convention on the Rights of the Child

Article 19 of the UN Convention on the Rights of the Child commits government to protect children from all forms of violence and abuse in the home environment.

African Charter on the Rights and Welfare of the Child

Article 16 of this document reiterates the commitment to protect children from violence and abuse in the home. Article 21(1) states an important additional principle, by requiring governments "to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child", particularly customs and practices which are prejudicial to the child's life or health, and those which discriminate on the basis of sex or other status. (Article 21(1))

UN Convention on the Elimination of all Forms of Discrimination against Women

Violence against women is not explicitly addressed in the UN Convention on the Elimination of all Forms of Discrimination against Women (CEDAW). However in 1992, the UN Committee responsible for monitoring the implementation of this

Convention issued General Recommendation 19, which formally identified gender-based violence as prohibited gender discrimination.

Although international conventions are usually directed only at the acts of governments rather than the acts of private individuals, the Committee emphasised that governments may also be responsible for private actions if they fail to act with due diligence to prevent violations of rights, to investigate and to punish acts of violence, and to ensure that victims receive appropriate compensation.

The following were among the recommendations on measures which governments should take to protect women against gender-based violence:

- (i) *effective legal measures, including penal sanctions, civil remedies and compensatory provisions to protect women against all kinds of violence, including, inter alia, violence and abuse in the family, sexual assault and sexual harassment in the workplace;*
- (ii) *preventive measures, including public information and education programmes to change attitudes concerning the role and status of men and women;*
- (iii) *protective measures, including refuges, counselling, rehabilitation action and support services for women who are the victims of violence or who are at risk of violence.*²⁰

UN Declaration on the Elimination of Violence Against Women

In 1994, the UN General Assembly gave strong recognition to violence against women as a human rights issue, by adopting a Declaration on the Elimination of Violence Against Women. This is the first international human rights instrument which deals exclusively with violence against women, and it explicitly includes violence which occurs “in public or in private life”. In terms of this resolution:

*States should condemn violence against women and should not invoke any customs, tradition or religious consideration to avoid their obligations with respect to its elimination.*²¹

Governments are expected to develop penal, civil, labour and administrative sanctions to punish and redress wrongs caused to women who are subjected to violence. They must also make sure that laws which are insensitive to gender considerations do not result in the re-victimisation of women.²² Although this Declaration is not legally binding, it sets forth clear international standards.

The UN’s concern with violence against women was further emphasised when the Commission on the Status of Women appointed a Special Rapporteur on Violence Against Women in 1994.²³ One of the duties of this Special Rapporteur is to make recommendations on national mechanisms for eliminating violence against women. In 1996, the Special Rapporteur published a Framework for Model Legislation on Domestic Violence, which is one of the sources for this paper.²⁴

Beijing Platform for Action

In the Beijing Declaration adopted at the Fourth World Conference for Women in 1995, governments pledged to “eliminate all forms of violence against women and girls”.²⁵

The Beijing Platform for Action devotes an entire chapter to violence against women. It identifies violence against women as “an obstacle to the achievement of the objectives of equality, development and peace” which prevents women from enjoying their basic human rights and fundamental freedoms.²⁶

Some of the specific actions to be taken by governments in this regard have particular relevance to the problem of domestic violence:

- *Refrain from engaging in violence against women and exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons;*
- *Enact and/or reinforce penal, civil, labour and administrative sanctions in domestic legislation to punish and redress the wrongs done to women and girls who are subjected to any form of violence, whether in the home, the workplace, the community or society;*
- *Adopt and/or implement and periodically review and analyse legislation to ensure its effectiveness in eliminating violence against women, emphasizing the prevention of violence and the prosecution of offenders;*
- *Take measures to ensure the protection of women subjected to violence, access to just and effective remedies, including compensation and indemnification and healing of victims, and rehabilitation of perpetrators;*
- *Provide women who are subjected to violence with access to the mechanisms of justice and, as provided for by national legislation, to just and effective remedies for the harm they have suffered and inform women of their rights in seeking redress through such mechanisms;*
- *Create or strengthen institutional mechanisms so that women and girls can report acts of violence against them in a safe and confidential environment, free from the fear of penalties or retaliation, and file charges;*
- *Create, improve or develop as appropriate, and fund the training programmes for judicial, legal, medical, social, educational and police and immigrant personnel, in order to avoid the abuse of power leading to violence against women and sensitize such personnel to the nature of gender-based acts and threats of violence so that fair treatment of female victims can be assured;*
- *Allocate adequate resources within the government budget and mobilize community resources for activities related to the elimination of violence against women, including resources for the implementation of plans of action at all appropriate levels;*
- *Provide well-funded shelters and relief support for girls and women subjected to violence, as well as medical, psychological and other counselling services and free or low-cost legal aid, where it is needed, as well as appropriate assistance to enable them to find a means of subsistence;*

- *Disseminate information on the assistance available to women and families who are victims of violence;*
- *Provide, fund and encourage counselling and rehabilitation programmes for the perpetrators of violence and promote research to further efforts concerning such counselling and rehabilitation so as to prevent the recurrence of such violence.*²⁷

African Charter on Human and People's Rights

The "Draft Protocol to the African Charter on Human and People's Rights Concerning the Rights of Women" interprets Article 4 of the Charter (which gives protection to the life and integrity of the person) to include protection against all forms of violence against women, including those which take place in private life. It also requires that states who are parties to the Charter take measures to:

- *prohibit all forms of violence against women -- physical, mental, verbal or sexual - whether they take place in the private sphere or in society and public life*
- *identify the cause of violence against women and take measures to eliminate such violence*
- *punish perpetrators of such violence committed against women*
- *provide for reparation to victims of such violence.*²⁸

Addendum to 1997 SADC Declaration on Gender and Development

On 14 September 1998, representatives of the Southern African Development Community agreed to an addendum to the SADC's 1997 Declaration on Gender and Development. This Addendum deals specifically with "The Prevention and Eradication of Violence Against Women and Children". The signatories resolved to take a range of measure to combat violence, including the following:

Enacting laws such as sexual offences and domestic violence legislation making various forms of violence against women clearly defined crimes, and taking appropriate measures to impose penalties, punishment and other enforcement mechanisms for the prevention and eradication of violence against women and children.

The Namibian Constitution

The Namibian Constitution protects life, human dignity and personal liberty. It prohibits torture and cruel, inhuman or degrading treatment or punishment. It also guarantees equality before the law, and forbids sex discrimination.²⁹ Similar provisions in international conventions such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights have been interpreted to mean that states have obligations to protect women from all kinds of violence, including domestic violence.³⁰

It is interesting to note that several countries -- including Brazil, Colombia, Ethiopia and Vietnam -- have Constitutional provisions that address violence against women specifically. For example, the Constitution of Brazil enacted in 1988 promises

assistance to each person in the family and promises that the government will create mechanisms to prohibit violence within familial relationships. The 1989 Constitution of Colombia states that “any form of violence within the family is considered destructive to its harmony and unity and will be punished by law”.³¹

4. CIVIL VERSUS CRIMINAL APPROACHES

In recent years, there has been much debate about whether criminal law is an appropriate tool in cases of domestic violence. Understanding this debate can help to explain the legal approaches which some countries have chosen.

The **arguments in favour of using the criminal law** against perpetrators of domestic violence include the following:

- Assault and sexual violence are crimes regardless of the relationship between perpetrator and victim, and they should be treated as serious crimes in every context.
- Crimes of violence are often even more serious when they occur in intimate relationships because of the breach of trust involved, and because of the practical consequences for the family.
- The process of arrest, prosecution, conviction and punishment sends out a clear message that a society condemns domestic violence.
- Treating domestic violence as a serious crime sends out a strong symbolic message, and educates the public about the seriousness of this behaviour.
- The fear of arrest and punishment may cause deter some individuals from engaging in domestic violence.
- Other strategies, such as mediation or counselling, may give the impression that the preservation of the relationship is the most important goal, or that the victim shares responsibility for the violence.

There are also **arguments against using the criminal law** in situations of domestic violence:

- Criminal law focuses on punishment rather than rehabilitation.
- Criminal law focuses on past conduct rather than future behaviour.
- Criminal proceedings may not take into account the needs and wishes of the victim, who may feel uncomfortable with the criminal process, or be financially dependent on the perpetrator, or wish to find a way to end the violence while still preserving the relationship.

- It may be difficult to put the criminal law into practice, because police, prosecutors, magistrates and judges may not take domestic violence seriously. It may also be difficult to get convictions, since domestic violence often occurs in private so that the victim is the only witness.
- The victim may continue to have contact with the perpetrator or the perpetrator's family before the trial takes place, making her or him vulnerable to intimidation to withdraw the complaint or to refuse to co-operate with the police and the prosecutor.
- The punishment for domestic violence offences may be trivial in comparison with other crimes. Fines may come out of joint family resources, while imprisonment of the offender may produce emotional and financial hardship for other family members.
- The victim may find herself or himself in greater danger when the perpetrator is out on bail, or when he or she is released from prison after completing a sentence for domestic violence.
- Criminal proceedings may have negative consequences for the victim and the entire family -- from the loss of the income of the perpetrator, from family or community disapproval, or from the complex emotions involved.³²

The arguments and counter-arguments about the use of the criminal law have inspired many countries to adopt **intermediate approaches**, such as "protection orders" which direct that the perpetrator must stop the violent behaviour, or stay away from the applicant altogether. A failure to obey this court order is then punishable as a crime. Such orders are usually quick, easily accessible and low-cost. There is also a lower standard of proof for a protection order than for a criminal trial. But enforcement of the order through the criminal law then leads to some of the same problems which would arise from using the criminal law in the first place. And the effectiveness of protection orders in protecting victims against violence depends on how vigorously they are enforced.

II. GENERAL PROVISIONS OF PROPOSED LAW

5. OVERVIEW OF PROPOSED LAW

The ideal way to combat domestic violence is through an overall strategy that combines law reform with public awareness campaigns, training for professionals who work in the field of domestic violence, community-based shelters, and various support services for victims and perpetrators. This paper, however, focuses on legal measures. The law will never be a solution to such a complex social problem on its own, but laws are powerful tools for change, both in terms of their practical value and the wider educational function. A new law on domestic violence will be an important starting point.

The need for a comprehensive statute

Most model legislation on domestic violence suggests a single comprehensive statute covering civil and criminal approaches, police duties and support services.³³ This is the approach recommended by the UN.³⁴

A 1996 survey of 146 experts in domestic violence in some twenty-one countries produced a strong recommendation for *comprehensive* domestic violence legislation. In fact, many of those surveyed identified the lack of comprehensive legislation as the biggest obstacle to ending domestic violence in their countries. Respondents made the following recommendations on domestic violence legislation:

- It should apply to a broad range of acts and relationships.
- It should specifically criminalise domestic violence.
- It should provide easy access to protection orders.
- It should mandate strong penalties for domestic violence, as well as remedies which incorporate counselling or treatments for abusers.
- It should make courts more sympathetic to domestic violence victims, by providing appropriate training and re-assessing the appropriateness of existing rules of evidence and procedure.
- It should provide clear directions for police and other officials on how to handle domestic violence complaints, with penalties for the failure to follow proper procedures.³⁵

It should be noted that the South African Law Commission has been criticised for focusing on the topic of protection orders, to the exclusion of criminal prosecutions and other remedies.³⁶

Including criminal provisions aimed at domestic violence side-by-side with protection orders will also help to prevent misunderstandings about the relationship between the two. In South Africa, for example, some police mistakenly think that a protection order is a necessary prerequisite to laying a charge relating to domestic violence.³⁷ Conversely, a study in Saskatchewan (Canada) found that protection orders were usually not used if criminal charges had already been laid, even though there may be an even greater need for protection in such circumstances.³⁸ Putting criminal provisions

together with protection orders in a single law emphasises the fact that they are equally valid alternatives which can be utilised simultaneously.

Structure of proposed law

The proposed law on domestic violence has five components:

1) A section defining domestic violence and domestic relationships.

This explains what behaviour and what relationships are covered by the statute.

2) A section on criminal law which makes domestic violence a specific crime.

Domestic violence is different from all other crimes because it involves by definition people who are members of the same family, or who have or had an intimate relationship. Treating it as a separate crime makes it easier to provide strict bail conditions, amended procedural evidence, special arrest and charging policies, and alternative sentences which take into account the relationship between the accused and the victim.

3) A section on protection orders.

Protection orders are designed to prevent domestic violence. They contain provisions restricting the abuser from certain behaviour. For example, they can forbid all contact with the victim, and they can order the abuser to leave the family home (on the theory that the victim should not always be the one who must relocate in order to escape a violent situation). Violation of a protection order is a crime.

4) A section on police duties.

Police response is crucial to effectively combating domestic violence. The proposed statute sets forth some specific police duties.

5) A section on related legal issues.

This section covers privacy and the admission of expert evidence on the effects of domestic violence – particularly for proof of defences in cases where a victim of domestic violence commits a criminal offence against the perpetrator out of desperation.

6. COSTS OF PROPOSED LAW

The proposed law would be a low-cost one to implement. It would operate almost entirely within the framework of existing personnel and institutions. Even though the law would create new crimes, most of the acts covered are already criminal under existing common-law crimes and statutes. The possibilities for diversion in respect of the new domestic violence crimes could actually reduce pressures on the courts and prisons. The civil protection order procedures are designed to be quick and simple, to minimise court time and to eliminate the need for lawyers in most cases.

The only new state employee envisaged under the Act is one part-time post for a person to co-ordinate the volunteers who would serve as victim advocates. Other direct costs on the state created by the new law would be minimal:

- a small amount of overtime pay for magistrates who issue protection orders after hours in emergency situations, which would probably be rare;
- the costs of providing free service of protection orders on respondents;
- extra costs for police services stemming from the requirement that police provide protection to an applicant until the protection order is served, keeping in mind that these costs could be minimised by prompt service.

By providing criminal and civil law solutions side-by-side, the law would discourage unnecessary two-step processes. Where domestic abuse has already reached serious proportions, there would be no need to approach the court for a protection order followed by a criminal prosecution for breach of that order. The criminal charge in such cases would take place immediately, without being preceded by a protection order, thus reducing the burden on the courts.

Even with the new legislation, there is unlikely to be a flood of domestic violence cases in the courts. Many victims will still be reluctant to approach police or courts with matters that they consider to be private. As a point of comparison, South Africa (with a population almost 30 times that of Namibia) reported an average of just over 1000 protection order per month nationwide during the first 20 months after the passage of the relevant legislation.³⁹ The passage of the law may serve in itself to stop some violence, by emphasising the fact that it is illegal.

Some countries utilise marriage licence fees to fund services for victims of domestic violence.⁴⁰ Some jurisdictions impose a fee on convicted abusers, which is not a fine but purely a funding mechanism -- with the idea being that state services to protect victims should be paid for by the people whose violence makes those services necessary. Such a “victim surcharge” is normally held by the state in a separate fund which is used solely for the costs of administering the domestic violence law. Utilising such an approach in Namibia could help to offset the costs of the new statute.

7. DEFINITION OF DOMESTIC VIOLENCE

Terminology

“Domestic violence” seems to be the most widely used term for the harm to be addressed, but some laws use the term “family violence”, “domestic and family violence” or “domestic abuse”.

“Family violence” is not broad enough, because it does not encompass all forms of violence in intimate relationships -- such as violence between men and women who are living together without being formally married, violence between partners of the same sex and violence in dating relationships.

“Domestic and family violence” is a cumbersome term that would be awkward to popularise.

The term “battering”, which is also sometimes used internationally, is not well-understood in Namibia, as well as being too narrow.⁴¹ At least one commentator prefers the term “private violence”⁴², but this might cause confusion as a legal term since it could be misunderstood to focus on the circumstances of the violence rather than the nature of the underlying relationship. “Domestic violence” has also been characterised as “terrorism”⁴³ and as “torture”⁴⁴, but while these terms have analytical validity, they do not seem appropriate for a Namibian law on domestic violence at this stage.

“Domestic violence” is the most commonly-used term. It comes closest to capturing the concept of violence that takes place within intimate and family relationships. It is also the term which occurs in most recent United Nations documents on the topic. Its only weakness is that it might be understood by some to refer only to violence that actually takes place inside the home. However, the definition of domestic violence should make it clear that the term “domestic” refers to the types of relationships involved rather than the place where the violent act occurs. “Domestic violence” also has the advantage of being a term that is already in common usage in Namibia.

“Domestic abuse” has all the advantages of the term “domestic”, as well as emphasising that harm can occur from actions that are not traditionally thought of as “violence”. This term is also commonly used in Namibia.

We recommend using the term “domestic violence” in respect of Namibia. However, the term “domestic abuse” would also be acceptable and appropriate.

Definitions of “violence against women”

It is useful to look at international definitions of “violence against women” before attempting to define “domestic violence”.

The UN Declaration on the Elimination of Violence Against Women defines “violence against women” as:

*any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.*⁴⁵

The definitions in respect of CEDAW and the Draft Protocol to the African Charter on Human and People’s Rights are virtually identical to the one quoted above.⁴⁶

The recently-adopted Addendum to the SADC 1997 Declaration on Gender and Development notes that violence against women and children includes the following (amongst other components):

*physical and sexual violence, as well as economic, psychological and emotional abuse occurring in the family, in such forms as threats, intimidation, battery, sexual abuse of children, economic deprivation, marital rape, femicide, female genital mutilation, and traditional practices harmful to women.*⁴⁷

Physical versus non-physical abuse

One controversial issue is whether non-physical forms of abuse should be covered by a statute on domestic violence. Arguments in favour of including emotional and psychological forms of abuse include the following:

- Some forms of non-physical abuse can be as harmful -- or more harmful to the victim as physical assault.
- Non-physical abuse may accompany, or precede, physical abuse.
- International standards on violence against women include non-physical forms of abuse.

Arguments against including non-physical forms of abuse include the following:

- For an action to constitute a crime, the conduct which is forbidden must be clear. Non-physical abuse can be difficult harder to define clearly, with the result that perpetrators do not have fair warning that they are engaging in illegal activity.
- Genuinely trivial conduct, such as ordinary domestic disputes, should not be covered by the statute.

However, a well-drafted definition of non-physical abuse can answer these criticisms.

Non-physical violence was discussed as a serious form of abuse in submissions to the national and regional hearings conducted by the LRDC, and local research supports the notion that psychological and emotional violence is understood as domestic violence in many communities.⁴⁸

We recommend that the legal concept of “domestic violence” should include emotional and psychological abuse.

Examples from other jurisdictions

The UN Special Rapporteur defines domestic violence as “violence that occurs within the private sphere, generally between individuals who are related through intimacy, blood or law”. The UN Model Framework recommends that countries adopt the broadest possible definitions of acts of domestic violence.⁴⁹

The Domestic Violence Bill recently introduced into the South African Parliament contains a particularly comprehensive definition of domestic violence, which serves as a very useful model for Namibia.

“domestic violence” means any controlling or abusive behaviour that harms the health, safety or wellbeing of the applicant or any child in the care of the applicant and includes but is not limited to--

- (a) *physical abuse or a threat of physical abuse* [“physical abuse” means any act of assault]
- (b) *sexual abuse or a threat of sexual abuse* [“sexual abuse” means but is not limited to any sexual conduct that abuses, humiliates, degrades or otherwise violates the sexual integrity of the applicant]
- (c) *emotional, verbal or psychological abuse*, [which means any degrading or humiliating conduct that includes but is not limited to--
 - (a) repeated insults, ridicule or name-calling;
 - (b) repeated threats to cause emotional pain; or
 - (c) the repeated exhibition of obsessive possessiveness or jealousy, which is such as to constitute a serious invasion of the applicant’s privacy, liberty, integrity or security]
- (d) *economic abuse* [which means but is not limited to--
 - (a) the deprivation or threatened deprivation of any or all economic or financial resources to which the applicant is entitled under law or which the applicant requires out of necessity, including household necessities for the applicant and any child, and mortgage bond repayments of the shared household; or
 - (b) the disposal or threatened disposal of household effects or other property in which the applicant has an interest]
- (e) *intimidation* [which means uttering, conveying or causing any person to receive a threat which induces fear]
- (f) *harassment* [which means engaging in a pattern of conduct that induces the fear of harm and includes but is not limited to --
 - (a) watching, or loitering outside of or near the building or place where the applicant resides, works, carries on business, studies or happens to be;
 - (b) repeatedly making telephone calls or inducing another person to make telephone calls to the applicant, whether or not conversation ensues;
 - (c) repeatedly sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the applicant’s home or work]
- (g) *stalking* [which means but is not limited to repeatedly following, pursuing or accosting the applicant]
- (h) *damage to or destruction of property; or*
- (i) *entry into the applicant’s residence without consent, where the parties do not share the same residence.*

This definition is one of the most comprehensive models located. Even so, it should be noted that there are certain omissions. For example, forced confinement is not included in South Africa, although this is commonly included in definitions of domestic violence in other jurisdictions -- and a problem which has been reported in Namibia. The South African definition is presented in a difficult manner, requiring cross-checking between several different definitions before the full meaning of domestic violence can be understood. It also contains some unnecessary repetition.

Another broad example can be found in the New Zealand Domestic Violence Act:

(1) In this Act, “domestic violence”, in relation to any person, means violence against that person by any other person with who that person is, or has been, in a domestic relationship.

(2) In this section, “violence” means--

- (a) Physical abuse;*
- (b) Sexual abuse;*
- (c) Psychological abuse, including, but not limited to,--*
 - (i) Intimidation;*
 - (ii) Harassment;*
 - (iii) Damage to property;*
 - (iv) Threats of physical abuse, sexual abuse or psychological abuse*
 - (v) In relation to a child, abuse of the kind set out in subsection (3) of this section.*

(3) Without limiting subsection (2)(c) of this section, a person psychologically abuses a child if that person--

- (a) Causes or allows the child to see or hear the physical, sexual, or psychological abuse of a person with whom the child has a domestic relationship*
- (b) Puts the child, or allows the child to be put, at real risk of seeing or hearing that abuse occurring; --*

but the person who suffers that abuse is not regarded, for the purposes of hits subsection, as having causes or allowed the child to see or hear the abuse, or, as the case may be, as having put the child, or allowed the child to be put, at risk of seeing or hearing the abuse.

(4) Without limiting subsection (2) of this section, --

- (a) A single act may amount to abuse for the purposes of that subsection;*
- (b) A number of acts that form part of a pattern of behaviour may amount to abuse for that purpose, even though some or all of those acts, when viewed in isolation, may appear to be minor or trivial.⁵⁰*

A third instructive example comes from the 1997 Protection from Domestic Violence Bill in Mauritius:

“domestic violence” includes any of the following acts committed by a person against his spouse or a child of such spouse—

- (a) wilfully causing or attempting to cause physical injury*
- (b) wilfully or knowingly placing or attempting to place the spouse in fear of physical injury to himself or to one of his children;*
- (c) intimidation, harassment, maltreatment, brutality or cruelty;*
- (d) compelling the spouse by force or threat to engage in any conduct or act, sexual or otherwise, from which the spouse has a right to abstain;*
- (e) confining or detaining the spouse against his will;*
- (f) any harm or threat to cause harm to a child of the spouse;*
- (g) causing or attempting to cause damage to the spouse’s property;*
- (h) a threat to commit any act mentioned in paragraphs (a) to (g).⁵¹*

The following definitions are from Puerto Rico's Domestic Abuse Prevention and Intervention Act 1989:

“domestic abuse” shall mean a constant pattern of conduct involving physical force or psychological violence, intimidation or persecution against a person ... to cause physical harm to their self, their property, or another's self, or to cause him/her grave emotional harm;

*“psychological abuse” shall mean a constant pattern of conduct performed to the dishonour, discredit or scorn of personal worth, unreasonable limitation to access and handling of common property, blackmail, constant vigilance, isolation, deprivation of access to adequate food or rest, threats of deprivation of custody of sons or daughters, or destruction of objects held in esteem by the person, except those that privately belong to the offender.*⁵²

The Guyana Domestic Violence Act 1996 contains a particularly interesting definition of “harassment”, which is described as:

- (i) *the intimidation of a person by-*
 - (a) *persistent verbal abuse;*
 - (b) *threats of physical violence;*
 - (c) *the malicious damage to the property of a person;*
 - (d) *inducing fear of physical or psychological violence; or*
 - (e) *any other means;*
- (ii) *the persistent following of a person from place to place;*
- (iii) *the hiding of any clothing or other property owned by or used by a person or the depriving of a person of the use thereof or the hindering of a person in the use thereof;*
- (iv) *the watching or besetting of the house or other places where a person resides, works, carries on business or happens to be or the watching or besetting of the premises that are the place of education of a person, or the watching or besetting of the approach to the house, other place or place of education;*
- (v) *the making of persistent unwelcome communications to a person;*
- (vi) *using abusive language to or behaving towards a person in any other manner which is of such a nature and degree as to cause annoyance to, or result in ill-treatment of that person.*⁵³

Recommendation for Namibia

On the basis of the foregoing models, as well as other legislation that has been examined, we recommend the following definition of domestic violence. Because this definition will be used in a criminal as well as a civil context, it is more definite and explicit than some models from other countries which serve civil purposes only.

Comments on the suggested wording are included under individual sections. There is some overlap between the various forms of abuse. Prosecutors would deal with this in the criminal context by framing charges in the alternative (as is done in the case of many other crimes).

Definition of domestic violence

(1) For the purposes of this statute, “domestic violence” means engaging in any of the following acts within the context of a previous or existing domestic relationship, as defined in section 2, and includes threats to carry out any of the following --

- (a) physical abuse, which means**
- (i) physical assault or any use of physical force against another person;**
 - (ii) forcibly confining or detaining another person;**
 - (iii) depriving another person of access to adequate food, water, clothing, shelter or rest; or**
 - (iv) compelling another person by force or threat to engage in any conduct or act whatsoever from which he or she has a right to abstain;**

The definition refers to both physical assault and physical force to ensure that all kinds of forcible touching are covered. Forced confinement is an important aspect of the definition, as this form of abuse has emerged in several cases brought to the attention of the Legal Assistance Centre.

- (b) sexual abuse, which means**
- (i) forcing another person to engage in any sexual contact; or**
 - (ii) engaging in any sexual conduct that abuses, humiliates or degrades another person or otherwise violates another person’s sexual integrity;**

The two prongs of this offence would cover situations where the abuser forces another person to engage in sexual actions, as well as other situations -- such as where the abuser forces another person to look at pornography or to watch the abuser engage in sexual conduct.

- (c) economic abuse, which means**
- (i) the deprivation or threatened deprivation of any economic or financial resources to which another person is entitled under law or requires out of necessity, including household necessities and mortgage bond repayments or rent payments in respect of a shared household; or**
 - (ii) disposing of or threatening to dispose of moveable or immovable property in which another person has an interest; or**
 - (iii) destroying or damaging, or threatening to destroy or damage property in which another person has an interest; or**
 - (iv) hiding or hindering the use of property in which another person has an interest;**

This is another form of domestic abuse which is well-documented in Namibia.

- (d) intimidation, which means intentionally inducing fear in another person by**
- (i) threatening to abuse that person or a third person;**
 - (ii) threatening to damage, destroy or dispose of property in**

- which that person or a third person has an interest;*
- (iii) exhibiting a weapon;*
- (iv) harassment; or*
- (v) any other menacing behaviour;*

- (e) harassment, which means repeatedly following, pursuing or accosting such person or by making persistent unwelcome communications, and includes but is not limited to --*
 - (i) watching, or loitering outside of or near the building or place where such person resides, works, carries on business, studies or happens to be;*
 - (ii) repeatedly making telephone calls or inducing a third person to make telephone calls to such person, whether or not conversation ensues; or*
 - (iii) repeatedly sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects or messages to such person's residence, school or workplace;*

This pattern of behaviour is referred to in some countries as “stalking”. It is similar to the behaviour defined by the Canadian Criminal Code as “criminal harassment” (section 264). The main distinction between intimidation and harassment as they are defined here is that harassment does not require a finding that the abuser intentionally induced fear in the victim.

- (f) entering another person's residence without consent, where the parties do not share the same residence.*
- (g) emotional, verbal or psychological abuse, which means any conduct which degrades or humiliates another person, or deprives another person of privacy, liberty, integrity or security;*

The wording of this section is intended to exclude trivial behaviour, such as the sort of arguments and insults which occasionally occur in virtually any intimate relationship. Some of the more specific forms of psychological abuse are covered under the categories of economic abuse, intimidation and harassment. Therefore, if this category were rejected on the grounds that it is too broad or too open to interpretation, the most common forms of such abuse would still be covered.

(2) Without detracting from the general definition in subsection (1)(g), a person psychologically abuses a child if that person—

- (a) causes or allows the child to see or hear the physical, sexual, or psychological abuse of a person with whom the child has a domestic relationship*
- (b) puts the child, or allows the child to be put, at real risk of seeing or hearing such abuse; --*

provided that the person who suffers such abuse shall not be culpable in terms of this subsection.

(3) *With the exception of harassment as described in subsection (1)(e), a single act may amount to domestic violence.*

(4) *A number of acts that form part of a pattern of behaviour may amount to domestic violence, even though some or all of those acts, when viewed in isolation, may appear to be minor or trivial.*

8. RELATIONSHIPS COVERED BY THE LAW

Categories of relationships

The UN Model Framework recommends that countries adopt the broadest possible definitions of relationships within which domestic violence occurs. It states that the relationships which come within the purview of legislation on domestic violence must include:

*wives, live-in partners, former wives or partner, girlfriends (including girl-friends not living in the same house), female relatives (including but not restricted to sisters, daughters, mothers) and female household workers.*⁵⁴

(The UN Model Framework does not refer to men and children because it arises from the concept of “violence against women”.)

Examples of broad definitions which have been examined include the US Model Code on Domestic and Family Violence, the New Zealand Domestic Violence Act 86 of 1995, the Guyana Domestic Violence Act 18 of 1996, and the most recent recommendations of the South African Law Commission.⁵⁵

Broad definitions such as these generally agree that **the following relationships should be covered:**

- current and former spouses (including marriage under any law or custom)
- persons who live together as spouses or have lived together as spouses
- persons who are or were engaged to be married
- persons who have or have had an intimate relationship or a dating relationship
- persons related by blood, marriage or adoption
- persons who have a child in common
- persons who would be related to each other by marriage if partners living together, engaged, dating or otherwise involved in an intimate relationship were married (which would include the children of either partner)
- persons who ordinarily share the same household.

Same-sex relationships

The Domestic Violence Bill recently introduced in South African states explicitly that same-sex relationships are covered. This approach prevents inconsistent interpretations of the general concept of intimate relationships. **We recommend that the Namibian statute should cover same-sex relationships explicitly.**

Persons who ordinarily share the same household

One issue that requires special attention is whether persons should be covered when they share the same dwelling but are not necessarily involved in an intimate personal relationship. For example, what about domestic workers and farmworkers who live on

their employer's premises, or persons who share a household by virtue of being landlord and tenant?

The UN Model Framework specifically includes domestic workers. On the other hand, the New Zealand Domestic Violence Act specifically excludes persons who are sharing a household only by virtue of being employer and employee, or landlord and tenant.

This question is a difficult one because relationships are sometimes blurred. For instance, Namibian research on domestic workers found that some families make arrangements with distant family connections to exchange domestic labour for room, board and spending money, in situations which are a hybrid between family and employment relationships.⁵⁶ South African research indicates that lodgers and tenants sometimes relate to others sharing the same premises as if they were kin.⁵⁷

We recommend that all persons residing in the same household should be covered by the legislation, including domestic workers and farmworkers who reside on their employer's residential premises. Key factors that make persons vulnerable to abuse in domestic situations are privacy combined with financial or emotional entanglement. These factors would be present with respect to both employees and lodgers in situations where they are sharing a single household, and justify their inclusion. The provision would exclude people living in different residential units on the same property, such as people living in different flats in a block of flats, since these circumstances do not on their own normally give rise to a high degree of personal intimacy and vulnerability. Similarly, employer-employee relationships which are situated in a public workplace rather than at the home of the employer have a more public character and should be dealt with in terms of labour relations.⁵⁸

Domestic workers

As noted above, domestic workers who live on their employers' residential premises would be covered if the act applies to persons who share the same household or premises. This should be made explicit in the act to avoid any confusion.

The position of domestic workers who do not live on their employer's residential premises would logically be dealt with as a labour matter (in the context of sexual harassment or unfair labour practices). However, in practice, the isolation of domestic workers combined with their vulnerability as a sector makes it difficult for labour law to protect them effectively.⁵⁹ The very term "domestic worker" points to the domestic nature of the relationships involved in this employment sector.

We recommend that the law on domestic violence should cover all domestic workers in private households. This would be in line with the recommendation of the UN's Special Rapporteur on Violence against Women, and an acknowledgement of the practical realities of domestic work. In addition to protecting domestic workers, this approach would also make it possible to provide protection against mistreatment for children in the protection of domestic workers.

Prostitutes and clients

The relationship between prostitutes and their clients is an "intimate" one in some senses. Prostitutes, who are sometimes minor children, are sometimes driven into their

position by economic necessity, and their role places them in a very vulnerable position. On the other hand, the commercial basis of the relationship means that the emotional involvement and trust normally found in family and marriage relationships would not usually be present. But not all prostitute-client relationships are identical. For example, a prostitute may have an ongoing relationship of sorts with a “regular” client. Sexual relationships can also be ambiguous in some cases, with the woman being in the position of a “girlfriend” who provides sex in exchange for gifts or protection.⁶⁰

We recommend that the question of whether or not prostitutes are covered be left open, so that the facts of each case can be examined to determine whether or not it can be considered an “intimate” or sexual “relationship”.

Examples from other jurisdictions

Again, the most useful example comes from the South African Domestic Violence Bill:

“domestic relationship” means a relationship between the applicant and respondent in any of the following ways:

- (a) they are or were married to each other, including marriage according to any law, custom or religion;*
- (b) they (whether they are of the same or of the opposite sex) live or have lived together in a relationship in the nature of marriage, although they are not, or were not, married to each other, or are not able to be married to each other;*
- (c) they are parents of a child or are persons who have or have had parental responsibility for that child (whether or not at the same time);*
- (d) they are family members related by consanguinity, affinity or adoption;*
- (e) they would be family members related by affinity if the persons referred to in paragraph (b) were, or were able to be, married to each other;*
- (f) they are or were in an engagement, dating or customary relationship which includes but is not limited to an actual or perceived romantic, intimate or sexual relationship of any duration; or*
- (g) they share or shared the same household or residence.*

“Residence” is defined to include “institutions for children, the elderly and the disabled”.⁶¹

The scope of domestic relationships covered by the Guyana Domestic Violence Act 1996 is similar.⁶²

The New Zealand Domestic Violence Act 86 of 1995, like some other jurisdictions, covers persons who have a “close personal relationship” with one another and sets forth criteria for defining this concept (such as the nature, intensity and duration of the relationship).⁶³ This approach is very subjective, however, and is not recommended for adoption in Namibia.

Recommendation for Namibia

After examining a number of examples, we propose the following definition for Namibia. It is modelled on the definition in South Africa’s 1998 bill, but with significant changes and additions.

Meaning of “domestic relationship”

(1) For the purposes of this Act, a person is in a “domestic relationship” with another person if:

- (a) they are or were married to each other, including marriage according to any law, custom or religion, or are or were engaged to be so married;**

This provision covers customary marriage as well as civil marriage, and engagements or betrothals under both systems.

- (b) they (whether they are of the same or of the opposite sex) live or have lived together in a relationship in the nature of marriage, although they are not, or were not, married to each other, or are not able to be married to each other;**

Some jurisdictions refer to this sort of relationship as cohabitation.

- (c) they have, have had or are expecting a child together;**

This provision would extend coverage of the definition to unmarried persons who have a child together – a significant relationship group in Namibia. The reference to “expecting: a child is intended to cover violent situations involving pregnant women.

- (c) they are family members related by consanguinity, affinity or adoption;**

This provision would apply to relationships such as those between extended family members, or stepchildren and stepparents.

- (e) they would be family members related by affinity if the persons referred to in paragraph (b) were, or were able to be, married to each other;**

This means that persons who are living together as though they were married will be deemed to have the same family relationships as if they were in fact married.

- (f) they are or were in an actual or perceived intimate, romantic or customary relationship which includes a sexual relationship of any duration but can also exist in the absence of any past or present sexual contact;**

This provision covers relationships which are particularly difficult to define. Some countries refer to “dating” relationships, but this concept might not mean the same thing in different Namibian communities. The focus here is on the term “intimate” instead.⁶⁴ One alternative would be to follow the example of the US state of Minnesota, which refers to “persons involved in a significant romantic or sexual relationship”.⁶⁵

The reference to “customary” relationships is designed to cover situations such as those in some Namibian communities in which distant cousins

are “betrothed” and engage in certain sexual contact without any actual intent to marry.⁶⁶ This term is also proposed in the South African Bill.

- (g) *they ordinarily share or shared the same household or residence, including employees who ordinarily reside on their employer’s residential premises; or***
- (h) *one person is a domestic worker in a private household and the other person is an employer or a member of the employer’s family or household.***

(2) *For the purposes of subsection (1)(g), “residence” shall include institutions for children, the elderly and the disabled, including school hostels.*

(3) *For the purposes of subsection (1)(d), a customary union shall give rise to relationships of affinity as if it were a civil marriage.*

III. CRIMINAL LAW APPROACHES

9. SPECIFIC CRIMES AIMED AT DOMESTIC VIOLENCE

Background

There is strong support for the introduction of legislation which specifically criminalises domestic violence. For example, this approach emerged as a strong recommendation in a recent survey of experts on domestic violence around the world.⁶⁷ It is also suggested in a 1994 World Bank discussion paper.⁶⁸ Countries which have criminal provisions aimed specifically at domestic violence include India, Sweden, Vietnam, Israel, Mauritania, Spain and Peru.⁶⁹

The following are **arguments in favour of creating a new and specific crime of “domestic violence”**:

- It will remove this problem from its invisible place under other crimes such as assault and highlight the unique nature of the crime
- It will help to raise public awareness about domestic violence.
- It will make it easier to enact appropriate criminal procedures, such as special search and seizure powers, arrest without warrant in appropriate cases, special bail requirements and conditions, protection for the complainant’s privacy and appropriate sentencing options.
- It is likely to help to change police attitudes towards domestic violence, by emphasising its criminal nature.
- Parties involved in domestic violence cases may continue their relationship after contact with the criminal justice system. Sensitivity to this fact requires a criminal justice approach which can help to break the cycle of violence as well as punishing perpetrators for their past actions.
- The existence of a specific domestic violence crime will make it easier to collect statistics on domestic violence, and to track domestic violence cases to see if the legal response is adequate.

There are also some **arguments for dealing with domestic violence in the context of existing criminal offences**:

- Existing statutes adequately cover most forms of domestic violence.
- Enhanced penalties for existing crimes may address the unique situation of domestic violence.

- It is easier to amend existing law than to enact entirely new provisions.

Currently in Namibia, perpetrators of domestic violence are placed in the same category as persons guilty of simple assaults. In South Africa, the situation is the same. As the court in South Africa said in the case of *S v. S*: “The accused who was convicted of a serious assault on his 4-month-old baby son, ends up with a conviction on his record of ‘assault with intent to do grievous bodily harm.’ No mention is made of the fact that the victim was his baby son - that, in fact, he was guilty of baby battering...”⁷⁰

Examples from other countries

Many states in the United States have enacted separate criminal statutes for domestic violence.⁷¹ These jurisdictions have recognised that domestic violence is a serious problem which must be addressed in an aggressive manner. A separate criminal statute raises public awareness that domestic violence in any form is unacceptable. One article on domestic violence states that “the first step in changing the practice is to name this act as forbidden. The next step is to recognise a woman’s right to safety, security, and equality within the home under the laws, naming domestic violence specifically in every legal instrument and document and code.”⁷² A separate statute sends the message that the state recognises that domestic violence is unacceptable.

Puerto Rico has also enacted a separate criminal statute which specifically addresses domestic violence. This statute covers a wide range of abusive situations, criminalising physical and psychological abuse, abuse by threat, abuse by restriction of liberty and conjugal sexual assault. The “domestic relationship” for purposes of the statute is also very broad, extending to spouses, former spouses, persons who have or have had a consensual relationship, and any persons who have children together. Any abuse which occurs in the context of those relationships can be punished by imprisonment for as little as 9 months up to 30 years. The statute also provides for enhanced sentences in the presence of aggravating factors including grave bodily harm, use of a lethal weapon, abuse of a child, abuse in the presence of a minor, and abuse in violation of a protective order.⁷³

Another approach used in some jurisdictions is to utilise existing criminal laws with enhanced penalties when the offence is committed in a domestic situation. In Canada, a person who commits a crime in the context of a domestic situation is charged under the existing criminal code. If the offence involved abuse of a spouse or child, that is considered an aggravating factor for which an increased sentence is imposed.⁷⁴

The Australian Capital Territory combines the two methods listed above. If a perpetrator commits a crime under an existing statute (ie assault or murder) but that crime is committed in a situation defined by the statute as domestic, the offence is then called a domestic violence offence. Different penalties are imposed for domestic violence offences as opposed to crimes which take place in other settings.⁷⁵ So, for example, where the perpetrator assaults his wife, this is called a domestic violence offence rather than assault even though the basic definition of the crime is the same – and the perpetrator will then face enhanced penalties.

Another approach can be seen in the Domestic Violence Bill recently proposed in South Africa. While this bill does not create any new crimes or provide for enhanced

penalties, it does provide that police officers may arrest without warrant any person at the scene of domestic violence. This would be a change to the current law, which does not authorise arrests without warrant for common assault. ⁷⁶

Recommendation for Namibia

We recommend the adoption of a new crime specifically aimed at domestic violence. This offence would be based on the definition of domestic violence proposed above. It would thereby explain to the public exactly what acts are forbidden. This would send out a strong message that such acts are illegal and will not be tolerated.

There would be some overlap between the new domestic violence offences and existing common law crimes such as assault and indecent assault, as well as existing statutory offences such as those in the Combating of Immoral Practices Act 21 of 1980 or the Children’s Act 33 of 1960. This could be dealt with by choosing the most appropriate crime for the circumstances, or by charging in the alternative. The possibility of overlap should be no bar to the enactment of a domestic violence offence, in the same way that the common law crime of theft sits side-by-side with the Stock Theft Act 12 of 1990.

Offence of domestic violence

A person who intentionally, knowingly or recklessly engages in any of the acts defined as “domestic violence” in section 1 commits the crime of domestic violence and shall be liable on conviction to imprisonment for up to X years.

10. WHO CAN LAY A CHARGE?

Background

One aspect of domestic violence is that the victim is often accused by the perpetrator of causing the violence: “If only you kept a cleaner house, I wouldn’t have to punish you”; You’re the reason I was arrested and put in jail”. Often victims who report domestic violence are blamed for the subsequent consequences, i.e. the perpetrator being arrested or charged with a crime. Currently in Namibia, victims of domestic violence are required to lay charges by signing an affidavit. This is done so that if the victim later withdraws the case, she may be charged with perjury.

The responsibility for the act of domestic violence should be shifted from the victim to the perpetrator. One way to do this is to lay charges without requiring the victim to take the initiative. The police officer who investigates the case should determine whether an act of domestic violence has occurred and if so lay the charge against the perpetrator. Family members or other persons in contact with the victim should also be able to lay charges against the perpetrator.

Examples from other countries

Historically, in many jurisdictions an affidavit or other document was required from the victim before a charge was filed. This further “victimised” the victim by making her responsible for the criminal case, thereby increasing the risk of retaliation by the perpetrator. Today, in most jurisdictions the victim is no longer required to press

charges before a prosecution occurs.

For example, in the Australian Capital Territory, the common practice of police was once to require the victim to sign the charge book and to act as legal informant. Now the police officer is the informant who charges the crime.⁷⁷ In Malaysia, any person who believes that domestic violence is occurring or has occurred may report that information to a police officer. The statute also provides that the reporter is immune from liability for defamation if the report is made in good faith.⁷⁸ Peru's 1993 Law Against Family Violence allows any family member, prosecutor, or witness to report incidents of domestic violence to the police.⁷⁹

In Sweden, the victim was once required to file charges of domestic violence before a criminal case could be filed, but legislation was enacted in 1982 to provide that anyone who receives information about an offence of domestic violence may report it to the police.⁸⁰

Recommendation for Namibia

Following the trend in other countries, Namibia should enact legislation which would allow a broad range of people to file a charge of domestic violence.⁸¹

Complaints

(1) A charge of domestic violence may be laid by any person who has an interest in the well being of the victim, including but not limited to a family member, a member of the Namibian Police, a social worker, a counsellor, a health care provider, a teacher or a guidance counsellor.

(2) No person who in good faith gives any information regarding a domestic violence offence or lays a charge in respect of such offence shall incur any liability for defamation or otherwise in respect of the giving of such information or laying of charges.

11. POWERS OF SEARCH AND SEIZURE

Background

The role of the police in a domestic violence situation is critical. The police must be able to quickly react to intervene when domestic violence occurs. They must have the tools to protect the victim and to investigate the case thoroughly so that the prosecution will be successful. One of the tools which should be enhanced in Namibia is the ability for the police to conduct a search of premises, vehicles or persons when domestic violence is imminent, is in progress or has occurred.

Existing law in Namibia

In Namibia, the power to search, enter premises and seize evidence is regarded as an infringement on an individual's right to privacy and ownership. Therefore, the powers to search are to be "exercised carefully and only when necessary." A search warrant issued by a magistrate or justice is required to enter and search premises and seize evidence, unless there is a specific exception to the search warrant requirement.⁸² In addition, a magistrate or justice may only issue a search warrant if there are reasonable

grounds to believe the person may have in his possession evidence which may be used to prove a criminal case.

There are already a number of exceptions to the search warrant requirement. A police officer may search a person when making an arrest or when the person consents to the search. A police officer may furthermore search any person, container or premises if the police officer reasonably believes that a search warrant will be issued and that the delay in obtaining a search warrant would defeat the purpose of the search.⁸³

In addition to these general exceptions to the search warrant requirement, certain special powers of entry, search and seizure have been created. For instance, the Stock Theft Act 12 of 1990 provides for arrest and search without warrant in relation to reasonable suspicion of theft of stock or produce.⁸⁴ A police officer may also search without a warrant any “person, premises, other place, vehicle, vessel or aircraft or any receptacle” within ten kilometres of any Namibian border, or any vehicle on a public road or railway.⁸⁵

Examples from other countries

Two approaches have been used in other jurisdictions to assist investigations in domestic violence cases. One is the ability to obtain a separate search warrant where domestic violence or abuse of a child has occurred. The other is an exception to the requirement of a search warrant when the case involves domestic violence.

An example of special search warrants can be found in New South Wales, Australia, where a police officer may obtain a special search warrant if the officer reasonably believes that a domestic violence offence has occurred. The police officer may obtain the search warrant by telephone if evidence may be lost while the time is taken to obtain a written warrant.⁸⁶

There are many examples of the use of exceptions to search warrant requirements. Many jurisdictions provide that a search warrant is not required where an emergency exists. All states in the U.S. have statutes which specify that search warrants are not required in certain situations. For instance, no search warrant is required when a police officer stops a moving vehicle and has probable cause to believe that a crime has been committed. Search warrants are not necessary in the U.S. when evidence will be destroyed if the time is taken to apply for and obtain a search warrant.

In New Zealand, a search is permitted without a warrant when a police officer reasonably believes that it is “critically necessary to protect a child.”⁸⁷ In 1991 the Papua New Guinea Law Reform Commission proposed legislation to provide for entry onto premises and arrest by a police officer without a warrant when a police officer reasonably believes that an assault is, is about to, or was committed. Police officers are also authorised to stay on the premises until all is safe and secure.⁸⁸

Recommendation for Namibia

As noted above, Namibia already has a range of broad exceptions to the search warrant provision. Thus, adding another exception to the search warrant requirement for domestic violence offences would be the most logical approach.

This exception could be added in the form of an amendment to section 22 of the Criminal Procedure Act 51 of 1977 or in the Domestic Violence Act itself. The second option would be preferable, since the Criminal Procedure Act deals with general exceptions to the search warrant rules, while exceptions applicable to specific situations tend to be contained in the acts which deal with those topics.⁸⁹

Search and seizure

(1) Any member of the Namibian Police Force who has reasonable ground to believe that a domestic violence offence has been, is being or is likely to be committed may, without a search warrant, search any person, premises, vehicle, container or receptacle and seize any article found thereupon which may relate to such offence.

(2) To the extent that the provisions of this section authorise interference with the privacy of a person's correspondence or home, such interference shall be authorised only on the grounds of public safety, the prevention of disorder or crime and for the protection of the rights or freedoms of others as contemplated in Article 13(1) of the Namibian Constitution.

12. MANDATORY ARREST

Background

Every state in the US permits warrantless arrests in domestic violence cases if a police officer determines that there is probable cause to believe that domestic violence has occurred.⁹⁰ This is also the case in many other jurisdictions. For example, the Domestic Violence Bill proposed in South Africa in 1998 provides that police officers may arrest any perpetrator of domestic violence without a warrant. But some experts on domestic violence believe that police officers should be *required* to make an arrest in domestic violence cases.⁹¹

There are two basic approaches to requiring arrests in cases of domestic violence. One is “**mandatory arrest**” (or “required arrest”), which means that police *must* arrest if they witness criminal activity themselves, or if they have reasonable grounds to believe that an offence has been committed. Most jurisdictions in the United States have mandatory arrest policies in domestic violence cases.

The other approach is usually referred to “**presumptive arrest**” (sometimes called “preferred arrest” or a “pro-arrest policy”), where police are expected to make an arrest where they see the offence or have a reasonable suspicion that an offence has been committed, unless there are clear reasons why such an arrest would be counter-productive. The second approach preserves a greater degree of police discretion.

Mandatory and presumptive arrest policies give the victim some immediate protection by getting the abuser out of the way long enough for her to seek other forms of assistance before he returns.⁹²

Arguments in favour of mandatory arrest

The following are arguments in favour of introducing mandatory arrest policies:

- Such policies reduce police discretion, so that they *must* take domestic violence offences seriously.
- Such policies make sure that domestic violence is treated like other crimes.
- Since the decision to arrest and charge is no longer up to the victim, the abuser may be less likely to subject the victim to pressure -- provided that the abuser is fully aware of the mandatory arrest and charging policies and acts rationally on this information.
- There is some evidence that mandatory arrest and charging reduce the risk of repeat offences, although studies of this issue have produced contradictory results. Mandatory arrest has been referred to as “a short, sharp shock inflicted in order to modify the perpetrator’s behaviour”.⁹³
- Mandatory arrest and charging policies send out a symbolic message that society will not tolerate domestic violence.
- Such policies give victims a breathing space to develop a long-term plan (at least in cases where the offender is not immediately released on bail).
- Such policies reduce police frustration, since victims often withdraw domestic violence charges if they have the power to do so.

Arguments against mandatory arrest

The following are some of the arguments against mandatory arrest policies:

- Such policies are paternalistic and erode the self-esteem of victims by taking decision-making power out of their hands. Since most domestic violence involves male perpetrators and female victims, the victim may feel completely disempowered as control over her life passes from the male batterer to a predominantly male police force.
- Victims may hesitate to call the police in the first place, to avoid forced involvement in a criminal trial -- particularly those victims who are generally uncomfortable with the courts and legal process. Victims who do approach the police may be unaware that they are setting the criminal justice process in motion with no way to stop it.
- Victims of domestic violence often want some level of police intervention without wishing to invoke the full power of the law. For example, they often want immediate protection along with some form of warning from an authority figure which may help to change the abuser’s behaviour.
- The power to threaten to lay a charge against the abuser may be one of the few forms of leverage which the victim has to exercise power in the relationship.

- Mandatory arrest may increase the perpetrator's anger and result in more violence to the victim.
- Some commentators argue that the mandatory charging policy is an individualistic, Western approach which does not take into account the family and cultural dynamics of other groups and societies. For example, the criminal process may result in economic hardship and the loss of family, church and community support for the victim in some communities, regardless of the fact that the process has been taken out of the victim's control. Misunderstandings are likely in Namibia since general court procedures are still unfamiliar to many.
- A victim who tries to defend herself against the violence risks being arrested along with the abuser under a mandatory arrest policy. However, this problem can be avoided in most cases with a carefully-drafted mandatory arrest provision which focuses on the primary aggressor.⁹⁴
- The victim's testimony is usually crucial to a successful prosecution. But compelling a victim to testify may result in the victim being charged with contempt of court if she still refuses to co-operate. In some countries, there are paradoxical cases where the victim ends up in prison for this reason, while the abuser does unpunished. The abuser may threaten the victim with harm if she co-operates through her testimony.⁹⁵ Some countries have responded constructively to this problem by
 - * amending the rules on hearsay so that the victim's initial statement to the police is admissible even if she does not give further testimony;
 - * providing for creative sanctions which take the needs of the victim into account, such as sentences which will allow the abuser to continue to contribute to the family's finances
 - * making the court process less traumatic and more user-friendly for the victim.

Studies of mandatory arrest policies

There have been several studies of the effectiveness of mandatory and presumptive arrest policies. The seminal study, known as the Minneapolis Experiment, took place in Minneapolis, Minnesota (USA) 1981. It was designed to assess three police responses to domestic violence -- informal mediation by the responding police officer, ordering the suspected abuser to leave the house for eight hours and arresting the suspect. Arrest was found to be the most effective of the three responses in preventing repeated violence. However, this study had several important limitations: the sample size was small; arrest under the Minneapolis system involves overnight incarceration which is not necessarily the case in other places; and the researchers' intensive follow-up interviews with victims over the six months following the arrests may have had their own deterrent effect. Nevertheless, a similar study in Minneapolis in 1985 produced similar findings.⁹⁶

A 1981 study in London, Ontario (Canada) found that the introduction of a policy requiring the police to proceed with criminal charges regardless of the victim's wishes played a significant role in reducing or ending the violence, as measured by interviews

with victims as well as by the level of subsequent police and court interventions. The research concluded that laying criminal charges reduced the risk of renewed threats or assaults.⁹⁷

On the other hand, there are also studies which have produced contradictory findings. Five similar studies in the USA found that mandatory arrest was *not* significantly more effective than other forms of police intervention in preventing future violence -- and in three of the studies mandatory arrest actually *increased* subsequent violence. These studies suggested that the impact of arrest depends on the characteristics of the perpetrator. For example, arrest appears to be a greater deterrent to perpetrators who are married and employed than to those who are unemployed and unattached. This may indicate that arrest is more effective as a deterrent for men who have “more to lose”, or it may be that men who have jobs and families respond differently because they have higher levels of education, self-esteem and social standing.⁹⁸

A 1989 study Lincoln, Nebraska (USA) found that arrest actually produced *more* abuse *except* where it was tied to other sanctions such as treatment programmes. This indicates that arrest and prosecution alone may not be as significant as the overall package of consequences for the abuser.⁹⁹

In 1984, Canada was the first country in the world to introduce nationwide mandatory arrest and charging policies. A 1996 study of mandatory arrest and charging in the Yukon Province of Canada is particularly relevant to Namibia, since the Yukon has a small population which includes many indigenous peoples from several different language and cultural groups, many of whom live in relatively isolated rural communities. This study found that about 70% of victims wanted their abusers charged, but most victims identified their primary needs as being *immediate police protection and victim support services*. Many victims also stated that they have refrained from reporting previous assaults because they hoped to preserve the family relationship, or because they felt that the criminal justice system would not really serve their interests. And the vast majority of victims stated either that they did not want to testify in court, or that they did not want to go to court at all. This feeling was particularly strong amongst indigenous persons, stemming from a generalised fear of the justice system and concerns about past and present racism in the administration of justice. Finally, more than half of the victims whose cases proceeded to court were dissatisfied with outcome -- because they thought the abusers' sentences were either too long or too short, or because they would have preferred treatment to punishment for the abuse (with alcohol abuse treatment being most commonly mentioned).

One suggestion which emerged from the Yukon study was that mandatory arrest and mandatory charging should be retained, but with a greater degree of flexibility after the charge is laid. For example, one suggested option was a stay pending treatment for the offender based on the following criteria:

- * the seriousness of the offence
- * the history of violence on the part of the accused
- * the victim's preferences
- * availability of support for the victim
- * the attitude of the accused.¹⁰⁰
- * the availability of appropriate treatment programmes.

Intermediate approaches

A recent Canadian study suggests a modified mandatory arrest/charging policy. For such an approach, the following criteria would be used to distinguish cases which required mandatory arrest and charging to those which were eligible for another response:

- no previous reports to police
- first offence
- violence assessed to be relatively less serious in nature
- victim is not in favour of arrest/charging
- offender accepts responsibility for his/her actions. ¹⁰¹

In cases which did not qualify for mandatory arrest and charging, the following alternatives could be employed:

- removal of offender for a “cooling-off” period
- mandatory treatment for offender as an option to arrest, or as an option after arrest but prior to charging
- mediation for couple made mandatory for the offender as an option to arrest or charging if the victim wishes to try this approach
- special police protection for victim for a limited period
- a police warning emphasising the illegality of such behaviour and the possible future consequences. ¹⁰²

Another example of an intermediate approach is contained in the New Jersey (USA) Prevention of Domestic Violence Act of 1991. In terms of this law, arrest and charging are mandatory if:

- the victim exhibits signs of injury caused by domestic violence
- a warrant is in effect
- there is probable cause to believe that a protection order has been violated
- there is probable cause to believe that a weapon has been involved in the commission of an act of domestic violence.

The police officer *may* arrest and charge the perpetrator if there is probable cause to believe that an act of domestic violence has been committed, but none of the conditions for mandatory arrest apply. ¹⁰³

In Israel, arrest is mandatory where there are signs of injury. However, the perpetrator is not incarcerated but transported to the police station for an interview and cooling off period. ¹⁰⁴

Recommended compromise approach for Namibia

Currently, in terms of the Criminal Procedure Act 51 of 1977, a police officer may arrest a person without a warrant if that person commits or attempts to commit any offence in the police officer’s presence. Arrest without a warrant is also possible in cases where the police officer reasonably suspects a person of having committed any of a long list of specified offences, ranging from murder to gambling. Unfortunately, this power does not extend to assault unless serious injury is inflicted. ¹⁰⁵

We recommend that Namibia should adopt an intermediate approach similar to that used in New Jersey, with arrest being *required* in cases where there is a reasonable suspicion that domestic violence has occurred and where there are signs of injury, where a child is involved, where a protection order was in place or where there is an arrest warrant in effect. If subsequent research indicates that such an approach is not producing a strong enough police response, the law could be amended at a later stage to require mandatory arrest in all cases of domestic violence.

If the conditions for mandatory arrest are not met, police must respect the choice of complainant (provided of course that probable cause for arrest is met). Police must explain the choices to the complainant *and give the complainant an opportunity to respond privately, outside the presence of the abuser.* This is necessary to ensure that the complainant is not being intimidated by the abuser to the point that she or her is afraid to request an arrest. (A provision on this point is included in the section below on police duties, since the same opportunity for private consultation with the police should apply in respect of protection orders as well as arrest.)

Arrest and seizure of weapons in cases of domestic violence

(1) Where a police official responds to an incident and reasonably suspects that domestic violence has occurred, such member shall arrest the person who is suspected of having committed the act of domestic violence if--

- (a) the victim exhibits signs of injury caused by an act of domestic violence;***
- (b) there is reason to believe that a weapon has been involved in the commission of an act of domestic violence.***
- (c) a child was present during the incident;***
- (d) the police official reasonably suspects that the person has been served with a protective order and has violated such order;***
- (e) an arrest warrant is in effect; or***
- (f) the person has previously been arrested for a domestic violence offence or has previously been issued with a warning in respect of such an offence.***

(2) If a police official reasonably suspects that an act of domestic violence has been committed but where none of the conditions in subsection (1) are met, the police official may take the following actions with respect to the person who is suspected of committing the act of domestic violence, having due regard for the wishes of the victim—

- (a) arrest the person without a warrant;***
- (b) issue a warning, copies of which shall be placed on file with the police and the Office of the Prosecutor-General; or***
- (c) transport the person to another place for a cooling off period which may not exceed 48 hours and issue a warning in terms of subsection (2)(b).***

(3) Any police official who has probable cause to believe that an act of domestic violence has been committed may--

- (a) question persons present to determine whether there are weapons on the***

premises; and

- (b) *upon observing or learning that a weapon is present on the premises, search the premises and seize any weapon that the officer reasonably believes would expose the victim to a risk of serious bodily injury.*

13. PROSECUTION AND DIVERSION PROGRAMMES

“No-drop” policies

Even mandatory arrest does not necessarily mean that a criminal case will proceed. Criminal charges are generally withdrawn by the police or prosecutor if the victim requests this. In cases of domestic violence worldwide, this approach disadvantages victims who may be coerced by the abuser to withdraw the charges. As a result, many jurisdictions require that the police (and, to a lesser extent, prosecutors) not only make an arrest, but also proceed with the charges, regardless of the victim’s wishes. This is sometimes called a “**no-drop policy**”. The theory is that such a policy will mean that the victim cannot be “blamed” for the fact that the abuser is put on trial -- and since she does not control the process, there is logically no reason for the abuser to threaten her in an effort to get her to drop the charges.

Some of the pros and cons of a “no-drop” policy are similar to those in respect of mandatory arrest. However, one special difficulty is that it may be difficult to get a conviction, especially where there is an uncooperative victim. In Namibia, the Constitution states that a spouse is a competent but not compellable witness against his or her partner. This means that a spouse *can* testify in court against his or her partner, but cannot be *forced* to give such testimony.¹⁰⁶ This is probably good policy in domestic violence cases, even where the victim and the perpetrator are not husband and wife. In countries where “no-drop policies” have been implemented, there have been instances where a reluctant victim has been charged with contempt of court for refusing to obey a subpoena compelling her to testify against her husband. The ironic result can be the imprisonment of the victim while the perpetrator goes free.¹⁰⁷

We recommend that prosecutors in Namibia should retain discretion to make prosecution decisions on the basis of the circumstances of the case and the available evidence, within the bounds of guidelines prepared by the Office of the Prosecutor-General to help standardise the treatment of domestic violence cases.

Diversion

Instead of requiring prosecution in every case, we recommend that the law should create diversion options in respect of domestic violence crimes.

Domestic violence cases involve the closest of relationships. Often relationships will continue after contact with the justice system. For that reason, the goal of the prosecution must be more than to obtain a conviction. The system should attempt to break the cycle of violence. This means that not every person charged with a domestic violence offence should be convicted. Treatment and a change in behaviour should be equally important goals in many cases.

A diversion programme for first time offenders is one possible solution. A diversion is an agreement between the court, prosecutor, and accused. After a charge is filed but prior to trial, the accused agrees to do certain things, such as perform community service, complete a treatment program, or pay a fine. The prosecutor agrees to dismiss the criminal charges if the accused completes all terms of the diversion agreement. The court agrees to continue the case to give the accused an opportunity to complete the diversion. A diversion agreement carries the understanding that if the accused fulfils the obligations of the program described therein, the criminal charges filed against the accused will be dismissed and may not be re-filed.

Diversion programs are widely used in the United States for crimes such as driving under the influence of alcohol, theft and minor assault cases. In Namibia, a Juvenile Justice Project was started in 1995 through co-operation between government agencies and the Legal Assistance Centre. This Project has successfully used diversion in certain cases where juveniles are charged with crimes. Social workers from the Juvenile Justice Project attend court every day to assess and screen juveniles to determine their suitability for diversion. The goal of the project is to review the charges and recommend to the court and prosecutor the outcome which would be in the best interests of the child. The Project aims to prevent the incarceration children (except in cases of extremely serious crime). If the case does not involve murder, rape or any other serious offence, the social worker normally recommends that the child must attend a life skills class, attend victim-offender mediation, perform community service, or get substance abuse treatment. If the child, parents and prosecutor agree, the charge is dismissed. If the child completes the requirements of the diversion, the case will not be re-filed. If the child does not complete the terms of the diversion the prosecutor may file the case again and proceed to trial.

The Juvenile Justice Project operated until recently as a pilot project in the Windhoek area. It has proved to be very successful in giving deserving children a second chance, and has gained the full support of the police and the Office of the Prosecutor-General. It is currently being expanded into other parts of Namibia.¹⁰⁸

A diversion programme is an attractive remedy because there are no increased costs, and the offender has the burden of taking the initiative to complete the diversion programme. In addition, fewer people are incarcerated and no special personnel are required to enforce the program.

Domestic violence cases are similar at times to juvenile crime cases. In both types of cases, the goal is to change behaviour rather than simply punishing the offender. In a juvenile case, the crime may be committed because of family problems or substance abuse. The same is true of many domestic violence cases. **Based on the Juvenile Justice Project experience, a diversion program for certain types of domestic violence cases could be very successful in Namibia. The key to the proposed diversion program is that only first time offenders would be eligible, and that a diversion would not be appropriate where serious injury has occurred.**

Diversion

(1) For the purposes of this section, “diversion” means referral of an accused in a domestic violence criminal case to a supervised performance programme prior to adjudication.

(2) “Diversion agreement” means the specification of formal terms and conditions which an accused must fulfil in order to have the charges against the accused dismissed.

(3) Where a person has been charged with commission of a domestic violence offence, the Prosecutor-General may propose a diversion agreement to the accused the terms of which are established in terms of section X below if it appears to the Prosecutor-General after consideration of the factors set forth in subsection (4) that diversion of the accused would be in the interests of justice and of benefit to the accused and the community.

(4)(a) Diversion shall be available only where the accused is a first time offender and no serious injury has resulted from the alleged offence.

(b) In determining whether diversion of an accused is in the interests of justice and of benefit to the accused and the community, the Prosecutor-General shall consider the following factors:

- (i) any special characteristics or difficulties of the offender;**
- (ii) whether the accused will co-operate with and benefit from alternative treatment;**
- (iii) whether any available programmes are appropriate to meet the needs of the accused;**
- (iv) the impact of diversion on the community;**
- (v) the recommendations, if any, of the involved law enforcement agency;**
- (vi) the recommendations, if any, of the victim;**
- (vii) voluntary provisions for restitution of any losses suffered by the victim as a result of the alleged offence; and**
- (viii) any mitigating circumstances.**

(5)(a) If the Prosecutor-General elects to offer diversion in lieu of further criminal proceedings and the accused agrees to the terms of the proposed agreement, the court shall stay further criminal proceedings for a definite period which shall not exceed XX days.

(b) If the accused declines diversion, the court shall resume criminal proceedings.

(6) If the Prosecutor-General finds at the termination of the diversion period or any time prior thereto that the accused has failed to fulfil the terms of the diversion agreement, the Prosecutor-General shall terminate the diversion and the court shall resume criminal proceedings.

(7) If the prosecutor-general informs the court at the termination of the diversion period that the accused has fulfilled the terms of the diversion agreement, the court shall dismiss with prejudice the criminal charges filed against the accused.

(8) The Prosecutor-General shall keep a record of the fact that an individual has participated in a diversion.

Conditions of diversion agreements

(1) If an accused fulfils the obligations of a diversion agreement and the programme described therein, the criminal charges filed against the accused will be dismissed and may not be re-filed.

(2) A diversion agreement shall include a waiver of the right to a speedy trial and a description of a programme to be completed by the accused, which may include without being limited to any of the following:

- (a) the performance of community service;**
- (b) residence in a supervised residence or treatment facility; or**
- (c) participation in programmes offering medical, educational, vocational, social or psychological services, counselling services, corrective and preventive guidance or other rehabilitative services.**

Provided that a diversion agreement may not require any person other than the accused to participate in any counselling or other programmes.

(3) A diversion agreement may include, where appropriate—

- (a) admissions by the accused concerning the alleged offence;**
- (b) stipulations of relevant facts;**
- (c) provisions concerning the payment of costs;**
- (d) provisions concerning restitution of losses suffered by the victim from the acts constituting the alleged offence; and**
- (e) provisions concerning continuation of gainful employment and support of children and spouse.**

14. BAIL

Recently in Namibia, there has been a call for a “no bail” provision in domestic violence cases. A “no bail” provision would be unconstitutional in Namibia. The Constitution provides that a person is presumed innocent until proven guilty and that an accused must be afforded adequate time and facilities for the preparation and presentation of their defence.¹⁰⁹ An automatic “no bail” provision would make meaningless that section of the Constitution which provides that a person is presumed innocent until convicted.

The purpose of bail is to secure the accused’s presence at trial. In *S. v. Acheson*, the court held that an accused may not be punished prior to conviction.¹¹⁰ For that reason, bail must be granted unless the accused’s release is likely to prejudice the ends of justice. The authors of a commentary on the Criminal Procedure Act sum up the principles regarding bail, “Important practical consequences stem from the fact that bail is non-penal in character. First, the amount of bail may not be used to deter possible future perpetrators. Second, bail may not be refused to deter offenders - the court should always grant bail whenever possible. Third, the discretion to allow bail or refuse bail may never be influenced by punitive notions, for example a notion that an accused’s lengthy criminal record is per se sufficient justification for refusal of bail. It is highly

irregular to withhold bail in order to punish the accused.¹¹¹ The court may not deny bail unless it is in the best interests of justice that the accused remains in custody.¹¹²

So too a mandatory bail amount would be contrary to the Criminal Procedure Act. In *S v. Visser*, the court held that bail amounts are to be tailored to the individual. “The court should not merely act as a ‘rubber stamp.’”¹¹³ The courts have consistently adhered to the notion that bail should not be fixed in an amount so large as to amount indirectly to a refusal of bail. Therefore, a mandatory minimum amount would be illegal as well as a no bail provision in domestic violence cases. It is clear that the court must consider each case individually.

On a case by case basis, however, the court may find that the accused should remain in custody if “it is in the interests of justice.”¹¹⁴ There are several factors listed in the criminal procedure act where the court could deny bail. If the court finds that the release of the accused will endanger the safety of the public or any person, bail may be denied.¹¹⁵ This provision should be used to deny release where the accused is likely to retaliate against or continue to hurt the victim.

The key issue, then, is how to make sure that the court gets the appropriate information from the victim. **The procedure for input by the victim at bail hearings which has been proposed in the Combating of Rape Bill should be similarly followed in domestic violence cases.**

According to the Criminal Procedure Act the court may impose special conditions for release. **The Domestic Violence Act should also include a provision concerning conditions of release in domestic violence cases, again following the example of the Combating of Rape Bill.**¹¹⁶

Rights of victim where accused has been charged with domestic violence

(1) It shall be the duty of the prosecutor in criminal proceedings where the accused is charged with a domestic violence offence to consult with the complainant in order-

- (a) to ensure that all relevant information has been obtained from the complainant which shall include all information relevant to the question whether the accused should be released on bail and whether any conditions should be imposed if the accused is released on bail; and***
- (b) to provide such information to the complainant as will be necessary to lessen the impact of the trial on the complainant.***

Rights of victim in bail application

(1) The following section is hereby inserted after section 59 of the Criminal Procedure Act 51 of 1977:

Rights of victim in bail application where accused is charged with domestic violence

(1) A victim of domestic violence shall have the right-

- (a) to attend any proceedings where the question is considered whether an accused who is charged with domestic violence should be released on bail or whether any conditions should be imposed under section 62 or***

whether any such conditions should be varied; and

- (b) to request the prosecutor in proceedings referred to in subparagraph (a) to present any information or evidence to the court that might be relevant to any question considered by the court in that proceeding.*

(2) If an accused is in custody on a charge of domestic violence, the person in charge of the police station or place referred to in section 50(1), shall cause the victim to be informed as soon as practical-

- (a) of the date, time and place of the first appearance of the accused in court; and*
- (b) of the rights of the victim under subsection (1).*

(3) If an accused lodges an application for bail on a date or at a time of which the complainant has not been informed under the provisions of this section, the accused or his or her legal representative shall cause the complainant to be informed as contemplated in subsection (2) and the provisions of this section shall apply mutatis mutandis to such an application.

(4) The person who informs the victim as contemplated in subsection (2) or (3), shall prepare an affidavit stating-

- (a) whether the provisions of subsection (2) have been complied with and, if they have not been complied with, the reason why it was not possible to comply with them;*
- (b) the method by which the complainant has been informed;*
- (c) the time and date when he or she has informed the complainant.*

(5) When an accused who is in custody for domestic violence is brought before the court for the first time, the affidavit referred to in subsection (4) shall be handed to the judicial officer who presides at that court and shall form part of the record of the proceedings concerned.

(6) If the victim is present in proceedings where the accused is before the court for domestic violence, and such proceedings are postponed, the victim shall be informed of the date to which such proceedings have been postponed and of his or her rights under this section.

(7) If the victim is not present in proceedings where the accused is before the court for domestic violence, the court shall enquire into the question whether he or she has had knowledge of the proceedings and shall-

- (a) if it is of the opinion that it is probably that the victim has had knowledge of the proceedings, order that the matter be dealt with in his or her absence;*
- (b) otherwise postpone the matter in order to obtain the presence of the victim, unless it is in the interest of justice (with due regard to the interests of the victim) that the matter be dealt with forthwith and in the absence of the victim.*

(8) If, in proceedings where the accused is before the court for domestic violence, and such proceedings are postponed in the absence of the victim, the prosecutor in such proceedings shall cause the complainant to be informed –

- (a) of the matters referred to in subsection (6); and*

- (b) *whether the accused has been released on bail, and the provisions of subsection (2), (4) and (5) shall apply mutatis mutandis.*

(9) If the accused is in custody for domestic violence and a court releases that accused on bail, that court shall impose such conditions as would ensure that the accused does not make contact, directly or indirectly with the victim concerned.

Conditions for release on bail in domestic violence cases

(1) The court shall impose the following conditions in domestic violence cases when release of the accused on bail is appropriate:

- (a) *an order prohibiting any direct or indirect contact with the victim during the pendency of the proceedings;*
- (b) *an order prohibiting the possession of any firearm or other specified weapon;*
- (c) *an order prohibiting the use of alcohol or controlled substances if either were involved in the offence; and*
- (d) *an order requiring that the accused support his or her children and spouse at the same or greater level as prior to the arrest where appropriate.*

(2) The court must notify the victim immediately if the accused is released on bail and notify the victim of the conditions of such release.

15. TRIAL

Rules of evidence

Victims may be reluctant to testify at the trial of the accused. One of the problems prosecutors often face is that the victim, even though she was served with a subpoena, does not appear and testify at a domestic violence trial.

In the United States, when a victim does not appear for trial, after being served with a subpoena, prosecutors often use the “excited utterance” exception to the hearsay rule to admit statements made by the victim or other witnesses at the time the offence occurred. The statement must be made while the victim is still under the stress of the events. For instance, suppose that a police officer arrives at the scene of a domestic assault. The victim runs from the house, her head is bleeding, and she screams, “My husband won’t stop hitting me, Help me.” If she doesn’t appear to testify at the trial, her statement will be admitted as an excited utterance.

In Namibia, spontaneous statements or exclamations which are very similar to excited utterances are admissible as part of the doctrine of *res gestae*. In the case of *S. v. Qolo* the court held, “...(1) the original speaker must be shown to be unavailable as a witness, (2) there must have been an occurrence which could produce a stress of nervous excitement, (3) his statement must have been made while the stress was still so operative upon the speaker that his reflective powers may be assumed to have been in

abeyance and lastly (4) the statement must not amount to a reconstruction of a past event.”¹¹⁷

Prosecutors should work closely with police officers to make sure that they carefully and accurately record any statements by witnesses at the scene of domestic violence cases so that those statements may be used in a later trial. Spontaneous statements as an exception to the hearsay rule should be codified. However, as that exception would apply in all cases, this issue should be addressed when evidentiary rules are generally considered and codified, rather than in the context of domestic violence legislation. **No provision on this point is recommended at present.**

Fast-tracking domestic violence cases

The trial of a domestic violence case should be heard as quickly as possible. Victims are often under a great deal of stress during the pre-trial period.¹¹⁸ The victim may be feeling guilty or may be intimidated by the accused or the accused’s family members, and such risks will only increase with delay. **To avoid these problems, domestic violence cases should be put on a fast track.**

Priority of cases involving domestic violence

(1) Cases involving domestic violence shall be given priority and be heard as quickly as possible.

(2) Cases involving domestic violence shall follow the prescribed time limits set forth in regulations promulgated in terms of this Act.

(3) Postponements in domestic violence cases shall not be allowed except on good cause shown.

Closed court

As in the case of criminal proceedings for rape, **criminal proceedings involving domestic violence offences should be held in closed court**, with only the parties who are necessary to the proceedings allowed to be present. The proposed provision to this effect is modelled on that in the draft Combating of Rape Bill. (The fuller context of the proposed provisions can be seen in that bill.)

Closed court

The following amendments are hereby inserted into section 153(3A) of the Criminal Procedure Act 51 of 1977:

(3A) Subject to the provisions of subsection (3B), in criminal proceedings relating to a charge that the accused committed or attempted to commit—

- (a) any indecent act towards or in connection with any complainant;***
- (b) any act for the purposes of procuring or furthering the commission of an indecent act towards or in connection with any complainant; or***
- (c) any domestic violence offence is defined in terms of the Domestic Violence Act X of 1999***

the court before which such proceedings are pending shall direct that any person whose presence is not necessary at such proceedings, shall not be present at those proceedings, unless the court directs otherwise, because those proceedings or part thereof are not covered by the provisos to Article 1291(a) or 12(1)(c) of the Namibian Constitution, as the case may be, or unless the complainant in those proceedings or if he

or she is a minor, his or her parent or guardian or a person in loco parentis requests otherwise.

Victim's Advocate Programme

Services for victims should be developed to provide as much support during the prosecution of the case as possible. That support should be available as soon as the charge is filed. Cases of domestic violence should be assigned to a specific prosecutor as soon as the charge is filed. A programme designed to help victims through the court process would be very helpful.

Several other countries focus on supporting victims through the system. In Canada, a victim/witness assistance program was developed to help victims of domestic violence and other violent crimes through the court process.¹¹⁹ In Canberra, Australia, the Domestic Violence Counselling Service supports victims by attending court proceedings.¹²⁰

Several jurisdictions in the United States have victim/witness advocate programs in the prosecutor's office. These programs usually employ a small staff who run the program. Most of the advocates are volunteers who are trained by the permanent staff. Since the advocate program is located in the prosecutor's office, the prosecutor and victim advocate are able to work together very closely. As most of the advocates are volunteers, the cost of the program is fairly low. In the United States, a portion of the court costs and fines assessed against criminal defendants go to pay for the victim assistance programs. A well-run victim's assistance program will help guarantee a successful prosecution as well as much needed support for the victim.

In each prosecutor's office in the State of Oregon, a victim's advocate co-ordinator is hired. That person is responsible for obtaining and training volunteers. The co-ordinator is the only person who is paid; all others provide their time free of charge. The volunteers are trained to guide the victim through the judicial process. As soon as the charge is filed, the victim's advocate contacts the victim. The victim's advocate meets with the victim to explain court procedures and protective orders. The victim's advocate acts as an important "go-between" the prosecutor and the victim. Based on the contact with the victim, the advocate can inform the prosecutor of any issues or problems with the case. This role can increase the efficiency of the prosecutor's work and increase the chances of getting a conviction.

We strongly recommend that Namibia adopt a similar Victim's Advocate Programme. Such a programme could be instituted at a very low cost and would be of great practical assistance to domestic violence victims. This aspect of the proposed legal changes is considered to be one of the most fundamental

Victim's Advocate Programme

(1) A Victim's Advocate Programme shall be established in the Office of the Prosecutor General to substantially accomplish the following aims:

- (a) to inform victims and witnesses of their case status and progress;***
- (b) to communicate victim needs and concerns to appropriate persons in the criminal justice system;***

- (c) *to assist victims in recovering property damaged or stolen and in obtaining restitution or compensation for medical and other expenses incurred as a result of the criminal act;*
- (d) *to prepare victims for pending court proceedings by informing them of procedures involved;*
- (e) *to accompanying victims to court proceedings;*
- (f) *to involve victims, when possible, in decision-making processes pertaining to the offence in question;*
- (g) *to assist victims with personal logistical problems related to court appearances;*
- (h) *to develop community resources to assist victims of crime;*
- (i) *to generally encourage and facilitate testimony by victims of and witnesses to criminal conduct.*

16. Sentence

Sentencing options

Once a conviction is obtained an appropriate sentence must be imposed. The goal of the sentence should be to change the behaviour of the perpetrator. When the accused is sentenced, the court should require the accused to complete treatment which addresses domestic violence issues. In addition, the accused should complete substance abuse or alcohol treatment if that was a factor in the case.

Community service is used in various jurisdictions as an alternative to prison. Community service is labour performed by the accused without compensation for a specific agency. Usually the agency is a non-profit entity. The accused may perform community service and still work or go to school. Community service may appeal to victims because the accused may need to support his family. In the context of a domestic violence case, the court could be required to impose community service or prison, or both.

Both treatment and community service options are available in terms of section 297 of the Criminal Procedure Act 51 of 1977, but these alternative are not well-utilised and need to be highlighted in the context of domestic violence.

Some jurisdictions in the United States offer the accused after conviction a conditional discharge. If the accused qualifies for a conditional discharge, the accused first pleads guilty or is found guilty after trial. The court does not enter a judgement of guilt but defers further proceedings and places the accused on probation. If the accused violates the terms of probation, the court enters the conviction and sentences the accused. If the accused completes the terms of probation the court would dismiss the case.

Once again, since the goal of the prosecution is to change the behaviour of the accused, a conditional discharge in some cases may be appropriate. Victims may also respond

more favourably to the system if they know that the accused is likely to get treatment rather than incarceration.

This alternative of conditional discharge is similar to that prescribed conditional postponement of sentence in terms of section 297 of the Criminal Procedure Act 51 of 1977, except that the existing Namibian approach does not allow the offender to avoid a conviction. **We recommend that the existing procedure for conditional postponement of sentence should be emphasised in the domestic violence context.**

Sentencing options in cases of domestic violence

After an accused has been convicted of a domestic violence crime, the court shall give particular consideration to the possibility of postponing the passing of sentence, or to suspending all or part of a sentence of imprisonment imposed, in terms of subsection (a)(i) or subsection (b) of section 297 of the Criminal Procedure Act 51 of 1977 on condition of submission to appropriate treatment or the performance of community service.

Victim input in respect of sentence

The victim should have the opportunity to address the court prior to sentencing. The court must be required to notify the victim of the time and place of the sentencing hearing. The victim should be allowed to personally address the court, prepare an affidavit, or designate a representative to make a statement.

Victim input in respect of sentence

(1) The court shall notify the victim, or the victim's next of kin if the victim is deceased, of the time and place of sentencing in a case involving domestic violence against the victim.

(2) At the time of sentencing, the victim, a person designated by the victim or the victim's next of kin has the right to appear personally or through a legal representative, and has the right to reasonably express any views concerning the crime, the person responsible, the impact of the crime on the victim, and the need for restitution and compensation.

(3) A victim who is unwilling or unable to appear personally or through a legal representative at sentencing has the right to inform the court of his or her views on an appropriate sentence by means of an affidavit.

Prohibition on possession of firearms

The Arms and Ammunition Act 7 of 1996 provides that a person who is convicted of an offence involving a firearm shall be declared unfit to possess a firearm unless the court determines otherwise. If the conviction is for any of a list of specified crimes (such as murder, rape or stock theft) but the offence did not involve a firearm, the court has the discretion to declare the convicted person unfit to possess a firearm. A determination of unfitness in either circumstance must remain in force for a fixed period of at least two years.¹²¹ We recommend that "any domestic violence offence" should be added to the list of specified offences for this purpose.

This procedure seems somewhat lenient. For example, in the US state of New Jersey a conviction on a domestic violence offence is ground for a court to seize firearms and require their sale or disposal, as well as to revoke the owner's arms permit – all apparently with permanent effect.¹²² However, in Namibia, it would seem contradictory to require stricter consequences in respect of domestic violence offences than in respect of other serious offences such as murder and rape. **The general treatment of firearms with relation to persons convicted of serious crimes, including domestic violence, warrants an overall re-examination at a later stage.**

Amendment of Arms and Ammunition Act 7 of 1996

Schedule 1 of Act 7 of 1996 is hereby amended by the addition of “any domestic violence offence” to the list of scheduled offences.

Victim surcharge

Funds are always needed to support victim advocate programs, shelters and treatment facilities. Many jurisdictions in the United States require that the court impose a “unitary assessment” at the time of sentencing. This unitary assessment applies to all criminal cases, not just domestic violence cases. It is a different amount for felonies and misdemeanours. It is technically not a fine, but a fee which goes to support various approved programmes which help victims. The term “victim surcharge”, which is also in use in the United States, helps to communicate the purpose of the fee.

In Namibia, this approach could be introduced in the context of domestic violence to fund the small amounts needed for the Victim Advocate Programme. If it is successful, it could be replicated in respect of other crimes. Alternatively, such a “user fee” could be introduced in respect of all crimes.

Victim surcharge

(1) In all cases of conviction for the commission of a crime of domestic violence, the court shall impose upon the accused, in addition to any other monetary obligation imposed, a victim surcharge under this section.

(2) The victim surcharge is a penal obligation in the nature of a fine and shall be in an amount of \$NXXXX.

16. Victim Compensation

Currently in Namibia, restitution to the victim may be ordered by the court in criminal cases only where property has been lost or damaged. The court is not authorised to order any restitution for personal injury. Restitution is important in making the victim whole – in paying for medical bills or time off from work. Expanding the existing provision in the Criminal Procedure Act would make it possible for victims of domestic violence offences as well as other crimes to obtain restitution for losses resulting from the crime without having to bring a separate civil action. **The Criminal Procedure Act should be amended to provide for compensation in respect of persons as well as property.**

Victim compensation

(1) Section 300 of the Criminal Procedure Act 51 of 1977 is hereby amended as follows:

300. Court may award compensation where offence causes damage or loss in respect of person or property

(1) Where a person is convicted by a superior court, a regional court or a magistrate's court of an offence which has caused damage or loss in respect of person or property (including money) belonging to some other person, the court in question may, upon the application of the injured person or of the prosecutor acting on the instructions of the injured person, forthwith award the injured person compensation for such damage of loss....

17. MANDATORY REPORTING OF DOMESTIC VIOLENCE OFFENCES

Certain professional people in society are particularly likely to come into contact with victims of domestic violence. Often, these professionals will not report domestic violence to the authorities because they do not want to be involved in the system, or they do not want to expose themselves to civil liability. Doctors, teachers, police officers and social workers are in a unique position to help break the cycle of violence by reporting what they know to the appropriate authorities.

As of 1994, 45 out of 50 US states had mandatory reporting laws which cover at least some instances of domestic violence. Such statutes usually also provide immunity from civil liability if a report is made in good faith. A mandatory reporting requirement raises awareness of domestic violence and emphasises the message that domestic violence is unacceptable.

There is generally strong agreement on the imposition of such reporting requirements where a child is at risk. Extending such requirements to adults is more controversial. Five US states have done so (California, Kentucky, New Mexico, New Hampshire and Rhode Island), with some limitations. For example, New Hampshire requires that suspected domestic violence against an adult must be reported over the victim's objections only if there is a gunshot wound or other serious injury.

The following are arguments against imposing mandatory reporting requirements on health care practitioners in respect of adults:

- It may put patients at risk of retaliation by the perpetrators.
- It may decrease patient trust.
- It will compromise privacy and confidentiality.
- Some perpetrators may prohibit access to health case to prevent reporting.
- Reporting alone may not ensure appropriate assistance or protection for the batterer.

- Health care providers may experience conflicts between their legal duties, their judgement of what will be in the best interests of the patient and their relationship of trust and confidentiality with the patient.¹²³

Similar arguments would apply in respect of mandatory reporting by other professionals and service providers.

Because of the many potential drawbacks of extending reporting requirements to cover adult victims of domestic violence, we suggest mandatory reporting only in respect of children and mentally incapacitated persons at this stage.

Duty of officials to report domestic violence

(1) For the purposes of this section, “public or private official” means any

- (a) health care provider or other professional who is regulated by the Medical and Dental Professions Act 21 of 1993, the Allied Health Services Profession Act 20 of 1993, the Council for Health and Social Services Professions Act 29 of 1993 or the Nursing Professions Act 30 of 1993;***
- (b) teacher or other employee of a public or a private school;***
- (c) pastor, member of the clergy or other religious leader;***
- (d) any person who receives remuneration for providing day care, educational services or any other form of care for children;***
- (e) legal practitioner; or***
- (f) firefighter or emergency medical technician.***

(2) Any public or private official having reasonable cause to believe that any child or mentally incapacitated person with whom the official comes in contact has suffered domestic violence or that any person with whom the official comes in contact has abused a child or a mentally incapacitated person shall immediately report the matter to a member of the Namibian Police: Provided that a psychiatrist, psychologist, legal practitioner or a pastor, member of the clergy or other religious leader shall not be required to report such information communicated by another person if the communication is privileged.

(3) A person who violates subsection (2) is guilty of an offence and liable on conviction to imprisonment of up to X years or a fine of up to N\$XXXX or both.

(4) No person who in good faith provides information to the Namibian Police in terms of this section shall incur any liability for defamation or otherwise in respect of the provision of such information.

IV. PROTECTION ORDERS

18. THEORY BEHIND PROTECTION ORDERS

Protection orders (which are known by a variety of names) are in some respects an intermediate measure between civil action and criminal action. Protection orders are a means of emphasising the illegality of acts of domestic violence. They can also provide various forms of practical protection to the applicant, such as ensuring that the applicant can have undisturbed occupation of a common residence. Breach of a protection order constitutes a crime.

Virtually every piece of domestic violence legislation which has been reviewed provides for protection orders. Terminology varies -- for example, some jurisdictions call them restraining orders, emergency orders, victim assistance orders -- but “protection order” is the usual term. This term also provides a correct description of the fundamental purpose of such orders.

Protection orders are the most common legal responses to domestic violence in recent years. For example, every Australian province provides for protection orders. The same is true of all 50 states in the United States, and these have generally been upheld against constitutional challenges.¹²⁴

19. WHO CAN REQUEST A PROTECTION ORDER?

Any person who is a party to one of the domestic relationships covered by the act should be able to apply for a protection order. An applicant could be an adult or a child, and a parent or a guardian should be able to make an application to protect his or her child.

Because domestic violence victims can be incapacitated by fear and intimidation, some countries allow applications to be made on behalf of a domestic violence victim by persons such as police officers, counsellors or social workers. The consent of the victim is not necessary in some circumstances.

For example, the South African Domestic Violence Bill provides for an application to be brought on behalf of the applicant by any other person with “a material interest in the wellbeing of the applicant” -- including but not limited to a counsellor, health service provider, police officer, social worker or teacher. The consent of the victim is necessary unless the victim is a minor, mentally incapacitated, unconscious or under the influence of intoxicating liquor or drugs.

In Saskatchewan (Canada), an application can be brought on behalf of the victim without the victim’s consent if the court gives permission for this. A study of the operation of Saskatchewan Victims of Domestic Violence Act 1994 over a 14-month period revealed that police requested the orders in about 74% of cases, with less than half of these being at the request of the victim.¹²⁵

We recommend that Namibia follow the South African example, but with an additional catch-all provision allowing for application for a protection order without the victim’s consent in cases where the court deems this necessary to protect the victim from serious harm.

In instances where an application is made without the consent of the applicant, the applicant should be given an opportunity to approach the court at the hearing before the interim protection order is made final, to state his or her views.

Who may apply for protection order

(1) Any person who is in a domestic relationship may apply for a protection order against another person in the domestic relationship in terms of section X.

(2) Notwithstanding the provisions of any other law, an application may be brought on behalf of an applicant by any other person (including but not limited to a family member, a member of the Namibian Police, a social worker a counsellor, a health care provider, a teacher or a guidance counsellor) who has a material interest in the wellbeing of the applicant.

(3) Any application made on behalf the applicant by another person in terms of subsection (3) must be made with the consent of the applicant, except in circumstances where the applicant is—

- (a) a minor;***
- (b) mentally incapacitated;***
- (c) unconscious;***
- (d) under the influence of alcohol or drugs; or***
- (e) at risk of serious physical harm and the court approves the making of the application without the consent of the applicant.***

(4) Notwithstanding the provisions of any other law, a minor may apply for a protection order without the assistance of a parent, guardian or any other person if the court is satisfied that the child has sufficient understanding to make the proposed application.

(5) Where an application is brought on behalf of one person by another person in terms of subsection (3), the “applicant” shall be deemed to be the person on whose behalf the order is sought.

20. APPLYING FOR A PROTECTION ORDER

Speedy relief is crucial in cases of domestic violence. For this reason, the procedure for obtaining protection orders should be as simple and straightforward as possible. The simple, low-cost procedure for obtaining maintenance orders in terms of the Maintenance Act is a good analogy.

Jurisdiction

Magistrates' courts should be competent to issue protection orders, in order to make the procedure as simple and as accessible as possible. It must be kept in mind that the applicant may have fled his or her normal residence before approaching the court. This means that flexible jurisdictional requirements are needed to make the procedure easily accessible to the applicant. **Following on the example of the South African Domestic Violence Bill and the US Model Code, we recommend a wide jurisdictional provision.**¹²⁶

Jurisdiction

(1) Any court shall have authority to issue a protection order in terms of this Act in the area-

- (a) where the applicant permanently or temporarily resides, is employed or carries on business;**
- (b) where the respondent resides, is employed or carries on business; or**
- (c) where the cause of action arose.**

(2) No minimum period of residence shall be required in respect of subsection (1)(a).

(3) Any protection order issued in terms of this Act shall be enforceable throughout Namibia.

Application

The South African Domestic Violence Bill is a particularly useful example on procedural issues, since it comes from a legal context which is so closely related to that of Namibia.

Application for a protection order should be in the form of an affidavit, which can be made by completing a simple form which should be available at all police stations, shelters and counselling services. This form should indicate all the potential elements of protection order, so that the applicant will be fully informed of all the options and can indicate all those which are being requested. The applicant should be free to submit supporting affidavits, such as a report from a doctor or a social worker, but this should not be necessary.

Most legislation examined makes protection orders available on a 24-hour basis. This could be done most simply by giving the police the duty to forward applications to a magistrate after hours. While this option would theoretically entail some extra expense (overtime payment of magistrates), the costs would probably be very small. The procedure for after-hours applications by telephone is based on the US Model Code on Domestic and Family Violence. New South Wales and Western Australia are examples of a jurisdiction which allows application and service of protection orders by telephone after hours and in emergency situations.¹²⁷

In South Africa, there has been some confusion under the Prevention of Family Violence Act as to whether an initial order can be granted on the basis of affidavit evidence alone, or whether the hearing of oral evidence is allowed. South African magistrates have generally been granting *ex parte* protection orders on the basis of

affidavit evidence from the applicant, calling for additional oral evidence from the applicant if necessary for clarification.

Several submissions to the South African Law Commission opposed the routine hearing of oral evidence on the grounds that this would undermine the goal of providing a simple and speedy procedure. Hearing oral evidence in every case might also place an unreasonable and unnecessary burden on overworked magistrates' courts. Other South African submissions asserted that the applicant should have the option of coming to court and making an oral application, because it may be difficult for an illiterate or uneducated applicant to set out the relevant facts clearly in a written document, even with the help of court or police personnel. Concerns were also raised about the respondent's rights -- if the applicant gives evidence only by way of affidavit, then the respondent has no opportunity for cross-examination.

The South African Law Commission recommended that the original application be made by affidavit evidence, but that the court have the discretion to require further oral evidence or further evidence by affidavit if necessary. It also recommended that the substance of any oral evidence in an *ex parte* application be noted so that the respondent can have the opportunity to respond to these allegations before the interim order is made final. This suggestion was followed in the recent Domestic Violence Bill.¹²⁸

The proposed South African approach to oral evidence is recommended for Namibia. It protects the applicant by giving him or her an opportunity to provide additional evidence that might establish the need for the protection order if the original affidavits are insufficient. It also protects the respondent by discouraging the court from granting orders on the basis of borderline evidence rather than seeking more clarity.

Application for a protection order

(1) Any person qualified in terms of section X may make application for a protection order by making an affidavit on the prescribed form, or an affidavit which substantially corresponds to this form.

(2) If the applicant makes the application in person, the Clerk of the Court shall inform the applicant of the relief available in terms of this Part and shall assist the applicant to complete the necessary form.

(3) The affidavit referred in subsection (1) must state

(a) the facts on which the application is based;

(b) the nature of the order applied for; and

(c) the police station where the applicant is most likely to report any breach of the protection order.

(4) Supporting affidavits by persons who have knowledge of the matter concerned may accompany the application, but are not required.

(5) The applicant may request that his or her physical address be omitted from the application, in which case the court may not make an order forbidding the respondent to enter the applicant's residence in terms of section (X)(x).

(6) If application is made during ordinary court hours, the application and any supporting affidavits shall be lodged with the clerk of the court who must submit the document forthwith to the court.

(7)(a) An application made in terms of this section may be brought outside ordinary court days or hours, in which case the application and any supporting affidavits shall be delivered to a police station.

(b) In such a case, the police officer shall without delay deliver the application to a magistrate or judge or communicate the contents of the application to a magistrate or judge telephonically.

(8) The procedure set forth in subsection (7) may also be used in situations that are determined by a police officer to be emergency situations.

(9) In considering any application for a protection order the court may require oral evidence or further evidence by affidavit before making a decision, and must record any oral evidence placed before the court.

21. PROCEDURE FOR GRANTING PROTECTION ORDERS

Criteria for granting protection orders

A protection order should be available if the court is satisfied that domestic violence has occurred. It should also be available *before* violence has actually taken place, if the court is satisfied that the applicant has established a significant risk of violence to the applicant or to a child of the applicant.

In the Canadian jurisdictions of British Columbia and Saskatchewan, a protection order can be issued once domestic violence (which is defined to include threats of such violence) has occurred. The court is directed to consider

- (a) the nature of the domestic violence;*
- (b) the history of domestic violence by the respondent towards the victim;*
- (c) the existence of immediate danger to persons or property; and*
- (d) the best interests of the victim and any child of the victim or any child who is in the care and custody of the victim.*

Mauritius' 1997 Protection from Domestic Violence Bill allows for protection orders whenever an act of domestic violence has occurred and the victim reasonably believes that the perpetrator is likely to commit further acts of domestic violence. The court is directed to consider the following factors:

- (a) the need to ensure that the aggrieved spouse is protected from domestic violence;*
- (b) the welfare of any child affected or likely to be affected, by the respondent's conduct;*
- (c) the accommodation needs of the aggrieved spouse and her children as well as those of the respondent and his children;*
- (e) any hardship that may be caused to the respondent spouse or to any of his children as a result of the making of the order;*
- (f) any other matter the court may consider relevant.*

Guyana has adopted a similar list of factors, with the addition of the following:

the income, assets and financial obligations of the respondent and of the applicant.

The Australian Capital Territory contains a list similar to that in Guyana, as well as directing the court to specifically consider the existence of any previous protection orders and any previous domestic violence offences.¹²⁹ The 1991 Bill proposed for Papua New Guinea contains similar criteria, and takes the extra step of stating that “paramount consideration” must be given to the need to protect the aggrieved person and to the welfare of any children who may be affected by the order.

The New Zealand Domestic Violence Act 1995 empowers the court to issue a protection order if it is satisfied that the respondent has used domestic violence (again defined to include threats of violence) against the applicant or a child of the applicant, *or* if it is satisfied that the making of an order is necessary for the protection of the applicant, or a child of the applicant’s family. The statute points out that isolated incidents which may appear trivial in themselves can form part of a dangerous pattern of behaviour. It also directs the court to give consideration to the applicant’s perception of the nature and seriousness of the respondent’s behaviour and the effect of the behaviour which is complained of on the applicant and children in the applicant’s family.¹³⁰

South Africa’s Domestic Violence Bill states simply that a protection order must be issued if the court is satisfied that the respondent has committed an act of domestic violence (defined to include threats of such violence).¹³¹

We recommend that the court be empowered to grant a protection order if domestic violence (including threats of violence) has occurred. Because the definition of domestic violence which is proposed for Namibia includes broadly-worded references to threats and intimidation, we do not think that it is necessary to include the New Zealand alternative of issuing an order on the basis that it is otherwise necessary for the protection of the applicant. But if the definition of domestic violence is ultimately narrowed, this alternative basis for a protection order should be re-considered.

Following on the example of many US jurisdictions, we recommend the inclusion of a time limit. The protection order would have to be based on an incident of domestic violence which occurred during the previous year.¹³² This would help ensure that protection orders are granted only if the danger is current, thus minimising the possibility that an old incident will be dredged up purely out of revenge or other questionable motives. A one-year time limit is generous enough to ensure that the applicant has a reasonable opportunity to seek assistance.

The proposed criteria include a list of factors that the court should consider, based on the Canadian and New Zealand models. This will give guidance to courts that may be unfamiliar with domestic violence and its dangers.

The proposed references to children are broadly worded to take account of extended family situations where a person may have responsibility for the wellbeing of a child

even where he or she is not the child's parent. For example, an abusive relative might try to get control of a grandmother's pension by threatening harm to a grandchild in her care if she is not co-operative.

Criteria for granting protection orders

(1) A court shall grant an interim protection order in a form substantially corresponding to Form X if it is satisfied on a balance of probabilities that the respondent has committed an act of domestic violence, including a threat of such violence, against the applicant, a child of the applicant or a child in the care of the applicant within the previous year.

(2) In determining whether to issue a protection order, a court shall have regard to—

- (a) the history of domestic violence by the respondent towards the applicant;**
- (b) the existence of immediate danger to persons or property;**
- (c) the applicant's perception of the seriousness of the respondent's behaviour; and**
- (d) the need to preserve the health, safety and wellbeing of the applicant, any child of the applicant or any child who is in the care of the applicant.**

(3) For the purposes of subsection (1) of this section, a respondent who encourages another person to engage in behaviour that would amount to domestic violence if engaged in by the respondent shall be regarded as having engaged in such behaviour personally.

(4) Where an application for a protection order is based on behaviour which may appear minor or trivial or appears unlikely to recur, the court shall nevertheless consider whether the behaviour forms part of a pattern of behaviour which establishes a need for protection.

Interim orders without notice to the respondent

Many countries allow protection orders to be made in the absence of the respondent, without notice to the respondent (“*ex parte* orders”). In South Africa, the recent re-examination of the Prevention of Family Violence Act 133 of 1993 by the South African Law Commission was directly inspired by concerns about this issue.¹³³

A protection order is essentially a civil proceeding (as opposed to a criminal one). Article 12(1)(a) of the Namibian Constitution provides that “in the determination of their civil rights and obligations... all persons shall be entitled to a fair and public hearing by an independent, impartial and competent Court or Tribunal established by law...”. Yet this right must be balanced against the victim's Constitutional right to life in terms of Article 6, and the right to dignity and to be protected against “cruel, inhuman or degrading treatment” in terms of Article 8. Because these competing rights must be balanced against each other, the Constitution does not provide a clear answer.

It is a basic legal principle that both parties to a dispute must have the opportunity to be heard (sometimes referred to by the Latin phrase “*audi alteram partem*”). However, there are a number of exceptions to this principle which are justified by special circumstances. For example, it is possible to get an interim interdict from the High Court in the absence of the other party to the dispute if there is sufficient urgency.¹³⁴

The usual procedure is that the affected person in such a case must be given an opportunity to be heard within a reasonable time, before the interdict is made final.¹³⁵

Those who are opposed to *ex parte* orders make the following arguments:

- The consequences of protection orders can be dire for the respondent. For example, respondents may be evicted from their homes, denied contact with their children and access to their possessions. It would be unfair to the respondent to make such orders without notice to the respondent.
- Some people fear that protection orders may be abused, for revenge against the respondent, as a way to exercise power, or to gain the upper hand in a matrimonial dispute. There is a greater danger of injustice if the court has heard only one side of the story.
- If the order is given in the absence of the respondent, there will be no opportunity for the court to emphasise the seriousness of the situation and the consequences of failing to comply with the order.

Those who are in favour of allowing *ex parte* orders make the following arguments:

- The enormity of the problem of domestic violence and the harm it causes to individuals and to society as a whole justify extraordinary measures to combat it.
- The rights of the respondent can be protected by giving him or her the right to challenge the order before it is made final, or the right to appeal the order upon very short notice.
- There are strong sanctions against perjury and malicious abuse of the legal system. Such mechanisms are sufficient to prevent abuse by applicants.
- When weighing up competing rights and principles, the need to protect persons from serious harm as a result of domestic violence is more important than the right of the perpetrator to be heard.

One of the major issues here is a procedural one. Normally, a court grants an interim order in the absence of the respondent, and gives notice to the respondent to appear before the court on the appointed “return day” and “show cause” why the interim order should not be made final. At this stage the *applicant* still bears the burden of persuading the court that the interim order should be made final. On the other hand, if a final order is issued in the absence of the respondent and the respondent is given the subsequent right to ask for the order to be withdrawn or amended, the burden of persuading the court to do so will fall on the *respondent*.¹³⁶

The following arguments were put forward in South Africa against restricting *ex parte* orders to interim orders with a return date:

- This procedure will require the victim to be involved in protracted legal proceedings and additional confrontation with the respondent.
- This procedure provides the respondent with an opportunity to intimidate or persuade the victim into dropping the proceedings.
- The most dangerous time for a victim of domestic violence is when she or her tries to change or leave the situation. Approaching the court for protection is likely to trigger a violent response, meaning that giving the respondent advance notice of the applicant's intentions could prove catastrophic.
- Domestic violence situations are by their nature extraordinary ones which call for special measures and justify emergency action.

A survey of legislation from other countries indicates that there are four basic approaches to the question of whether a protection order can be issued without notice to the respondent:

- (1) Allow interim protection orders without notice to the respondent, but give the respondent an opportunity to be heard before the order is made final.
- (2) Allow only limited interim orders without notice to the respondent, in special emergency situations.
- (3) Allow final protection orders without notice to the respondent, and protect the respondent's rights with automatic judicial review and/or a quick procedure for requesting variation or withdrawal for the order.

The South African Domestic Violence Bill is an example of the first model. An interim order can be issued without notice to the respondent. This interim order can include any provision that can be included in a final protection order. The order must set a return date which is at least 10 days after the date on which the interim protection order has been served on the respondent. The respondent may then notify the court on or before the return date that he or she wishes to oppose the making of a final protection order.

The approach contained in the South African Bill is a common one. Similar procedures are contained in the UN Framework for Model Legislation on Domestic Violence, the Guyana Domestic Violence Act 1996, and in many Australian and US jurisdictions. The US Model Code essentially follows the first model as well, but would require a hearing within a specified time period where directions involving custody, contact with minor children or economic relief are included in the order.¹³⁷

Some countries follow the second model, with a focus on a special showing of emergency conditions. For example, draft legislation in respect of Papua New Guinea would allow interim protection orders containing any of the provisions of final orders without notice to the respondent whenever the magistrate is satisfied that "that the personal safety of the aggrieved person would be threatened if an interim protection order was not made".¹³⁸ Similarly, the UK Law Commission recommended that courts should have the power to grant interim orders without notice to the respondent only after considering the following factors:

- a) the risk of significant harm to the applicant or a child if the order is not made immediately*

- b) *whether it is likely that the applicant will be deterred or prevented from pursuing the application if an order is not made immediately*
- c) *whether there is reason to believe that the respondent is aware of the proceedings but is deliberately evading service and the applicant or a child will be seriously prejudiced by the delay involved in effecting service or substituted notice.*¹³⁹

Mauritius' 1997 Protection from Domestic Violence Bill allows only a limited interim order in cases where "there is a serious risk of harm being caused to the applicant before the application may be heard". The interim protection order can direct the respondent not to engage in domestic violence and order the Commissioner of Police to provide police protection to the applicant until the interim order is served on the respondent, or as long as the circumstances of the case justify it. Another example of the second model can be found in the Domestic Violence Ordinance 1986 of the Australian Capital Territory, which is somewhat unusual in that it requires oral evidence from the applicant to support a limited interim order.

Examples of the third model (allowing final protection orders to be issued without notice to the respondent) can be found in several Canadian jurisdictions (such as Alberta, British Columbia and Saskatchewan). This approach is also the one used in the original South African Prevention of Family Violence Act. The respondent is protected only by the subsequent right to request variation or withdrawal of the order. For example, the original South African Act gave the respondent the right to make such a request on 24 hours' notice. British Columbia and Saskatchewan add the safeguard of judicial review in chambers within three working days. The judge may confirm the order or direct that the respondent be summoned to a re-hearing (which the applicant is entitled but not required to attend).¹⁴⁰

We recommend that Namibia should follow the first model (allowing interim protection orders without notice to the respondent but with a return date) as being the best way to accomplish the objective of preventing domestic violence whilst still respecting the Constitutional rights of the respondent. This recommendation is also based on the fact that the protection orders recommended for Namibia are very broad in scope and could have a substantial financial and social impact on the respondent, as well as affecting the respondent's freedom of movement.

It is envisaged that the form on which the interim protection order is entered will contain a clear statement informing the respondent of his or her right to oppose the order and explaining that the order will become final after one month unless the court receives notice of an intention to oppose. If the respondent does oppose, an enquiry must be held within one month of receipt of the notice to oppose. This procedure allows the respondent to speed up the process so that he or she is not unduly prejudiced by the *ex parte* interim order.

The proposed procedure for granting interim protection orders after hours or in emergency situations is based on the US Model Code on Domestic and Family Violence. For example, this approach could be used by a police officer who witnesses the violence. The protection order could be obtained and served immediately while all of the parties are still on the scene, this minimising danger to the applicant as well as

eliminating the potential difficulties of subsequently serving the order on the respondent. This procedure could also be used to obtain a protection order in respect of a respondent who is arrested so that the protection order could be served on the respondent before he or she is released on bail.

If the suggested approach is rejected, the next best alternative would be to allow basic protection provision to be imposed without notice to the respondent (such as a prohibition on committing acts of domestic violence) whilst allowing other provisions only after notice has been served.

Interim protection orders

(1) If the criteria for granting a protection order have been satisfied but the respondent has not been given notice of the proceedings and an opportunity to be heard, the court shall grant an interim protection order in a form substantially corresponding to Form X, which shall be served on the respondent forthwith.

(2)(a) When an application for a protection order has been made telephonically after hours or in an emergency situation, a judge or magistrate may dictate an interim protection order to a police officer telephonically, which dictation shall be recorded on the prescribed form by the police officer and served on the respondent forthwith.

(b) A copy of an interim protection order dictated in terms of subsection (a) shall be provided to the court before the end of the next working day.

(3) An interim protection order must call upon the respondent to show cause on or before the return date why the interim protection order should not be confirmed.

(4) The return date shall ordinarily be one month from the date of the interim protection order, but may not be less than 10 days after service has been effected upon the respondent in terms of section X.

(5) A court may from time to time extend the period of an interim protection order, to ensure that the respondent has at least 10 days after being served with notice of the order to notify the court of an intent to oppose it.

(6) A copy of an interim protection order shall be retained by or sent to the police station named by the applicant in the application, and the station commander of that station shall cause police protection to be provided to the applicant until such time as the interim protection order is served on the respondent.

Validity of interim protection order

(1) An interim protection order has no force and effect until it has been served on the respondent in the prescribed manner.

(2) A copy of any affidavits submitted in support of the application and the record of any oral evidence noted in terms of section must be served on the respondent with the interim protection order.

(3) Upon service or upon receipt of a return of service, the Clerk of the Court must forthwith serve a certified copy of the interim protection order on the applicant.

Final protection orders

The South African Domestic Violence Bill proposes the following basic procedure for making interim protection order final. If the respondent gives notice that he or she would like to oppose the protection order, the clerk of court will set a date for an enquiry and notify the applicant. The respondent must file an answering affidavit with the clerk of the court at least 10 days before the hearing, along with any supporting affidavits. These documents must be served on the applicant, who has the right to file replying affidavits that must be served on the respondent. The court may then decide the matter on the basis of the documents from both parties, or postpone it to another date in order to hear oral evidence.

One advantage of such an approach is that it might prevent the applicant from having to appear in court or confront the respondent. However, there seem to be serious disadvantages to the South African approach:

- It would make it more likely that parties would need the assistance of legal practitioners to put their cases forwards effectively. It is unlikely that parties not trained in this specific skill (such as social workers and police officers) would be able to use affidavits as skilfully.
- It would make it more likely that the contest would be an unequal one because one party might be able to afford a lawyer while the other was unrepresented. This might lead to more pressure on legal aid services to provide lawyers for this process.
- It would involve the administrative burden and the added costs of extensive service of process.
- It would be likely to lead to more protracted proceedings.

A better procedure for Namibia would be an enquiry more analogous to the procedure for obtaining maintenance orders. If the respondent gives notice by the return date that he or she would like to oppose the protection order, then a prompt date for an enquiry should be set and both parties notified. They would then both have an opportunity to present evidence and to bring along any supporting witnesses or documents they choose. The presiding officer would be expected to help the parties present their cases with appropriate questioning, as in other legal proceedings. If the respondent did not appear on the appointed date, the interim order would be made final. If the applicant did not appear, the court would still be able to consider the evidence in the application and supporting affidavits against the evidence put forward by the respondent. If neither party appeared, the order would also be made final since there would be no evidence to oppose the facts in the application.

Timeframe

The suggested procedure includes a timeframe based on the date of the respondent's notice that he or she wishes to oppose the order. This helps to protect the rights of the respondent, by allowing him or her to speed up the process with a prompt reply. The time period suggested here is one month. As points of comparison, New Zealand uses a time period of 42 days while the US Model Code suggests 30 days, Western Australia uses 21 days and the US state of Minnesota uses 10 days.

Legal representation

The procedure for obtaining protection orders should be as simple and speedy as possible. It should be possible for a complainant to receive adequate assistance from a

clerk of the court or from specially-trained police officers or social workers. This would eliminate the need for legal practitioners to become involved on a routine basis. The operation of the maintenance courts, where applicants are assisted by maintenance officers, provides a useful parallel. As in the case of maintenance courts, however, the domestic violence law should not exclude legal representation of either the applicant or the respondent. The right to legal representation, even in a civil matter, is viewed as a fundamental right in most democratic societies. It may be incorporated in Namibia's Constitutional guarantee of a "fair" hearing in the determination of civil rights and obligations and criminal charges. We propose that parties be entitled to be represented by legal practitioners or laypersons of their choice. This would make it possible for counsellors or shelter workers who develop experience in such cases to provide useful assistance.¹⁴¹

Postponements

In the maintenance context, postponements are sometimes abused to prolong proceedings. To avoid this problem, the court should allow a postponement only in cases where the party requesting the postponement is likely to be severely prejudiced if the postponement is denied. The court should also extend the interim order at the time it agrees to the postponement.

Privacy

Like maintenance enquiries, pertaining to protection orders should be held in private. Article 12 of the Namibian Constitution guarantees all persons the right to a "public hearing" in the determination of civil rights and obligations. However, it is submitted that civil and criminal proceedings relating to domestic violence would fall under the Constitutional exceptions relating to "morals" and "public order" (Article 12(1)(a)).

Confirmation of interim protection order if respondent does not oppose

If the respondent does not give notice of an intent to oppose the confirmation of the protection order on or before the return date contemplated in section X, a court which is satisfied that proper service has been effected on the respondent shall confirm the interim protection order.

Effect of notice to oppose by respondent

(1) If the respondent gives notice of an intent to oppose the confirmation on or before the return date, the Clerk of Court shall set a date for an enquiry within one month of receipt of the respondent's notice and notify the applicant and the respondent of the date for such enquiry in the prescribed manner.

(2) A notice of intent to oppose the confirmation of an interim protection shall not be grounds for a stay of such order, which shall remain in force until the court makes a decision on whether or not to confirm it.

Procedure for enquiry

(1) An enquiry held in terms of this Act shall take place in accordance with the rules governing a civil proceeding in the magistrate's court, except as otherwise provided in this section.

(2) If the applicant or the respondent provides the Clerk of the Court with the names and addresses of any witnesses who may have relevant information at least two weeks before

the date of the enquiry, the Clerk of the Court shall issue subpoenas to such persons in the form of Form X.

(3) The court may, at its own motion, call as a witness any person whose evidence may, in its opinion, be relevant in the matter.

(4) Any witness at an enquiry held in terms of this section may be examined or cross-examined by the applicant, the respondent, or a representative of either the applicant or the respondent appointed in terms of subsection (5).

(5) An applicant or a respondent may be represented at an enquiry held in terms of this section by a legal practitioner or by any person duly authorised by such applicant or respondent, as the case may be.

(6) No person whose presence is not necessary shall be present at an enquiry held in terms of this Act, except with the permission of the court, provided that both the applicant and the respondent shall be entitled to be accompanied by two persons of their choice to provide support.

(7) (a) The court shall not grant a request for a postponement unless it is satisfied that the party making the request would be severely prejudiced if the postponement is not granted.

(b) A court which grants a request for a postponement shall extend any interim protection order which is in force accordingly.

(8)(a) If the respondent fails to appear at the enquiry, or if both parties fail to appear, the court shall confirm the interim protection order.

(b) If the applicant fails to appear but the respondent is present, the court shall base the decision whether to confirm the interim protection order by weighing the information in the application and any supporting affidavits which accompanied the application against the evidence presented by the respondent at the enquiry.

(9) The court may after an enquiry held in terms of this section—

- (a) confirm or discharge the interim order in its entirety;*
- (b) confirm specified provisions of the interim order;*
- (c) withdraw or vary specified provisions of the interim order;*
- (d) discharge the interim order and substitute another order for the interim order; or*
- (e) add provisions which were not contained in the interim order at the request of the applicant, by consent of the parties or at its own initiative.*

(10) A protection order made upon the conclusion of an enquiry held in terms of this section shall be a final protection order.

Final protection orders

(1)(a) A protection order issued in terms of section X or section X shall be in a form substantially corresponding to Form X and shall be served on the respondent either in person at the conclusion of the enquiry held in terms of section X or in the prescribed manner.

(b) Where an interim protection order is confirmed with or without modifications after an enquiry which the respondent fails to attend, the court shall extend the interim

protection order until such date as the final protection order is served on the respondent and the interim protection order shall have full force and effect until this date regardless of whether or not the respondent has been notified of the extension.

(2) A copy of a final protection order shall be filed at the police station named by the applicant in his or her application.

22. CONTENTS OF PROTECTION ORDER

Mandatory and discretionary provisions

If protection orders simply directed the respondent not to commit violent acts, then they would serve mainly to accentuate other legal prohibitions on violent behaviour. In most other countries, protection orders can include a variety of components, to give the applicant meaningful practical protection. The recommendations for the components to be included in protection orders in Namibia are based on a survey of existing models. **The recommendations are also based on the principle that the primary purpose of a protection order is to ensure the practical safety of the applicant and any children involved in the violent situation. A protection order should not be used as a forum for attempting to resolve every aspect of a violent relationship.**

Some countries make use of different categories of protection order with different names for different types of remedies. But such as approach seems to create unnecessary complication and confusion. For example, in Saskatchewan, where there are two types of orders, the more complicated one with the more elaborate procedural requirements is not well-understood, even by legal practitioners, and is seldom used.¹⁴² **We recommend a single protection order encompassing a range of remedies, in order to keep the procedure as simple as possible.**

The proposed terms of protection orders are divided into two groups – mandatory terms and discretionary terms – following on the example of New Zealand. **We recommend that any protection order should direct the respondent not to engage in domestic violence and prohibit the respondent from possessing a firearm or other specified weapons. The other terms of a protection order should depend on the particular circumstances of the case.**

Terms of protection order

(1) An interim or a final protection order shall include the following:

(a) a provision restraining the respondent from subjecting the applicant to domestic violence;

This is the heart of a protection order. One of the primary purposes of a protection order is to send out an authoritative message to the respondent that domestic violence is illegal and will not be tolerated. A provision restraining the respondent from committing domestic violence should always be included in the restriction order.

(b) a provision directing the respondent to surrender any firearm or other specified weapon in the possession of the respondent, which may also include if appropriate:

- (i) ***a provision suspending any firearm licence in the name of the respondent for the duration of the protection order;***
- (ii) ***a provision authorising the police to search for and seize any weapon at any specified place where there is probable cause to believe that the weapon may be located.***

This provision is crucial to the purpose of preventing violence. Where there is evidence that one person is putting another in danger, any previous permission to possess a firearm should be overridden.

(c) a provision directing the station commander of the police station named in the application to cause police protection to be provided to the applicant to the extent reasonably necessary to protect the physical safety of the applicant and child who is at risk until such time as the protection order is served on the respondent, or as long as the circumstances of the case require it.

This idea comes from Mauritius and is designed to protect the applicant at the time he or she is most vulnerable. One form of special protection that could be employed is to provide specially-programmed cell phones to the applicant, to ensure that he or she can summon the police immediately in cases of danger. This idea has been used successfully in other parts of the world. It is discussed in more detail below in Chapter XX.

(2) An interim or a final protection order may include any of the following provisions, whether on application by the applicant or on the court's own motion:

(a) "no-contact" provisions which

- (i) ***forbid the respondent to be at or near specified places frequented by the applicant or by a child of or in the care of the applicant, including but not limited to—***
 - (aa) ***the home, workplace or educational institution of the applicant, or a child of or in the care of the applicant;***
 - (bb) ***a shelter or other residence where the applicant is temporarily living; or***
 - (cc) ***the residences of specified family members;***
- (ii) ***forbid the respondent from coming within 500 meters of the applicant, a child of the applicant, a child in the care of the applicant or specified members of the applicant's family in any place;***
- (iii) ***forbid the respondent from making any communication to the applicant, a child of the applicant, a child in the care of the applicant or specified members of the applicant's family, including direct or indirect personal, written, telephonic or electronic contact;***

Provided that a "no-contact" provision may be extended to a person other than the applicant or a minor child of or in the care of the applicant, only where consent has been given by or on behalf of that person.

The no-contact options could forbid physical contact, while still allowing other communication. For example, the applicant might like to leave the door open for a

discussion of reconciliation. It might also be necessary for the parties to communicate in writing or by telephone to discuss shared responsibilities, such as financial matters or parenting issues.

However, if the applicant fears intimidation or harassment from any form of communication by the respondent, then the full set of no-contact provisions could be included in the protection order to forbid all communication. .

These provisions also take into account the fact that the respondent may be threatening violence to persons other than the applicant, as a means of intimidating the applicant. It may be that such third parties would be able to apply for protection orders themselves if they felt it necessary, but it would save trouble and expense to allow one protection order to cover all aspects of the situation. The proposed law requires that any third parties named in a “no-contact” provision consent to being included in the order. (It is contemplated that consent in respect of minor children could be given by a parent or guardian).

(b) a provision granting the applicant and family members of the applicant 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 respondent shall continue to make rent or bond repayments in respect of the joint residence;***
- (ii) a provision directing that the applicant shall pay the respondent a reasonable periodic amount in respect of the right of occupation, taking into account the respective financial circumstances of the parties and the best interests of any children who may be affected;***
- (iii) a provision directing that the contents of the joint residence (or certain specified contents) remain in the home for the use of the person given possession;***
- (iv) a provision apportioning responsibility for the repair and maintenance of the residence during the period of the protection order;***
- (vi) a provision directing a police officer to remove the respondent from the residence;***
- (vii) a provision authorising the respondent to collect personal belongings from the residence under police supervision;***

Provided that the court shall take the following factors into consideration in respect of any order under this subsection:

- (i) the length of time that the residence has been shared by the applicant and the respondent, but without prejudicing the applicant on the grounds that he or she has at any stage fled the common residence to assure his or her safety or the safety of any child;***
- (ii) the accommodation needs of the applicant, considered in light of need to secure the health, safety and wellbeing of the applicant or any child of or in the care of the applicant; and***

- (iii) any undue hardship that may be cause to the respondent or to any other person as a result of such order.**

Provisions for granting the applicant exclusive occupation of the joint residence are common features of protection order legislation. For example, this aspect appears in the UN Framework for Model Legislation on Domestic Violence, the UK Family Law Act 1996, every jurisdiction in Australia, several Canadian jurisdictions, virtually every US jurisdiction as well as the US Model Code on Domestic and Family Violence, Guyana, Malaysia, Mauritius, New Zealand and both the existing law and the new bill in South Africa.¹⁴³

The theory is that the victim of domestic violence should not be the one who has to suffer the cost and inconvenience of relocation, but that this burden should fall on the perpetrator. The criteria set forth above direct the court to consider the length of time that the residence has been shared by the applicant and the respondent, the accommodation needs of the applicant in light of the danger posed by the respondent and any undue hardship that may be cause to the respondent or to any other person as a result of such order. However, these guidelines also make it clear that the applicant should not be prejudiced on the grounds that he or she has at any stage fled the common residence to assure his or her safety or the safety of any child;

Some jurisdictions allow orders for exclusive occupation to be included in interim protection orders that can be given without notice to the respondent. Examples include the South Africa Domestic Violence Bill, the New Zealand Domestic Violence Act 1995, the UK Family Law Act 1996 and Guyana's Domestic Violence Act 1996. Other jurisdictions allow such orders only after notice to the respondent and a civil hearing. Mauritius is an example of such an approach. We recommend the first, more common approach, since an interim protection order is likely to be useless in practice if the applicant has no safe place to go.

The detailed directives suggested in connection with this provision are designed to provide a balance between the rights of the applicant and the respondent, and to prevent future disputes or violence arising from the order.

Legal aspects relating to the respective property rights of the applicant, the respondent and third parties who may be affected (such as landlords) are dealt with in a separate section below.

Opposition to such a provision may come from employers who provide housing as a condition of employment, such as in the case of farmworkers. It is submitted that exclusive occupation of a joint residence can be granted to the spouse of a worker without necessarily interfering with the employment relationship. For example, the terms of protection orders are flexible enough to allow a farmworker to remain on the farm of his employer without sharing a house with his spouse and without coming within a specified distance of her. While it is true that the employer might be faced with the inconvenience of having to organise alternative accommodation for the evicted employee, this is nothing compared with the inconvenience which would be faced by a spouse and children who had to find alternative accommodation without financial resources in order to ensure their own personal safety.

(c) a provision directing the respondent to pay rent for the applicant by a specified date of each month at a residence comparable to the joint residence previously shared by the applicant and the respondent if the respondent is legally liable to support the applicant and the applicant does not wish to have exclusive occupation of the joint residence or the court determines that it is more just in the circumstances for the respondent to remain in the joint residence;

This provision provides an alternative to an order giving the applicant exclusive occupation of the joint residence. It would give the court greater flexibility to meet the needs of both parties for accommodation, especially where children are involved on both sides.

(d) a provision directing a police officer to accompany, within a specified time, the applicant or another person designated by the applicant, to the joint residence to supervise the removal of personal belongings of the applicant or a child in the care of the applicant;

This is a very common provision of protection orders which responds to a common practical need. It is designed to ensure that the applicant is not exposed to greater risk of violence while collecting essential personal items.

(e) a provision granting either party possession of specified personal property, including a motor vehicle, furniture, chequebook, bank cards, children's clothing and toys, medical insurance cards, identification documents, keys or other necessary personal effects;

A violent person may attempt to restrict the options of the victim by hiding, destroying or controlling vital property such as identity documents or chequebooks. This provision is designed to prevent an abusive respondent from continuing to exert control over the applicant in this way.

(f) a provision restraining the respondent from taking, converting, damaging or otherwise dealing in property in which the applicant may have an interest;

One case brought to the attention of the Legal Assistance Centre involved a man who severely intimidated his wife by destroying a motor vehicle (which was part of the couple's joint marital property) with a hammer while she watched from inside the house.. Selling or damaging property which belongs to the applicant, or which forms part of the community of property shared by the couple, can be a threat or a means of attempting to control the behaviour of the applicant.

(g) a provision temporarily directing the respondent to make periodic payments in respect of the maintenance of the applicant, and of any children of the applicant, where no such maintenance order is already in force: Provided that any provision on maintenance made in terms of this section shall be deemed to be a maintenance order in terms of the Maintenance Act * of **;**

One reason that women do not end abusive relationships is the fear that they will not be able to support their children on their own. Children should never become pawns in a struggle between their parents. This provision is intended to protect a child who is involved in a violent home setting, by attempting to ensure that financial dependency

does not limit the options available to the victim. This option would be available whenever no maintenance order was already in force in respect of some or all of the persons in question.

The purpose of this provision is to ensure that practical considerations do not force the applicant to continue to expose himself or herself to danger. Any directive concerning maintenance made in terms of this section would remain in force for only a limited period. The idea is to give the applicant time to escape the violent situation without having to initiate multiple legal proceedings simultaneously to secure the safety and wellbeing of any children involved.¹⁴⁴

This provision would be treated as a maintenance order in terms of the forthcoming Maintenance Act, meaning that the applicant or the respondent would be able to apply for substitution or withdrawal of the order at any stage without challenging the protection order itself.

(h) a provision granting temporary sole custody--

(i) of a child applicant to any appropriate custodian other than the respondent, or

(ii) of any child of an adult applicant or any child in the care of an adult applicant to the applicant or to another appropriate custodian

Provided that this is in the opinion of the court necessary for the safety of the child in question.

The primary purpose of this provision is to allow for prompt action to protect the safety of any children involved in a violent situation. In cases where the applicant is a child, the court can award temporary custody to someone other than the respondent. In cases where the applicant is an adult, this provision is designed to ensure that the respondent cannot control the applicant by threatening the safety of his or her children.

This provision is particularly necessary in cases involving couples married under civil law, in light of the fact that the Married Persons Equality Act gives married parents joint custody of their children in complete equality. Clients of the Legal Assistance Centre have reported circumstances where children become the focus of a tug-of-war between parents asserting their “equal rights” in cases where the marriage is disintegrating. This provision will ensure that children can be removed from danger without delay.

A temporary custody order made as part of a protection order should have a limited duration. Because the best interests of the child are so important, a long-standing custody order should be made only after all interested parties have had a chance to be heard in a proceeding which focuses on the needs of the child. This point is dealt with in a proposed provision below.

It is contemplated that an order made under this section would temporarily override custody provisions in any existing divorce order. This point is also dealt with below.

(i) a provision temporarily

- (i) ***forbidding all contact between the respondent and any child of an adult applicant;***
- (ii) ***specifying that contact between the respondent and a child applicant, or between the respondent and any child of an adult applicant, shall take place only in 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 applicant, any child who may be affected, and any other family members.***

Provided that this is in the opinion of the court necessary for the safety of the child in question.

As in the case of a temporary order concerning custody, this provision on contact is designed primarily to ensure the safety of any child who is part of a violent situation without necessarily cutting off all contact with a parent.

This provision should be considered in light of the potential enactment of legislation giving unmarried fathers greater rights of access to their children (as proposed in the draft Children's Status Act currently with the technical legal drafters).

This approach is consistent with the Constitutional requirement the children have the right to know and be cared for by their parents *subject to legislation enacted in the best interests of children* (Article 15(1)).

As in the case of a temporary custody order, an order made in terms of this section should have a limited duration.

- (j) ***a provision requiring the respondent to post any bond which the court considers appropriate to secure compliance with the terms of the order***

This proposal is based on the old "peace bond" concept contained in Namibia's existing Criminal Procedure Act. The theory is that, even though violation of a protection order is a criminal offence, certain financial loss can be more persuasive for some people than the uncertain possibility of a fine or a prison sentence. Inclusion of a bond also widens enforcement mechanisms, taking account of the fact that many victims do not want to see their abusers face criminal sanctions.

If the respondent lost a bond because of violation of the protection order, the money would go into a fund to be used for financing the administration of the act.

- (k) ***any other provisions that the court deems reasonably necessary to ensure the safety of the applicant or any child who is affected.***

Catch-all provisions such as this are common in the other legislation examined and a good way to allow for unanticipated situations.

Comparisons with other countries

To make comparisons easier, the accompanying chart indicates the terms of protection orders in some recent legislation in a range of other countries which go beyond a basic

prohibition on committing further domestic violence. The laws selected for the table are intended to give a sampling of approaches from different regions of the world, in both developed and developing countries, and were partly determined by which laws were available to the researchers.

What has been excluded

Compensation for losses arising from the violence

As the chart indicates, some jurisdictions allow limited compensation for the applicant as part of a protection order, in relation to specified expenses arising from the violence. This is often allowed only after notice and hearing, rather than in interim orders issued without notice to the respondent. (The proposal for “emergency monetary relief” contained in the South African Domestic Violence Bill is one of the broadest. The widest compensation provision discovered is in Puerto Rico, which allows compensation for any losses stemming from the violence even in an *ex parte* proceeding.)

While compensation is an important issue, it should not be part and parcel of protection order proceedings for the following reasons:

- Having to prove the amount of losses mitigates against a simple and speedy procedure. Even making an application which included this point would be more complicated and would require more supporting documentation.
- If substantial amounts of money are involved, it is likely that proceedings will be more protracted. It is also likely that the respondent in particular will seek legal representation, which may place an applicant without financial resources at an unfair disadvantage.
- Including compensation may cast doubts on the applicant’s motives for seeking a protection order.
- The focus of protection orders should be to secure the personal safety of the applicant and any other children involved. The provisions pertaining to occupation of the joint residence or the alternative of paying rent at another residence, combined with the provisions on maintenance and secure possession of personal and household property should be sufficient to provide for the basic necessities of the applicant.

The section on criminal law suggests that compensation for domestic violence offences should be available in the course of criminal proceedings. The applicant also has the option of bringing a civil case for compensation.¹⁴⁵

Forced treatment or counselling

Some countries make it possible for protection orders to direct the respondent to receive treatment or counselling. This is not suggested for Namibia because it seems inappropriate in an order of an emergency nature and consistent with the desire for a simple and speedy procedure. This proposal utilises treatment and counselling as part of diversion programmes included in criminal law measures.

23. DURATION OF PROTECTION ORDER

A final protection order could remain in force for a set time period, or it could continue indefinitely, until either the applicant or the respondent requests a variation or withdrawal.

For example, the South African Domestic Violence Bill proposes that protection orders remain in force indefinitely.

New Zealand follows a mixed approach. Broadly speaking, protection orders generally remain in force indefinitely, but orders relating to property have a more limited duration. An order relating to occupancy of a joint dwelling place must be for a set time period determined by the court. Where the residence is leased, this time period is affected by the terms of the lease. Orders relating to household effects in the residence normally must also have a set duration which will normally parallel the occupancy order.

An alternative approach is to give the entire final protection order a set duration. For example, in Guyana, the court must determine the duration of the protection order and may set different time periods for different provisions of the order. Mauritius also allows the court to set time periods for different provisions of a protection order, but specifies that no part of the order may remain in force for longer than two years.

We recommend the approach taken by New Zealand. The basic provisions of the protection order should remain in place until varied or discharged, while provisions relating to occupation of a joint residence and household property should have a specified duration. This seems to be the best way to protect personal safety while giving clear limits on encumbrances of property rights. It also seems logical and fair to the interests of third parties that an order for occupancy of a leased residence must be limited by the period of the lease. A provision with a limited time period could always be renewed if the applicant requests it and the court finds that the provision is still reasonably necessary for the safety and wellbeing of the applicant.

Orders relating to maintenance and to custody and access to children should have limited time periods. The theory is that the applicant will need security in order to break away from the abusive relationship. But after being given an opportunity to deal with the primary question of safety, the applicant should utilise ordinary existing procedures for obtaining decisions on these issues. The proposal custody and access is intended to ensure that no child is returned to an abusive environment simply because of a lapse of time, but to require that a full enquiry into the best interests of the must take place within a reasonable time period. .

Duration of provisions of final protection orders

The provisions of a final protection order shall have the following durations:

- (a) A provision granting the applicant exclusive occupation of a residence owned by applicant shall have unlimited duration.***
- (b) A provision granting the applicant exclusive occupation of a residence owned by the respondent, owned jointly by the applicant and the respondent or owned jointly by respondent and other parties may remain in force for any period set by the court, up to a maximum of one year.***

- (c) A provision granting the applicant exclusive occupation of a leased residence may remain in force for any period set by the court, but shall not extend beyond the expiration of the current lease period.*
- (d) A provision directing that the applicant enjoy possession of household effects shall remain in force for the same period as a provision granting the applicant exclusive occupation of a joint residence, if made in conjunction with such an order.*
- (e) A provision concerning temporary custody of children and access to children shall remain in force until custody and access rights are determined in accordance with a full hearing on these issues, which must be scheduled to begin within six months of the date on which protection order is made final;*
- (f) A provision concerning maintenance shall remain in force for six months;*
- (g) Any other provisions of a final protection order shall remain in force until withdrawn or modified upon application by applicant or respondent.*

24. ENFORCEMENT

Breach of an interim or a final protection order should be a criminal offence, provided that the respondent received proper notice of the order. The act of domestic violence itself will often be a criminal offence as well, even if no specific crime of “domestic violence” is enacted.

South Africa takes a cumbersome approach of issuing a suspended warrant of arrest for violation of a protection order at the time the order is made. This procedure seems particularly anomalous in the context of the new South African Domestic Violence Bill, which otherwise provides that a person may be arrested without a warrant at the scene of an incident on a reasonable suspicion that a offence containing an element of violence has been committed.

We propose that it would be more appropriate to allow arrest without a warrant on the basis of a reasonable suspicion that there has been a breach of an interim or final protection order. For example, this approach was recommended for Papua New Guinea and is used in Guyana, Puerto Rico and in 48 of the 50 states in the United States.¹⁴⁶

The same options for diversion and sentencing set forth in the section of the Act on criminal offences of domestic violence should apply in respect of the crime of breaching a protection order.

Enforcement of protection order

(1)(a) Breach of an interim or final protection order is a criminal offence punishable upon conviction by a fine of N\$XXXX or imprisonment of up to X years of both.

(b) Where a respondent is convicted for violating any provision of a protection order, any bond posted in terms of that order shall be forfeited to the state and paid into a fund to be used for the administration of this Act.

(2) A police officer who has a reasonable suspicion that a person has violated a protection order, based upon an affidavit from the applicant in respect of such order or

from any other person, or based upon the personal observations of the police officer, may arrest such person without a warrant.

(3) A completed return of service shall constitute prima facie proof that the protection order has been served on the respondent.

(4) If a protection order requires a respondent to stay away from the residence of the applicant, or from any other place, or to stay within a certain distance of the applicant, an invitation by the applicant to act otherwise does not waive or nullify the protection order and is not a defence against a charge of breach of such order.

(5) A respondent who wilfully causes another person to act in violation of a protection order will be deemed to have breached the order.

(6) The provisions of Part II shall apply mutatis mutandis in respect of any criminal offence under this section.

25. ADDITIONAL PROCEDURAL ISSUES

Because many of these issues are straightforward and relatively non-controversial, draft provisions in respect of some of them are included only in the draft bill which accompanies this report rather than in the text.

Modification or withdrawal of protection orders

The South African Domestic Violence Bill provides for the modification or amendment of orders only at the request of the applicant. The respondent's only recourse would be an appeal. Other laws (such as the Papua New Guinea Bill and the laws of Guyana, Malaysia, New Zealand and Saskatchewan) allow application or discharge at the request of either the applicant or the respondent. We recommend the second, more even-handed approach.

Modification or withdrawal of protection orders

(1) The applicant or the respondent may make written notice to the court which granted a protection order requesting the modification or withdrawal of a protection order, in a form substantially corresponding to Form X.

(2)(a) Where withdrawal of a provision of a protection order is requested by the applicant, the court shall grant the request if it is satisfied by affidavit or by oral evidence that the application is made freely and voluntarily and serve notice of the withdrawal on the respondent in the prescribed manner.

(b) Where modification of a provision of a protection order is requested by the applicant, the court shall proceed in terms of sections X-X as if the request for modification were an application de novo.

(3)(a) Where the modification or withdrawal is requested by the respondent, the court shall grant the request only after an enquiry held in accordance with the procedure set forth in section X with at least 10 days prior notice to the applicant.

(b) Whether or not the applicant appears to oppose the modification or withdrawal, the court may grant the respondent's request only if it is satisfied on the basis of all the information before it, including the record pertaining to the original protection order, that such modification or withdrawal will not endanger the applicant or any child concerned in

the matter.

(4) *Where one or more terms of a protection order are varied or withdrawn, the order shall continue in full force and effect with respect to all other provisions.*

Appeals

Appeals of protection orders, or of decisions pertaining to particular provisions of protection orders, should proceed in the same manner as appeals in ordinary civil cases.

Effect of protection orders on property rights

This is a technical area that should be explored in detail once a final decision is made on the use of orders for exclusive occupation. Some possible issues for attention are included in the draft bill that accompanies this report. This issue should be dealt with in more detail at a later stage, with reference to the reports of the Scottish and UK law Commissions on this point.¹⁴⁷

Service of protection orders

Most jurisdictions logically provide that a protection order becomes effective only after the respondent has notice of it. This does not mean that the respondent can commit acts of domestic violence with impunity in the meantime -- such acts would still be crimes. It would simply mean that the respondent cannot be charged with criminal breach of a protection order before receiving notice that the protection order has been issued. Nevertheless, prompt notice to the respondent is required if protection orders are to serve their intended purpose of preventing domestic violence.

The question then arises as to whether or not notice of the protection order must be served on the respondent in person. One problem is that respondents may try to evade such service, which could defeat the object of the protection order. Another problem is who will bear the costs of personal service if this is required. Alternative forms of service which are regularly utilised in various legal proceedings are delivery of the order at the respondent's place of residence, work or business by delivering it to anyone at such premises who is apparently over the age of 16, or by affixing it to the door.

In Namibia, it must be remembered that problems experienced with the service of subpoenas in maintenance cases by the Namibian Police led to the transfer of this responsibility to the messenger of the court. On the other hand, service by the police would be a useful way to acquaint the police with the situation, and it might send out a stronger message to the respondent about the potential consequences of violating the protection order.

In Saskatchewan, the regulations allow for substituted service by a range of mechanisms whenever personal service is impractical for any reason, provided that a presiding officer approves substituted service in person or over the telephone. Substituted service can be by any of the following methods:

- (a) serving a member of the respondent's family or another person who is able to bring the order to the respondent's attention;
- (b) serving a person with whom the respondent is residing or leaving the order at the place where the respondent is residing;

- (c) posting the order in a public place
- (d) publishing the order in a newspaper;
- (e) any other method the justice considers appropriate.¹⁴⁸

It should be noted, however, that some of these methods would compromise the privacy of the applicant and could not be counted on to actually reach the respondent. .

We recommend that the prescribed procedures for notice should be the same as those for other civil proceedings. This issue would probably be dealt with in regulations and so could be examined in more detail at a later stage.

Pending proceedings

The Act should explicitly state that an applicant not barred from seeking a protection order because of other pending proceedings, including divorce proceedings, custody proceedings or criminal charges in respect of the same incidents of domestic violence. Similarly, a person who has breached a protection order by committing a domestic violence offence could be charged with both breach of the order and with the underlying offence.

V. ROLE OF THE POLICE

26. THE IMPORTANCE OF POLICE RESPONSE

Police attitudes

In many respects, the key to an effective legal response to domestic violence is the police response. They are usually the first to respond when domestic violence occurs, as well as being the link between the prosecutor and the case. But police response in many countries has been criticised as being inadequate, in light of some of the following factors:

- The police may underestimate the violence which has taken place or the legitimacy of the victim's fear of future violence.
- Police may be reluctant to intervene into family matters which they consider to be "private".
- Police may believe that the victim "provoked" the violence.
- Police experience frustration when victims are reluctant to press charges or to co-operate with the police, and lack knowledge of the complicated dynamics of fear and dependency which can affect the victim's behaviour.
- Police may feel that they are placing themselves in danger if they intervene into an emotionally charged situation.
- Police may be unaware of sources of help and support, such as shelters or counselling services -- to which they could direct the victim.¹⁴⁹

It has been pointed out in Papua New Guinea how police response directly influences public attitudes:

To most people...the police represent the law. If the police take action against a particular kind of behaviour, that behaviour is understood to be against the law. If police do nothing, people assume that that behaviour is not against the law, and is therefore acceptable. Even though, for various reasons, only a small proportion of domestic assault cases are brought to the police, the way that the police respond (or do not respond) to those cases becomes known to a large number of people and influences how the general public regards domestic violence.¹⁵⁰

Victim attitudes

A recent study of domestic violence in the Yukon (Canada) showed that victims wanted more from the police than merely an arrest. When asked about police response which

they would like, the following possible police responses rated equal to or higher than arrest:

- * to respond with sympathy and to take the victim seriously
- * to provide protection
- * to provide information on options and procedures
- * to come to the victim immediately, either to the home or to the place where the victim had fled
- * to take steps to calm the abuser
- * to give the victim information on support services
- * to show sensitivity to the victim's situation
- * to protect the victim's children.

Other needs which were mentioned included transport to a safe house, or assistance in obtaining medical treatment.¹⁵¹

Police liability

In the United States, a key domestic violence case concerned police liability for failure to protect an abused woman. Ms Thurman called the police during a domestic assault. They arrived on the scene, yet did not arrest the abuser. After they left, the man committed further assaults which resulted in permanent disability and disfigurement. Ms Thurman won a case against the police for damages from this second assault, based on evidence that the police responded less effectively to the situation because of its domestic nature.¹⁵² This case helped to spur police departments throughout the USA to adopt clear police guidelines on the appropriate response to domestic violence cases. The US Supreme Court subsequently narrowed the scope of liability claims in the *DeShaney* case, which held that a social services agency was not liable for failing to protect a child from his father's violence -- on the theory that government inaction cannot give rise to liability in the same way as government action.¹⁵³ Nevertheless, police officers who fail to provide adequate assistance to domestic violence victims in the US still face civil liability under a variety of legal theories. The same would appear to be true under Namibian law.¹⁵⁴

Specific statutory duties would provide clear directives with clear consequences. They could produce legal liability on the part of the police if their failure to carry out these duties gave rise to harm. On the other hand, police appear to have a legal duty to act even in the absence of a duty articulated by statute.¹⁵⁵ Thus, specific statutory directives could actually limit liability -- where statutory duties have been followed, this could be a defence against an attempt to hold police liable for not doing more.

27. STATUTORY DUTIES REGARDING DOMESTIC VIOLENCE

Experts on domestic violence from more than 40 countries who were surveyed on the issue of police response to domestic violence made concrete suggestions for statutory police duties. This survey is the primary basis for the following suggestions.¹⁵⁶

The Guyana Domestic Violence Act 1996 includes the following provision regarding police assistance to victims of domestic violence:

Whenever a police officer intervenes in a case of domestic violence the police officer shall as soon as possible take all reasonable measures within his power to prevent the victim of domestic violence from being abused again and shall also take the following steps—

- (a) where a victim indicates that he has suffered injuries which require medical assistance the police officer shall assist the victim to obtain medical treatment as soon as possible;*
- (b) where a victim of domestic violence expresses concern for his safety, the police officer shall assist the victim in getting to a place of safety;*
- (c) where a victim of domestic violence requests it, a police officer shall protect a victim by accompanying the victim when he takes his personal belongings from a place where the respondent may reside;*
- (d) advise the victim of domestic violence on the importance of preserving the evidence; and*
- (e) inform the victim as to his rights and services which may be available to assist him, be they government or private services.*

Similar provisions on the duties of enforcement officers appear in the 1997 Protection from Domestic Violence Bill in Mauritius, the domestic violence laws of Puerto Rico and the US Model Code.

Some countries (such as Guyana and Puerto Rico) impose special reporting requirements on the police in cases of domestic violence. This is not recommended in respect of Namibia. If domestic violence offences are treated as specific crimes, then the normal record-keeping procedures should be sufficient for the extraction of information about domestic violence.

We recommend a clear statutory statement of police duties in domestic violence cases. The idea of a standard statement of rights comes from the South African Domestic Violence Bill.

Police duties in respect of reports of domestic violence

(1) Police officials shall respond to every request for assistance and protection on cases alleging domestic violence and shall take all reasonable steps to protect the victim and any children involved from any further abuse.

(2) Police officials shall not assign a lower priority to calls and cases alleging violence in domestic relationships than to calls and cases alleging similar violence in other contexts.

(3) Police officials must respond promptly in person at the scene of alleged domestic violence if they receive a report from any person stating that –

- (a) domestic violence is imminent or in progress; or***
- (b) a protection order is in effect and is likely to be breached.***

(4) In responding to a call or case alleging domestic violence, a police official shall interview the alleged victim and any witnesses out of the hearing of the alleged perpetrator to ensure that they are able to speak freely.

(5) In responding to a call or case alleging domestic violence, a police official shall read the following notice to the victim in a language he or she understands and hand written copies to the victim, the perpetrator and any adult family member who is present:

IF YOU ARE THE VICTIM OF DOMESTIC VIOLENCE, You have the right to request the assistance of a member of the Namibian Police to protect yourself and your children. If you need medical treatment, the police will transport you and your children to the nearest hospital or clinic. If you wish, the police will assist you to collect your personal belongings and transport you and your children to a shelter, to the home of a family member or friend, or to any other place of safety. If you wish, the police will also assist you to make contact with a social worker or a counsellor.

You have the right to apply for a protection order free of charge. This is a court order which will direct the abuser not to commit any further violence and to hand over any firearms. If you wish, a protection order can also direct the abuser not have any contact with you or your children. If you share a home with the person who has abused you, a protection order can make it possible for you and your children to remain in the home by ordering the abuser to leave. A protection order can also direct the abuser to provide temporary maintenance for you and your children. It can also make sure that the abuser does not deprive you of the use of personal belongings or household property. You can get a protection order very quickly by filling out the proper forms, but it is only temporary. You will have to come to court at a later date if you want the protection order to remain in place.

You have the right to lay a criminal charge against the abuser now, or at any time in the future.

You have the right to bring a court case seeking reimbursement for losses suffered as the result of the abuse, including medical expenses, moving expenses, loss of earnings or support and other expense relating to injuries or property damage resulting from the violence.

If you make false allegations of domestic violence, you can be convicted of a criminal offence.

You have the right to ask for more information on any of your rights from myself or from any other member of the Namibian Police.

(6) In responding to a call or case alleging domestic violence, a police official shall--

- (a) arrange or provide transport to a victim of domestic violence and any children of or in the care of the victim to the nearest medical facility for treatment or to any safe place or shelter within a reasonable distance, if requested to do so by the victim or by a person with an interest in the wellbeing of the victim;***
- (b) accompany a victim of domestic violence to his or her residence to collect personal belongings if so requested; and***
- (c) advise a victim of domestic violence of the availability of shelter or other appropriate local services.***

(7) Failure to carry out any of the duties prescribed in this section shall be grounds for internal disciplinary proceedings in accordance with the Police Act 19 of 1990.

28. COMMUNITY CARETAKING FUNCTIONS

In the late 1980's, the concept of community policing became popular in the United States. Police officers were to work hand in hand with citizen in neighbourhoods to fight crime. Neighbourhood watch programs, youth-police programs and citizen boards reviewing police issues became popular. One mechanism used to enhance police powers in neighbourhoods was a "community caretaking" statute. Community caretaking statutes authorise police officers to enter and remain on premises in order to prevent harm to any person or property, to render aid or to locate missing persons.

In Namibia a community caretaking provision would provide yet another tool for police officers to use in domestic violence cases. Although a community caretaking statute is not limited to domestic violence cases, it would give police officers clear authority to intervene in domestic violence situations. (Such a provision would have been useful in the notorious Florin case, where friends and neighbours reportedly approached the police to express concern to for the safety of the deceased when they had not seen or heard from her for several days, before there was any reason to suspect Mr Florin of wrongdoing.)

We recommend that such a provision should be added to the Police Act 19 of 1990 rather than to the Criminal Procedure Act 51 of 1977, since the primary purpose of the provision is to facilitate positive protection of law-abiding citizens rather than to investigate or apprehend criminals. This would dovetail with the existing provision in the Police Act which gives any member of the Namibian Police special power to enter premises which appear to be on fire for the purpose of extinguishing the fire, protecting the premises or rescuing persons or property.¹⁵⁷

Community caretaking

The following section 19A is inserted in the Police Act 19 of 1990:

19A. Community caretaking functions of police officers

(1) Any member is authorised to perform community caretaking functions.

(2) For the purposes of this section, “community caretaking functions” means any lawful acts that are inherent in the duty of the police official to serve and protect the public and include without being limited to the right to enter or remain upon the premises of another if it reasonably appears to be necessary to:

- (a) prevent harm to any person or property;***
- (b) render aid to injured or ill persons; or***
- (c) locate missing persons.***
- (d) to offer to transport any person injured or apparently in danger to a place of safety.***

(3) Nothing contained in this section shall be construed to limit the authority of a police official that is inherent in the office or that is granted by any other provision of law.

29. ADDITIONAL MEASURES

Police guidelines

In addition to the statutory duties, policy guidelines on appropriate responses in domestic violence cases should be adopted by the police. The guidelines should define domestic violence, explain its status in law, set out police behaviour in handling incidents, outline procedures for protecting the victim, require police officers to link victims to appropriate services, and recognise that police officers must collaborate with

other community service providers. ¹⁵⁸.

Training

It is commendable that training in domestic violence has already been incorporated into police courses at various levels. This training should be expanded to cover the new legislation when it is enacted.

Awards

Police are often criticised for their failure to respond appropriately to domestic violence, but good work should also receive positive recognition. One idea for helping to motivate effective police response would be to introduce a prestigious award for the police officer who has shown the most sympathetic and effective response to a domestic violence case. Such a project could be organised by the Domestic Violence Support Group, which could invite nominations from community-based organisations and counselling services.

VI. RELATED LEGAL ISSUES

30. PRIVACY

Confidentiality of proceedings concerning domestic violence is the clear international norm. The precise wording of this provision raises technical questions which can be dealt with at a later stage, in light of the approach which is adopted in the Combating of Rape Bill. Proposed provisions in the preceding sections on criminal offences and protection orders require that these proceedings be held in private. There should be corresponding prohibitions on publication of information which would reveal the identity of the parties or any child involved in the matter.

Privacy

(1) It shall be an offence to publish any information concerning proceedings held in Part 2 or Part 3 of this Act which might reveal the identity of a victim of domestic violence or of any child involved in such proceedings.

(2) Contravention of subsection 2 shall be punishable upon conviction by a fine of up to N\$XXX.

31. WHEN THE VICTIM FIGHTS BACK

Introduction

Because of the inequities of strength and power, women sometimes fight back against domestic violence in situations which do not fit normal understandings of “self-defence”. For example, a study in the US state of Illinois found that 40% of women convicted of homicide in the state had been battered by the deceased and had sought assistance from the police.¹⁵⁹ But the defensive violence by the victim sometimes takes place in situations where the danger does not appear to an outsider to be imminent, and the argument is made that the victim had the better alternative of leaving the batterer.¹⁶⁰ For example, battered women often attack when the batterer is asleep, drunk or otherwise incapacitated, taking advantage of the only opportunity which presents itself. The problem is that conventional understandings of legal doctrine often fail to take account of the psychological and economic dependencies which often accompany domestic violence.

Some commentators have proposed that this problem requires a new legal defence of “self-preservation”, where an accused acts out of utter desperation under circumstances where he or she believed that committing an offence was the only option.

Another approach is to ensure that evidence of a history of domestic violence and the psychological consequences of the violence (sometimes referred to as “battered woman syndrome”) is admissible --

- a) to support a defence to the crime, such as self-defence or provocation; or
- b) as a factor favouring mitigation of punishment after a conviction.¹⁶¹

On the other hand, such evidence must be used carefully to avoid stereotyping victims of violence as being helpless or irrational.

The second approach has been successfully used in the USA and in Canada, and would seem to be the most useful addition to the existing framework of criminal defences in Namibia.

“Battered woman syndrome”

The concept of the “battered woman syndrome” was first formulated in 1984 by clinical psychologist Dr Lenore Walker. It refers to a pattern of psychological symptoms which are frequently found in women who suffer domestic abuse – low self-image, helplessness, dependence, depression, and avoidance techniques which perpetuate the illusions that the abuser will change his behaviour. Understanding the psychological effects of abuse helps to explain why some victims are unwilling or unable to leave their abusers.

For example, psychologists have found that battered women tend to exhibit the following traits: (1) "learned helplessness", which means loss of a sense of control combined with depression; (2) logical inconsistencies, stemming from efforts to make sense of a senseless relationship in which a loved one is the enemy; (3) a reduced ability to perceive alternatives; (4) an acute ability to detect signals of impending violence, as a survival skill. ¹⁶²

But there are also dangers to placing too much emphasis on this syndrome:

- Even though reference is usually made to the ‘battered woman syndrome’, there is no evidence that men who are abused respond any differently.
- Too much emphasis on the syndrome can lead to a rigid profile of what a "battered women" is like, making it harder for women who do not fit into the typical pattern to explain or justify their conduct.
- The idea of a “syndrome” may send out a message that all battered women are the same and that they are all “abnormal”.
- The concept must be applied individually to the circumstances of each particular case. It should not be approached as a "status defence" which can be applied to excuse any course of action taken by a victim of domestic violence.
- Too much emphasis on the syndrome may lead to a perception of a domestic violence victim as a person with a physical or mental incapacity, thus shifting the focus away from the wrongs committed by the abuser. ¹⁶³

The defence of “self-preservation”

One Canadian writer has proposed that an entirely new, gender-neutral defence of "self-preservation" be created:

This defence could require the accused to have acted out of utter desperation -- that she subjectively, and perhaps even reasonably, believed that committing the offence was her only option. In assessing the charge, the trier of fact would be directed to consider questions such as whether the accused attempted to get protection or assistance from the state, whether she was afraid of retaliation, etc.... [This defence] could be framed so as to provide for outright acquittal or conviction for a lesser offence. ¹⁶⁴

One advantage of these suggested amendments is that they are gender-neutral. However, both of these defences would still be inappropriate, as they are both premised on immediate reaction, rather than on responses to cumulative indignities: self-defence would still require a perception that serious violence is imminent, and provocation is designed for persons who strike back in the heat of passion.

Examples from other countries

USA

The seminal case on the use of “battered women syndrome” is *State v Kelly* ¹⁶⁵ in which the New Jersey Supreme Court held that expert testimony on the “battered woman syndrome” was admissible and relevant to the concept of self-defence.

Another key case on this point is *S v Wanrow* ¹⁶⁶, in which the Washington Supreme Court held that certain criminal law concepts, such as the traditional notion of self-defence, contain elements of sex bias. For example, the *Wanrow* court stated that “women suffer from a conspicuous lack of access to training in and the means of developing those skills necessary to effectively repel a male assailant without resorting to the use of deadly weapons”. ¹⁶⁷

These two leading cases have been followed by numerous others dealing with victim responses to domestic violence, with increasing acceptance of expert testimony on the “battered woman syndrome” and more gender-sensitive applications of concepts such as self-defence. ¹⁶⁸

Canada

The leading Canadian case on this issue in Canada is *R v Lavallee*. ¹⁶⁹ In this case, a woman fatally shot the man she lived with and who had a long history of physical abuse. The Canadian Supreme Court held that expert testimony on the “battered woman syndrome” was relevant to an assertion of self-defence. The court stated: “Given the relational context in which the violence occurs, the mental state of an accused at the critical moment cannot be understood except in terms of the cumulative effect of months or years of brutality.” ¹⁷⁰

The principles articulated in *Lavallee* were recently reiterated by the Canadian Supreme Court in the case of *R v Mallott*. ¹⁷¹ The court noted that expert testimony on the battered woman syndrome may be relevant to an understanding of—

- why an abused woman might remain in an abusive relationship;
- the nature and extent to the violence that may exist in a battering relationship;

- the accused’s ability to perceive danger from her abuser;
- whether the accused believed on reasonable grounds that her actions were necessary to save herself from serious harm.

This case also pointed out that “the utility of such evidence in criminal cases is not limited to instances where a battered woman is pleading self-defence, but is potentially relevant to other situations where the reasonableness of a battered woman’s actions or perceptions is at issue (eg provocation, duress or necessity).”¹⁷² It also suggests that such expert evidence should always be related to the individual experiences of the accused in the case at hand, to avoid creating a new set of stereotypes to replace the old.

¹⁷³

EXISTING LAW IN NAMIBIA

Private defence

“Private defence” is the legal term in Namibia for what is perhaps more commonly referred to as “self-defence”. (“Private defence” is more accurate because it refers to the defence of the self or the defence of property by a private person – as opposed to resorting to the police or the courts.) In Namibia, a person who is the victim of an unlawful attack upon person or property may resort to force to repeal such an attack. The successful assertion of this defence requires an imminent attack – “not so much the immediacy of the threat but the immediacy of the response required to avoid the attack”.

¹⁷⁴

It is also relevant that the accused must show that the private defence was necessary and reasonable. The reasonableness of the response depends on the court’s assessment of the circumstances rather than on the accused’s assessments and perceptions at the time.

¹⁷⁵

Expert testimony on the effects of domestic violence might help courts to apply informed assessments of the dynamics of such situations. Nevertheless, the concept of “private defence” would probably be unavailable in many cases.

Provocation

The defence of provocation might be more relevant in cases where victims of domestic violence defend themselves. According to Burchell and Milton:

*Provocation, or severe emotional stress, may deprive a person of the capacity to appreciate the wrongfulness of his or her conduct or to act in accordance with this appreciation.*¹⁷⁶

Criminal capacity may also be removed by severe mental or emotional stress, which need not constitute mental illness or a mental defect.

The examples which Burchell and Milton cite on when a defence of provocation might be relevant include a husband who kills the man he finds in bed with his wife; a son

who kills his aged father who is suffering great pain from cancer; and a wife who kills the husband who has repeatedly battered her while he is asleep.¹⁷⁷

In 1984, an accused who allegedly murdered his wife was acquitted on the grounds that he lacked criminal capacity because of the emotional stress caused by a variety of family circumstances (but with no domestic violence involved). The court held that his emotional state made him unable at that time to appreciate right and wrong or to control his actions.¹⁷⁸ Then, in 1987, the South African Appellate Division considered the case of *S v Campher*, where a wife was accused of killing her husband. While a majority of the court held that emotional stress could in principle lead to the acquittal of the accused, a majority found that the accused was guilty on the facts of the particular case.

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The most significant case with respect to the connection between provocation and domestic violence is *S v Wiid*, where a wife was accused of murdering her husband after he had assaulted her. The Appellate Division held that, where a foundation for the defence of temporary non-pathological incapacity is laid, the State bears the burden of disproving this defence beyond a reasonable doubt. In the *Wiid* case, the State was found not to have discharged this burden and the accused was acquitted.¹⁸⁰

The South African Appellate Court has emphasised that the evidence given by an accused in support of a defence of non-pathological incapacity must be subjected to careful scrutiny.¹⁸¹ The burden of laying a factual foundation for the defence rests on the accused, and the court must have regard to expert evidence as well as to all the facts of the case, including the nature of the accused's actions during the relevant period.¹⁸² For example, a man who killed his ex-wife in retaliation for the divorce after stalking her for several months was found not to have diminished criminal capacity.¹⁸³

Mitigation

There is at least one Namibian case in which a history of domestic violence has been treated as a mitigating factor when a battered woman killed her abuser. In the 1991 case of *S v Killian*, which received significant media attention, a woman with a long history of being assaulted by her husband fatally stabbed him. On the day in question, he had already assaulted her twice, when she grabbed a knife to frighten him away. The court found that she had fatally stabbed him as a result of negligent misjudgement on her part and thus concluded that she was guilty of culpable homicide. However, the history of abuse played a role in the question of sentencing:

'More sinned against than sinning' has frequently been a mitigation plea of defence counsel. Never has it probably been more appropriate than in [this] case. For 28 years, long years, Mrs Killian, you have been frequently, four to five times a year, beaten in the face and on the head. You have lived in the shadow of imminent brutal assaults, assaults which through no fault of yours would be perpetrated upon you. I have frequently condemned... this primitive concept of certain men that marriage gives them the right to thrash their wives. If men do not like what their wives are doing, there is nothing that compels them to remain married to their wives. I have no doubt that this trial will leave a scar on your life, and I also have no doubt that society does not expect vengeance in

these circumstances, that society does not expect that you should serve a term of imprisonment...

Mrs Killian was sentenced to five years' imprisonment, suspended in its entirety for five years.¹⁸⁴

Expert evidence on the emotional and psychological effects of domestic violence could be extremely helpful to courts as they attempt to determine appropriate punishments in such cases.

Recommendation for Namibia

Burchell and Milton make the following comments on the relative role of private defence and provocation or severe emotional stress in domestic violence cases:

*A wife, or any other person for that matter, who is subjected to actual physical abuse or the imminent application of physical violence is entitled to retaliate against her attacker in legitimate self-defence. However, theoretical problems in the application of the doctrine of private defence arise where there is no commenced or imminent attack but the wife has been subjected, often over many years, to constant physical and mental abuse and she eventually kills her husband during a "lull in the beatings" or when he is asleep or his back is turned. One approach is consciously to extend the bounds of private defence to include such an accumulation of abusive conduct as constituting an unlawful "attack". In terms of the South African criminal law, it is more desirable to treat such cases of wife battering under the principles governing the test of capacity.*¹⁸⁵

A counterargument centres on the question of justification versus excuse. Self-defence involves a determination that the act in question was justified because of the circumstances. On the other hand, provocation involves a finding that the act was wrong, but that the actor should not be held blameworthy because of her state of mind. Ideally, evidence about "battered woman syndrome" would be used to show that the woman's actions were reasonable in the circumstances, not to show that she must be excused because she is "suffering" from a "syndrome". However, even in the context of self-defence, the "battered woman syndrome" has in practice acquired overtones of weakness and incapacity.¹⁸⁶

One Canadian writer has suggested that triers of fact should be directed by statute to take into consideration certain factors in the application of criminal defences such as provocation and self-defence:

- a) any past relationship involving physical or prolonged emotional abuse that affected the accused's perception of imminent and serious violence and the accused's ability to escape the violence; and
- b) all the circumstances bearing on the accused's action, including his or her relative strength, socialisation, and other economic or social resources.¹⁸⁷

The Law Commission of Papua New Guinea proposed that long-term and persistent acts of domestic violence committed by the victim against the accused be specifically recognised as grounds for the defence of "provocation", and as a mitigating factor in

sentencing for a violent act committed by a domestic violence victim against the perpetrator.¹⁸⁸

Another approach gives more emphasis to the admissibility of expert evidence on the psychological impact of the situation. For example, the draft Combating of Rape Bill which will soon come before Parliament takes this approach.

We recommend that the Domestic Violence Act should similarly allow the introduction of expert testimony on the impact of domestic violence within the context of existing criminal defences.. **No substantive change is recommended in respect of criminal defences in Namibia. The best approach is rather to provide for the introduction of expert evidence relating to the psychological effects of domestic violence for the purposes of considering the applicability of existing offences.**

Evidence of the psychological effect of domestic violence

(1) Evidence of the psychological effects of domestic violence shall be admissible in any proceedings held in terms of this act order to prove-

- (a) that the act which forms the subject matter of a charge of domestic violence or an application for a protection order has been committed;***
- (b) the extent of the harm suffered by the victim, to enable the court to impose an appropriate sentence upon conviction of the perpetrator; or***
- (c) defences or grounds for mitigation of sentence in respect of the commission of a criminal act by a person who has suffered past domestic violence against the perpetrator of that violence.***

(2) The court shall determine the weight to be attached to the evidence referred to in subsection (1) after such evidence has been heard, with due consideration of—

- (a) the qualifications and experience of the person who gives such evidence; and***
- (b) all the other evidence given in the case.***

32. TELEPHONE HARASSMENT

There may be a need to provide related legal procedures to make it possible to identify the source of anonymous telephone calls so that this form of harassment can be stopped. Otherwise, the victim will be powerless to take action against this form of harassment. One submission to the LRDC National Hearings suggested that offenders who engage in “telephone terror” should be deprived of the right to own telephones.¹⁸⁹ This issue could be explored further after the basic approach on domestic violence law has been chosen.

33. ADDITIONAL LEGAL RESEARCH

The following legal topics are related to the issue of domestic violence. While research is underway in respect of some, research is still needed in respect of others.

Divorce

Domestic violence within the context of marriage can often lead to divorce as a primary remedy. Divorce under civil law is the subject of a study which the Legal Assistance Centre expects to publish in early 1999. While this study will make some reference to divorce under customary law, more research is needed on this aspect of the topic.

Compensation of crime victims

This paper touches on the issue of victim compensation in cases of domestic violence, but a more comprehensive approach to the topic would be preferable. This issue is currently under examination by the Ministry of Justice.

VI. SUPPORT SERVICES

34. POLICY DIRECTIVES

Some countries have incorporated directives regarding support services and preventative programmes into their domestic violence statutes. One example is Guyana, where the law places responsibility on a particular government official--

- to develop educational programmes aimed at preventing domestic violence
- to carry out appropriate research on the problem
- to train vulnerable groups in the skills necessary to combat domestic violence
- to raise community awareness of the needs of domestic violence victims
- to make government agencies more sensitive to the needs of domestic violence victims
- to help set up relevant support services for victims and for children from violent homes
- to provide special training for police officers and person who counsel and treat victims and
- to develop programmes to rehabilitate abusers.¹⁹⁰

Puerto Rico assigns similar statutory duties to its Women Affairs Commission, along with the duty to prepare annual reports evaluating the implementation of the domestic violence legislation.¹⁹¹

The new Swedish legislation on violence against women states that it will supplement the present social welfare legislation with a new provisions giving social welfare services the duty to act to provide women who have been suffered domestic abuse with help and support in order to change their situation. This Bill also contains measures for more effective police response to violence against women, but no further details on this point were available in English.¹⁹²

Domestic violence legislation in the Australian Capital Territory establishes a Domestic Violence Prevention Council with the following functions:

(a) to promote collaboration among government agencies and non- government organisations involved in-

- (i) law enforcement; or*
- (ii) the provision of health, education, crisis or welfare services to victims or perpetrators of domestic violence or otherwise relating to the incidence or prevention of domestic violence;*

(b) to assist and encourage the agencies and organisations referred to in paragraph (a) to promote projects and programs aimed at enhancing the safety and security of victims of domestic violence offences, with particular regard to children;

(c) to advise the Minister on any matter relating to domestic violence;

(d) to inquire into and provide advice to the Minister on matters relating to domestic violence that have been referred to the Council by the Minister;

(e) to establish and maintain links with and among government agencies and non-government organisations concerned with domestic violence;

(f) to assist government agencies and non-government organisations to develop procedures for the collection, standardisation and sharing of statistical information relating to domestic violence offences;

(g) to collect statistical and other information relating to domestic violence offences;

(h) to prepare and submit to the Minister a plan for dealing with domestic violence in the community, including recommendations on-

(i) any changes in the law or its administration that may be necessary;

(ii) improving the effectiveness of the provision of assistance to victims of domestic violence offences;

(iii) the prevention of the occurrence of domestic violence offences; and

(iv) developing systems for monitoring the effectiveness of any programs recommended in the plan that are implemented;

(i) to monitor developments within and outside Australia of legislation, policy and community views on domestic violence and the provision of health and welfare services to victims and perpetrators of domestic violence offences; and

(j) to give directions to the Domestic Violence Project Coordinator.¹⁹³

Whilst these objectives are extremely laudable, it is probably inefficient to create a specific government structure such as this one in a small country like Namibia.

It is suggested that support services for domestic violence should be the subject of an official policy paper in Namibia rather than being incorporated into a new domestic violence statute. This would be more in line with existing practice on other topics. It might also allow more flexibility for government-NGO co-operation in service delivery. Furthermore, the wording of the policy directives in the other countries which have been cited as examples is so general that meaningful legal enforcement of these goals would be difficult.

35. SUPPORT SERVICES FOR VICTIMS

Cell phone services

In some parts of the world, victims of domestic violence have been provided with cell phones which are programmed for emergency calls only. Police and protection orders

are useless if the one who is endangered cannot contact anyone to ask for help. In some parts of the USA, cell phone companies have provided free cell phone service to “high-risk” domestic violence victims.¹⁹⁴

In Namibia, cell phone coverage extends over a wide geographical range, although it does not yet reach into all parts of the nation. Cell phones can be programmed so that only certain numbers can be dialled, even if the telephone is stolen. (As another security measure, stolen telephones can be disabled by the service provider.)

The possibility of soliciting donor funds for a pilot project using cell phones to increase the protection of the most vulnerable women and children should be explored once the new domestic violence legislation is in place.

Support from health care providers

Another potential support service is screening at clinics and hospitals, where person with injuries consistent with domestic violence could be questioned privately by a supportive health care provider. The experience of other countries indicates that simply asking can be an important intervention - as one Brazilian physician put it, “It is my impression that some women have been waiting their whole lives for someone to ask.” In the United States, researchers have developed a short list of questions which health care providers can ask to determine whether a victim of domestic violence is at high risk of further serious injury. Such interventions can help victims to gain the courage to seek help.¹⁹⁵

One option here is to provide the victim with a “certificate of injury” in any case where domestic violence is suspected, even if victim is not interested in taking any legal action at that stage. This document could serve as evidence if the victim later takes a decision to approach the police or the courts.¹⁹⁶ Cumulative evidence of injury may prove very important at that stage, as a way to demonstrate a pattern of violent behaviour in a subsequent court proceeding.

Shelters and support groups

Although many women will find support and accommodation with extended family members, this avenue is not always available in a population which is increasing mobile and in a state of social transition. Family members may also be unwilling or unable to provide the necessary protection and assistance.¹⁹⁷ Several community groups have recently established shelters and support groups for victims of domestic violence. Efforts such as these should receive all possible encouragement, as they are crucial practical ways to encourage people to leave violent relationships. In this regard, a report from Papua New Guinea suggests that churches should play a more active role in providing emergency accommodation for women and children.¹⁹⁸

Community action

Communities in various parts of the world are developing their own techniques for combating domestic violence. For example, in one community in Belize, abusers are publicly confronted and humiliated by other members of the community. In Peru, women in one area have organised themselves into a neighbourhood watch, complete with whistles to summon the aid of other women if attacked. A group of indigenous

Canadians utilise traditional healing and cleansing ceremonies to address specific instances of domestic violence, in a process which can extend over several years.¹⁹⁹ Creative community-based campaigns in Namibia should be encouraged and supported.

36. SUPPORT SERVICES FOR ABUSERS

This appears to be an under-explored area in Namibia. There are several men's groups which have taken up family issues as well as violence against women. Examples are the Erongo Anti-Rape Men's Group and the Namibia Father's Union.

Other countries have some very successful men's groups which have been active around the issue of domestic violence. Examples include the 5 in 6 Project initiated in 1993 in Cape Town, the National Organisation for Men Against Sexism in the USA, the White Ribbon Campaign which originated in Canada in 1991 and then spread to Europe and Australia.²⁰⁰

Ideas which warrant exploration include training in non-violent conflict resolution skills as well as support groups where abusers help each other try to find better ways of dealing with anger and frustration. This is a crucial area that should be considered in depth in another forum.

37. PUBLIC AWARENESS

Violence in the media

The Legal Assistance Centre is presently attempting to initiate a research project that will monitor the general incidence of violence on NBC during a one-month sample period. The findings will be presented in a separate report, which can be used as a basis for analysis of the role models that are being presented to the public through television.

A cursory examination of the videos available in shops in Windhoek shows that violence predominates. One possibility for addressing this problem would be to encourage video shops to display prominent "Non violent film" selections, and to expand the choices in this category. The initiative could be structured as a competition, and shops that excelled in this endeavour could be the recipient of a prominent award from the Multi-Media Campaign on Violence against Women and Children.

Domestic violence manual

The Domestic Violence Support Group, a coalition of concerned groups which meets regularly in Windhoek, has mandated the Multi-Media Campaign on Violence Against Women and the Legal Assistance Centre to produce a manual giving clear information on basic facts about domestic violence and information about services such as Woman Child Protection Units, counselling services, shelters and support groups in all regions of the country. This project is underway and should be complete in early 1999.

Public awareness campaigns

The topic of domestic violence has already featured in national awareness programmes such as the Multi-Media Campaign on Violence Against Women and the LRDC workshops and hearings on violence against women and children. It has also been the focus of numerous initiatives by NGOs such as the Legal Assistance Centre and Women's Solidarity, as well as many community-based groups.

The introduction of new domestic violence legislation would provide the perfect opportunity for a renewed public awareness drive targeting the new law. For example, the Multi-Media Campaign on Violence Against Women is currently seeking funding to produce a sequel to the locally-produced film "A Betrayal of Trust", in order to take the issue of domestic violence further.

ENDNOTES

¹ See Papua New Guinea Law Reform Commission, *Final Report on Domestic Violence*, Report No. 14 (1992) at 9-15 (Chapter Three: "What is wrong with Domestic Violence?").

² Lori Heise *et al*, *Violence against Women: The Hidden Health Burden* (1994) (World Bank Discussion Paper 255) at 14-16; UNICEF submission to LRDC National Hearings, May 1997.

With respect to societies which are free from domestic violence, the Papua New Guinea Law Commission reports that domestic violence does not occur among the Kpelle (a people in East Africa) because neighbours, friends and relatives come running at the sound of raised voices to physically step in and prevent any violence from taking place. *Final Report on Domestic Violence*, Report No. 14 (1992) at 64.

³ Information from RAPCAN (Resources Aimed at the Prevention of Child Abuse and Neglect), South Africa, and UNICEF submission to LRDC National Hearings, May 1997.

⁴ These recent studies are as follows:

- Isabel Barbro-Bruhns, *Programmes and Services Responding to the Needs of Women and Children as Victims of Violence* (1996).
This report provides a summary of existing services.
- Heike Becker & Pamela Claassen, *Violence Against Women and Children: Community Attitudes and Practices* (1996).
This paper examines community attitudes on rape, domestic violence and sexual harassment.
- Debie LeBeau, *The Nature, Extent and Causes of Domestic Violence against Women and Children in Namibia* (1997).
The data in this study comes from doctors, nurses, social workers, police officers, community leaders and victims of domestic violence. Other information was gathered from nursing students and from victim studies carried out by law students.

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- Dr SMH Rose Junius *et al*, *An investigation to assess the Nature and Incidence of Spouse Abuse in Three Sub-Urban Areas in the Karas Region, Namibia* (1998).

This study gathered information from ü, Karasburg and Keetmanshoop by means of individual interviews with victims of domestic violence, group discussions with another community members, and interviews with social workers, doctors, nurses, police, church leaders and prisoners.

⁵ Debie LeBeau. *The Nature, Extent and Causes of Domestic Violence against Women and Children in Namibia* (1997) at 11.

⁶ For example, 453 children were removed from their homes in 1994. Ministry of Health and Social Services, cited in SSD-UNAM/LAC/UNICEF, *Children in Namibia: Reaching Towards the Rights of Every Child*, 1995 at 141.

⁷ P Tacon, Survey of Street Children in Three Urban centres of Namibia, 1991, cited in SSD-UNAM/LAC/UNICEF, *Children in Namibia: Reaching Towards the Rights of Every Child*, 1995 at 151.

⁸ Submissions from USAC to the O'Linn Commission and to the LRDC public hearing on violence against women and children in Swakopmund ion November 1996.

⁹ Dr SMH Rose Junius *et al*, *An investigation to assess the Nature and Incidence of Spouse Abuse in Three Sub-Urban Areas in the Karas Region, Namibia* (1998).

¹⁰ Ms Miriam Isaacs, Namibia Red Cross Society.

¹¹ See Debie LeBeau. *The Nature, Extent and Causes of Domestic Violence against Women and Children in Namibia* (1997) at 27; see also Department of Women Affairs, Office of the President, *Namibia National Report to the Fourth World Conference on Women*, November 1994 at 26.

¹² Debie LeBeau. *The Nature, Extent and Causes of Domestic Violence against Women and Children in Namibia* (1997) at 27.

¹³ Heike Becker & Pamela Claassen, *Violence Against Women and Children: Community Attitudes and Practices* (1996) at 16; Debie LeBeau, *The Nature, Extent and Causes of Domestic Violence against Women and Children in Namibia* (1997) at 4, 26-27.

¹⁴ Dr SMH Rose Junius *et al*, *An investigation to assess the Nature and Incidence of Spouse Abuse in Three Sub-Urban Areas in the Karas Region, Namibia* (1998) at 94-95.

¹⁵ Manfred O Hinz and Santos Joas, *Customary law in Namibia: Developments and perspectives*, Namibia Papers, Working Document No. 28, Centre for Applied Social Studies, 1995 at 21.

¹⁶ Heike Becker & Pamela Claassen, *Violence Against Women and Children: Community Attitudes and Practices*, 1996 at 39. A 1984 version of the “Laws of Uukwaluudhi” stated that “a husband who beats up his wife shall be fined” and further required that “the husband shall pay damages to the wife”, but this rule does not appear in the 1993 version of the “Laws of Uukwaluudhi”.

It should be noted in contrast that the customary laws of the Owambo communities include explicit rules for the handling of rape cases.

¹⁷ Debie LeBeau, *The Nature, Extent and Causes of Domestic Violence against Women and Children in Namibia* (1997) at 85.

¹⁸ Elfriede Gaeses, *Violence against San Women*, paper presented at the First African Indigenous Women's Conference, Agadir, Morocco, 20-24 April 1998 at 6-7.

¹⁹ Information from draft research proposal (unpublished).

²⁰ Committee on the Elimination of all Forms of Discrimination against Women, General Recommendation 19, "Violence against Women", 1992.

²¹ Declaration on the Elimination of Violence Against Women, UN General Assembly Resolution, 23 February 1994 (A/RES/48/104), Article 4.

²² *Ibid*, Article 4(d) and (f).

²³ Commission on Human Rights, Resolution 1994/45. The Special Rapporteur appointed was Ms Radhika Coomaraswamy of Sri Lanka.

²⁴ UN Framework for Model Legislation on Domestic Violence, E/CN.4/1996/53/Add.2.

²⁵ Beijing Declaration, paragraph 29.

²⁶ Beijing Platform for Action, paragraph 119. Violence against women was also explicitly addressed in the 1985 World Conference on women held in Nairobi. The Nairobi Forward-Looking Strategies for the Advancement of Women includes the following statement:

Violence against women exists in various forms in everyday life in all societies. Women are beaten, mutilated, burned, sexually abused and raped. Such violence is a major obstacles to the achievement of peace and the other objectives of the Decade and should be given particular attention and comprehensive assistance. To this end, legal measures should be formulated to prevent violence and to assist women victims. National machinery should be established in order to deal with the question of violence against women within the family and society. Preventative policies should be elaborated, and institutionalised forms of assistance to women victims provided. (paragraph 258)

²⁷ Beijing Platform for Action, paragraphs 24-225. The last three points were suggested as duties of government (including local governments) together with community organisations, non-governmental organisations, educational institutions, the public and private sectors.

²⁸ Draft Protocol to the African Charter on Human and People's Rights Concerning the Rights of Women, Article 12.

²⁹ Articles 6-8, 10.

³⁰ See, for example, Preliminary Report submitted by the Special Rapporteur on Violence against Women, E/CN.4/1995/42 at paragraphs 79-ff.

³¹ Report of the Special Rapporteur on Violence against Women, E/CN.4/1996/53 at paragraph 130; Lori Heise *et al*, *Violence against Women: The Hidden Health Burden* (1994) (World Bank Discussion Paper 255) at 31. The precise wording of the Brazilian Constitution has been translated as follows: The states should assist the family, in the person of each of its members, and should create mechanisms so as to impede violence in the sphere of its relationships”.

³² This discussion is based on United Nations Centre for Social Development and Humanitarian Affairs, *Strategies for Confronting Domestic Violence; A Resource Manual*, 1993 at 13-15.

³³ See, for example, the 1994 Model State Code on Domestic and Family Violence prepared by the National Council of Juvenile and Family Court Judges in the USA and the Model for Domestic Violence Legislation based on the international survey carried out by Women Law & Development International (Women, Law & Development International, *State Responses to Domestic Violence: Current Status and Needed Improvements*, 1996).

³⁴ UN Framework for Model Legislation on Domestic Violence, E/CN.4/1996/53/Add.2.

³⁵ Women, Law & Development International, *State Responses to Domestic Violence: Current Status and Needed Improvements* (1996) at 91-99.

³⁶ See, for example, Elsjie Bonthuys, “The Solution? Project 100--Domestic Violence” 114 *SALJ* 371 (1997).

³⁷ Human Rights Watch/Africa & Human Rights Watch Women’s Rights Watch, *Violence against Women in South Africa: State Response to Domestic Violence and Rape* (1995) at 75.

³⁸ Prairie Research Associates, *Review of the Victims of the Saskatchewan Domestic Violence Act* (1996) at 20-21.

³⁹ National Institute for Public Interest Law and Research (NIPILAR), Community Law Centre, University for the Western Cape, *We won’t be beaten: A Guide to the Prevention of Family Violence Act* (1996) at 21.

⁴⁰ Elizabeth M Schneider, “The Violence of Privacy in Martha A Fineman, ed, *The Public Nature of Private Violence*, 1994 at 45.

⁴¹ Information on public response to various terms was obtained from Women’s Solidarity, which conducts public workshops in domestic violence throughout the country.

⁴² Martha Fineman, ed, *The Public Nature of Private Violence: The Discovery of Domestic Abuse* (1994) at xi (n1).

⁴³ Isobel Marcus, “Reframing ‘Domestic Violence’: Terrorism in the Home” in Martha Fineman, ed, *The Public Nature of Private Violence: The Discovery of Domestic Abuse* (1994) at 11-ff.

⁴⁴ Diana Russell, “Wife rape and battery as torture” in S Jagwanth, PJ Schwikkard and B Grant, eds, *Women and the Law* (1994).

⁴⁵ Declaration on the Elimination of Violence Against Women, UN General Assembly Resolution, 23 February 1994 (A/RES/48/104), Article 1.

⁴⁶ General Recommendation 19 relating to CEDAW presents the following definition of gender-based violence:

violence which is directed against a woman because she is a woman or which affects women disproportionately. It includes acts which inflict physical, mental or sexual harm or suffering, threats of such acts, coercion, and other deprivation of liberty.

Article 12 of the Draft Protocol to the African Charter on Human and People's Rights Concerning the Rights of Women states:

violence against women shall mean all acts directed against women as women which cause or could cause them physical, sexual, or psychological harm or suffering, including the threat of such acts; or the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life.

A World Bank discussion paper suggests the following definition of violence against women:

Any act of verbal or physical force, coercion or life-threatening deprivation directed at a individual women or girl, that causes physical or psychological harm, humiliation or arbitrary deprivation of liberty and that perpetrates female subordination.

Even though this definition is not aimed at domestic violence alone, it contains several useful ideas. The terms "life-threatening deprivation" is particularly useful in its applicability to children, since it would cover the withholding of food and medical care. The term "arbitrary deprivation of liberty" is intended to cover enforced isolation, or excessively controlling behaviour which deprives the victim of mobility or access to money or other crucial resources. Lori Heise *et al*, *Violence against Women: The Hidden Health Burden*, 1994. (World Bank Discussion Paper 255) at 47.

⁴⁷ Article 5(a), SADC, The Prevention and Eradication of Violence Against Women and Children: An Addendum to the 1997 Declaration on Gender and Development by the Heads of State or Government.

⁴⁸ See, for example, Heike Becker & Pamela Claassen, *Violence Against Women and Children: Community Attitudes and Practices* (1996) at 7; Debie LeBeau, *The Nature Extent and Causes of Domestic Violence against Women and Children in Namibia* (1997) at 15-16; Dr SMH Rose Junius, *et al*, *An investigation to assess the Nature and Incidence of Spouse Abuse in Three Sub-Urban Areas in the Karas Region, Namibia* (1998) at 86. 88-89, 92-9.

⁴⁹ UN Framework for Model Legislation on Domestic Violence, E/CN.4/1996/53/Add.2, at paragraph 3.

⁵⁰ New Zealand Domestic Violence Act 86 of 1995, section 3.

⁵¹ Mauritius Protection from Domestic Violence Bill 1997, section 2.

⁵² Puerto Rico Domestic Abuse Prevention and Intervention Act 54 of 1989, section 1.3. Guyana's Domestic Violence Act 1996 includes a virtually identical definition of "psychological violence" in section 2(q).

⁵³ Guyana Domestic Violence Act 1996, section 2(h).

⁵⁴ UN Framework for Model Legislation on Domestic Violence, E/CN.4/1996/53/Add.2, at paragraphs 3 and 7.

⁵⁵ The most recent recommendations of the South African Law Commission are typical of the broadest statutes found in other jurisdictions. The Commission proposes that domestic violence legislation should cover persons related in the following ways:

- (i) They are or were married to each other (including marriage according to any law or custom),
- (ii) They (whether the same or opposite gender) live or lived together in a relationship in the nature of marriage, although they are not, or were not, married to each other, or are not able to be married to each other.
- (iii) They are the parents of a child or are persons who have or had parental responsibility for that child (whether or not at the same time).
- (iv) They are family members related by consanguinity, affinity or adoption.
- (v) They would be family members related by affinity if the persons referred to in (ii) above were, or were able to be, married to each other.
- (vi) They are or were in an engagement or dating relationship.
- (vii) They share or shared the same household.

⁵⁶ LAC/SSD, *The Living and Working Conditions of Domestic Workers in Namibia* (1996) at 80.

⁵⁷ Mamphela Ramphele, “How Sweet is Home? Family Dynamics in New Crossroads” in Lorraine E Glanz & Andrew D Spiegel, *Violence and Family Life in a Contemporary South Africa: Research and Policy Issues* (1996) at 46.

⁵⁸ A farmworker who lives on a farm owned by an absentee landlord would not be covered by this approach, but the absenteeism would give the farmworker greater scope to seek varying forms of assistance than a situation where the home and the workplace of employer and employee are both thoroughly and constantly entangled.

⁵⁹ See generally LAC/SSD, *The Living and Working Conditions of Domestic Workers in Namibia* (1996).

⁶⁰ For example, a 1991 survey of 100 unemployed women between the ages of 15 and 20 found that nearly one fifth of them lived with a “boyfriend” who gives them cash. These boyfriends were typically married, and older and richer than the female partners. These men generally discontinued the financial support if the woman fell pregnant. M Lewis & G van Rooy, “A Study of the Prospects for Training of Young Employed Women in Katutura”, NISER, University of Namibia (1991) at 5-6.

⁶¹ South African Domestic Violence Bill 1998 (B75-98), section 1.

⁶² Guyana Domestic Violence Act 1996, section 3.

⁶³ New Zealand Domestic Violence Act 86 of 1995, section 4.

⁶⁴ New South Wales (Australia) refers to “intimate personal relationship”. Crimes Act 1900, section 562A.

⁶⁵ Minnesota Statutes 1997, 518B.01.

⁶⁶ See Heike Becker, Dianne Hubbard & Yamillah Katjirua, “‘The Cousin Story’: Culture, social coercion and consent to sexual activity in Namibia” (tentatively-titled chapter in forthcoming publication of Children and Law in Eastern and Southern Africa).

⁶⁷ Women, Law & Development International, *State Responses to Domestic Violence: Current Status and Needed Improvements* (1996) at 92.

⁶⁸ Lori Heise *et al*, *Violence against Women: The Hidden Health Burden* (1994) (World Bank Discussion Paper 255) at 45.

⁶⁹ See Sweden Government Bill 1997/98:55 (gross violation of a woman’s integrity by men with whom they have a close relationship); Indian Penal Code section 498a (cruelty by husband or relatives of husband); Women, Law & Development International, *State Responses to Domestic Violence: Current Status and Needed Improvements* (1996) at 68.

⁷⁰ AJ Middleton, A Critical Evaluation of Legal Procedures to Prevent Family Violence SACJ 1991 at 5.

⁷¹ There are 30 US states with domestic violence laws which complement common law assault and battery. the primary purpose of these laws is to permit enhanced penalties, especially for repeat offences. Neal Miller, “Domestic Violence Legislation Affecting Police and Prosecutor Responsibilities in the United States: Inferences from a 50-State Review of State Statutory Codes”, presentation to the 5th International Family violence Conference, University of New Hampshire (June 1997, updated August 1998).

Examples of such laws include the following:

- Virginia, Assault and Battery Against a Family or Household Member, 1998 Code of Virginia, Chapter 4, Title 18.2-57.2
- South Carolina, Criminal Domestic Violence, 1997 Code of Laws, Chapter 25, Title 16, Section 16-25-10 *et seq*
- Oklahoma, 1997 Oklahoma State Statutes, Section 21-644v2
- Texas, 1997 Texas Code of Criminal Procedure, Chapter 5, Family Violence Prevention Article 5.01.

⁷² Katherine Tinker and Silvia Pimenetal, Violence in the Family: Human Rights, Criminal Law, and the New Constitution in Brazil, 4 *International Review of Comparative Public Policy* 1992 at 88.

⁷³ Puerto Rico Domestic Abuse Prevention and Intervention Act 54 of 1989 (S. B. No. 90, 1st Reg. Sess.).

⁷⁴ Criminal Code of Canada, Section 718.2, Other Sentencing Principles, Section 718.2. A court that imposes a sentence shall also take into consideration the following principles: (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing, (i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnical origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation or any other similar factor, (ii) evidence that the offender, in committing the offence, abused the offender’s spouse or child, or (iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim shall be deemed to

be aggravating circumstances;....

⁷⁵ Australian Capital Territory, Domestic Violence Act 1986, section 3.

⁷⁶ *Arrest by peace officer without warrant:* A peace officer may without warrant arrest any person at the scene of an incident of domestic violence whom he or she reasonably suspects of having committed an offence containing an element of violence. South African Domestic Violence Bill 1998 (B75-98), section 3.

⁷⁷ Australian Capital Territory, Domestic Violence Act 1986, section 3.

⁷⁸ *Information on offences involving domestic violence:* (1) Any person who has reason to believe that an offence involving domestic violence is being or has been committed may give information in respect thereof to an enforcement officer. (2) No person who gives any such information in good faith shall incur any liability for defamation or otherwise in respect of the giving of such information. Malaysia Domestic Violence Act 521 of 1994, section 18.

⁷⁹ Law 26260.

⁸⁰ Violence Against Women, Fact Sheet from the Swedish Government Offices, February 1998 at. 7.

⁸¹ A similar trend is evident in respect of protection orders. For example, in terms of South Africa's Prevention of Family Violence Act 133 of 1993, an interdict prohibiting family violence may be obtained by a party to the marriage or by any other person who has an interest in the matter. The proposed South African Domestic Violence Bill goes further to provide that any person who has a "material interest in the well being of the applicant" may request a protection order. Similarly, in Guyana, any person associated with the respondent, a police officer or a social worker may apply for a protection order. South African Domestic Violence Bill 1998 (B75-98), section 4(1).

⁸² Criminal Procedure Act 51 of 1977, section 21(1).

⁸³ Criminal Procedure Act 51 of 1977, section 22(b)(i)(ii).

⁸⁴ Stock Theft Act 12 of 1990, section 9.

⁸⁵ Police Act 19 of 1990, section 14(4) and (5).

⁸⁶ New South Wales Crimes Act 1900, section 357G(1).

⁸⁷ *Power to Remove Child or Young Person, Section 42 Search Without Warrant:*
(1) Any member of the Police who believes on reasonable grounds that it is critically necessary to protect a child or young person from injury or death may, without warrant,
 (a) Enter and search, by force if necessary, any dwellinghouse, building, aircraft, ship, carriage, vehicle, premises or place;
 (b) Remove or detain, by force if necessary, the child or young person and place the child or young person in the custody of the Director-General.
(2) Every member of the Police who exercises any powers conferred by subsection (1) of this section shall, on first entering any dwellinghouse,

building, aircraft, ship, carriage, vehicle, premises or place, and if requested, at any subsequent time,--

- (a) Produce evidence of identity and
- (b) Disclose that those powers are being exercised under this section.

(3) A member of the Police who exercises the power conferred by subsection (1) of this section shall, within 3 days after the day on which the power is exercised, forward to the Commissioner of Police a written report on the exercise of the power and the circumstances in which it came to be exercised.

⁸⁸ Papua New Guinea Law Reform Commission, Final Report on Domestic Violence, Report No. 14 (1992) at 128.

⁸⁹ If the option of amending the Criminal Procedure Act 51 of 1977 is preferred, it could be done as follows:

22. *Circumstances in which article may be seized without search warrant*

Any police official may without a search warrant search any person or container or premises for the purpose of seizing any article referred to in section 20-

- (a) *if the person concerned consents to such search for and the seizure of the article in question, or if the person who may consent to the search of the container or premises consents to such search and seizure of the article in question; or*
- (b) *if he on reasonable grounds believes-*
 - (i) *that a search warrant will be issued to him under paragraph (a) of section 21(1) if he applies for such warrant; and*
 - (ii) *that the delay in obtaining such warrant would defeat the object of the search; or*
- (c) *if he on reasonable grounds believes-*
 - (i) ***that a domestic violence offence has been, is being or is likely to be committed.***

⁹⁰ Neal Miller, “Domestic Violence Legislation Affecting Police and Prosecutor Responsibilities in the United States: Inferences from a 50-State Review of State Statutory Codes”, presentation to the 5th International Family violence Conference, University of New Hampshire (June 1997, updated August 1998) at 2.

⁹¹ South African Domestic Violence Bill 1998 (B75-98).

⁹² See Mark Anthony Drumbl, Civil, Constitutional and Criminal Justice Responses to Female Partner Abuse: Proposals for Reform, 12 *Canadian Journal of Family Law* 1994 at 146.

⁹³ *Strategies for Confronting Domestic Violence: A Resource Manual*, United Nations Office at Vienna Centre for Social Development and Humanitarian Affairs, New York (1993) at 29.

⁹⁴ See National Council of Juvenile and Family Court Judges, US Model Code on Domestic and Family Violence, (1994) on this point.

⁹⁵ For example, in one case in the US, a battered wife was killed outside the courtroom after the state compelled her attendance. *Duong v County of Arapahoe* 837 P.2d 226 (Colo. Ct. App. 1992).

⁹⁶ UN Centre for Social Development and Humanitarian Affairs, *Violence Against Women in the Family* (1989) at 53.

⁹⁷ *Ibid.*

⁹⁸ Lori Heise *et al*, *Violence against Women: The Hidden Health Burden* (1994) (World Bank Discussion Paper 255) at 36-37; see also Legal Responses to Domestic Violence. 106 *Harvard Law Review* 1498 (1993) at 1539.

⁹⁹ Mark Anthony Drumbl, Civil, Constitutional and Criminal Justice Responses to Female Partner Abuse: Proposals for Reform, 12 *Canadian Journal of Family Law* 1994 at 146; Lori Heise *et al*, *Violence against Women: The Hidden Health Burden* (1994) (World Bank Discussion Paper 255) at 37; see also Legal Responses to Domestic Violence. 106 *Harvard Law Review* 1498 (1993) at 1539-40.

¹⁰⁰ Tim Roberts, *Spousal Assault and Mandatory Charging in the Yukon: Experiences, Perspectives and Alternatives* (1996).

¹⁰¹ The study also suggests that the police should assess whether or not the offender is “treatable”, but this appears to be outside the reasonable scope of police training.

¹⁰² Janet Currie, *Responding to the Needs of Ethnocultural Minority Women in Situations of Spousal Assault* (1995) at 41-43.

¹⁰³ Prevention of Domestic Violence Act of 1991, section 2C:25-21.

¹⁰⁴ *Strategies for Confronting Domestic Violence: A Resource Manual*, United Nations Office at Vienna Centre for Social Development and Humanitarian Affairs, New York (1993) at 29.

¹⁰⁵ Criminal Procedure Act 51 of 1977, section 40(1) and Schedule 1.

¹⁰⁶ This position is entrenched in Article 12(f) of the Namibian Constitution, apparently without any possibility of exception.

¹⁰⁷ For example, such a situation arose in the UK where a judge was strongly criticised for sending an alleged victim of domestic violence to prison for refusing to testify against her attacker. “Jailed witness case for appeal court”, *The Guardian* 13/3/89.

¹⁰⁸ Interview with Doris Roos, Director of the Juvenile Justice Program, 3 September 1998.

¹⁰⁹ Article 12 (1)(d) of the Constitution of the Republic of Namibia provides as follows: “All persons charged with an offence shall be presumed innocent until proven guilty according to law, after having had the opportunity of calling witnesses and cross-examining those called against them.”

Article (1)(e) states: “All persons shall be afforded adequate time and facilities for the

preparation and presentation of their defence, before the commencement of and during their trial, and shall be entitled to be defended by a legal practitioner of their choice.”

¹¹⁰ 1991(2) SA 805 (Nm) at 822A.

¹¹¹ Du Toit, De Jager, Paizes, Skeen, Van Der Merwe, *Commentary on the Criminal Procedure Act*, sections 58-59 at 9-8 and 9-9, citing *R v. Rose* 18 Cox CC 717 719.

¹¹² Criminal Procedure Act 51 of 1977, section 60(1)(a).

¹¹³ 1975 (2) SA 342 (C).

¹¹⁴ Criminal Procedure Act 51 of 1977, section 60(4).

¹¹⁵ Criminal Procedure Act, section 60(4)(a).

¹¹⁶ The proposed provisions precisely mirror the approach taken by the Combating of Rape Bill. The amendments to the Criminal Procedure Act proposed in respect of rape and domestic violence could ultimately be combined into one new section of the Criminal Procedure Act.

¹¹⁷ 1965 (1) SA 174 (A).

¹¹⁸ *Strategies for Confronting Domestic Violence: A Resource Manual*, United Nations Office at Vienna Centre for Social Development and Humanitarian Affairs (1993) at 42.

¹¹⁹ *Id* at 42.

¹²⁰ *Id* at 41.

¹²¹ Arms and Ammunition Act 7 of 1996, section 10(6)-(8) and Schedule 1.

¹²² New Jersey Prevention of Domestic Violence Act 1991, section 2C:25-21.

¹²³ Hyman Ariell, Dean Schillinger and Bernard Lo, *Laws Mandating Reporting of Domestic Violence Do They Promote Patient Well-Being?* 273(22), *The Journal of the American Medical Association* 1781 (1995).

¹²⁴ Joan Zorza, “Women Battering: High Costs and the State of the Law” in Nancy K D. Lemon, *Domestic Violence Law: A Comprehensive Overview of Cases and Sources* (1996) at 271.

¹²⁵ Prairie Research Associates, *Review of the Saskatchewan Victims of Domestic Violence Act* (1996) at 17.

¹²⁶ See National Council of Juvenile and Family Court Judges, *US Model Code on Domestic and Family Violence* (1994), section 303.

¹²⁷ See New South Wales Crimes Act 1900, section 4; Western Australia Restraining Orders Act 1997, sections 16, 19-ff; South Australia Domestic Violence Act 1994, section 8. The procedure in Western Australia is particularly interesting. An application for a violence restraining order can be made by telephone, fax, radio, video conference, e-mail or any similar

method. A magistrate may hear a telephone application on grounds of practicality, or urgency. The magistrate communicates with the applicant by means of any of the listed methods, but does not usually try to contact the respondent unless it considers this necessary. A police officer may require the respondent to remain in a designated place while the telephone application is taking place, detaining the respondent for this purpose if necessary, without a warrant, for up to 2 hours. The telephonic order is communicated to an authorised person and then served on the respondent. An interim telephone order remains in place for 72 hours and must be served on the respondent within 24 hours, while a final telephone order can remain in force for up to three months.

In South Australia, a police officer must make the telephonic order, or introduce the applicant telephonically to ensure proper identification.

Northern Australia allows a police officer to apply to a magistrate for variation of an existing restraining order by telephone. (Domestic Violence Act, as in force in 1997, section 8A.)

¹²⁸ South African Domestic Violence Bill 1998 (B75-98), section 4(10).

¹²⁹ Domestic Violence Ordinance 1986, section 10, as amended. Section 12 of the Restraining Orders Act 1997 of Western Australia lists similar factors, as does section 6 of the Domestic Violence Act 1994 of South Australia.

¹³⁰ New Zealand Domestic Violence Act 1995, section 14.

¹³¹ South Africa Domestic Violence Bill 1998 (B95-98), section 5.

¹³² For example, the US state of Oregon requires that the abuse which provides the basis for the protection order must have occurred within the previous 180 days. ORS 107.710.

¹³³ See South African Law Commission, *Domestic Violence*. Discussion Paper 70, Project 100 (1997) and South African Domestic Violence Bill, section 13.

¹³⁴ Default judgements are frequently given in the absence of the respondent in civil cases, but this take place when the respondent has failed to appear despite having been served with notice of the hearing. So this procedure is not inconsistent with the *opportunity* to be heard.

¹³⁵ See *Administrator, Transvaal v Traub* 1989 (4) SA 731 (a) 750, holding: ‘Generally speaking... the *audi* principle requires the hearing to be given before the decision is taken by the official or body concerned... Exceptionally however, the dictates of natural justice may be satisfied by affording the individual concerned a hearing after the prejudicial decision has been taken.’ (Corbett CJ).

¹³⁶ This issue was discussed at length in the South African case of *EM Rautenberg v The Magistrate, Wynberg and R Rautenberg* (unreported, Case No. 912/95, Cape Provincial Division).

¹³⁷ The New Zealand Domestic Violence Act is similar, but it gives the court the power to insist upon a hearing on its own motion (regardless of the wishes of the applicant or the respondent) if it believes that this is necessary before issuing a final protection order (with respect to the entire order, or to specified provisions of it). See New Zealand Domestic Violence Act 1995, section 78. This approach is not recommended for Namibia, since it would go beyond the procedure which applies to normal civil cases.

¹³⁸ Papua New Guinea Law Reform Commission, Final Report on Domestic Violence, Report No. 14 (1992) at 137.

¹³⁹ See South African Law Commission, *Domestic Violence*. Discussion Paper 70, Project 100 (1997) at 18.

¹⁴⁰ British Columbia and Saskatchewan also provide for two different kinds of orders with different forms of relief – (a) an emergency intervention order which can give the applicant exclusive occupation of the joint residence and restrain the respondent from contacting the applicant and (b) a victim’s assistance order, which can provide the same relief as an emergency intervention order, as well as financial compensation, various additional directives relating to property, an order recommending that the respondent receive therapy or a requirement that the respondent post a bond. Only the emergency intervention order may be granted *ex parte*. An assessment of the Act found that the Victim’s Assistance Orders were seldom used. Prairie Research Associates, *Review of the Saskatchewan Victims of Domestic Violence Act* (1996) at 39.

¹⁴¹ The South African Law Commission recommended that legal representation should be allowed and suggested that guidelines should be issued for the more effective assistance of applicants by clerks or court registrars. South African Law Commission, *Domestic Violence*. Discussion Paper 70, Project 100 (1997) at 49-50.

¹⁴² See note 140 above.

¹⁴³ Detailed examinations of the exclusive occupation of joint residences can be found in Scottish Law Commission, *Report on Occupancy Rights in the Matrimonial Home and Domestic Violence* (1980) and UK Law Commission, *Family Law and Domestic Violence and Occupation of the Family Home* (1992).

¹⁴⁴ Allowing a directive on maintenance to be part of an *ex parte* interim protection order is similar to the procedure under the forthcoming Maintenance Act which allows maintenance orders to be given in the absence of the respondent if the respondent does not respond to the summons. Here, the respondent might well have no notice at all of the protection order application, but this is remedied by the fact that the interim order is issued for only a short duration before the respondent is given a chance to present the other side of the story.

¹⁴⁵ If a policy decision is taken to include emergency compensation, the following draft provisions could be added to the list of provisions available in protection orders:

(*) *a provision requiring the respondent to pay the applicant compensation for monetary losses suffered by the applicant and any child of the applicant or any child who is in the care of the applicant as a result of the actions by the respondent on which the application is based in respect of --*

- (i) *loss of earnings*
- (ii) *medical and dental expenses*
- (iii) *repair or replacement of property belonging to the applicant which has been damaged or taken by the respondent*
- (iv) *relocation and accommodation expenses*
- (v) *any costs incurred in bring an application for a protection order in terms of this Act, with the exception of legal expenses.*

Provided that such compensation shall not prevent the applicant from seeking additional compensation for other losses arising from the same actions of the respondent in an ordinary civil proceeding.

¹⁴⁶ See Neal Miller, “Domestic Violence Legislation Affecting Police and Prosecutor Responsibilities in the United States: Inferences from a 50-State Review of State Statutory Codes”, presentation to the 5th International Family violence Conference, University of New Hampshire (June 1997, updated August 1998) at 5.

¹⁴⁷ See note 143 above.

¹⁴⁸ Saskatchewan Victims of Domestic Violence Act, Regulation 13.

¹⁴⁹ This discussion is based on United Nations Centre for Social Development and Humanitarian Affairs, *Strategies for Confronting Domestic Violence; A Resource Manual* (1993) at 26-ff.

¹⁵⁰ Papua New Guinea Law Reform Commission, *Final Report on Domestic Violence*, Report No. 14 (1992) at 36.

¹⁵¹ Tim Roberts, *Spousal Assault and Mandatory Charging in the Yukon: Experiences, Perspectives and Alternatives* (1996) at 57-59.

¹⁵² *Thurman v City of Torrington* 595 F. Supp. 1521 (D.C. Conn. 1984). This case was technically based on section 1983 of the Federal Civil Rights Act.

¹⁵³ *DeShaney v Winnebago County Department of Social Services* 489 US 189 (1989).

¹⁵⁴ James T R Jones, “Battered Spouses’ Actions for Damages against Unresponsive South African Police” 114 *SALJ* 356 (1997) at 357, 369.

¹⁵⁵ *Id* at 369.

¹⁵⁶ Women, Law & Development International, *State Responses to Domestic Violence: Current Status and Needed Improvements* (1996) at 112-ff.

¹⁵⁷ Police Act 19 of 1990, section 15.

¹⁵⁸ *Strategies for Confronting Domestic Violence: A Resource Manual*, United Nations Office at Vienna Centre for Social Development and Humanitarian Affairs, New York, (1993) at.30.

¹⁵⁹ Deborah L Rhode, *Justice and Gender* (1991) at 241.

¹⁶⁰ The real-life case of Francine Hughes which was dramatised in the movie "The Burning Bed" is a well-known example. After years of abuse, she set fire to her sleeping husband but was acquitted of murder on the grounds of temporary insanity.

¹⁶¹ See, for example, Ilze Olckers, “Battering: Towards A Legal Strategy, in S Jagwanth, PJ Schwikkard and B Grant, eds. *Women and the Law* (1994) at 99. The seminal work on this syndrome is Dr Lenore Walker, *The Battered Woman* (1979).

¹⁶² Julie Blackman. "Potential Uses for Expert Testimony: Ideas Toward the Representation of Battered Women Who Kill", 9 *Women's Rights Law Reporter* 227 (1986).

¹⁶³ See, for example, B Levinson, "Using Expert Testimony in the Grand Jury to Avoid a Homicide Indictment for a Battered Women: Practical Considerations for Defense Counsel", 9 *Women's Rights Law Reporter* 239 (1986); Elizabeth M Schneider, "Describing and Changing: Women's Self-Defence Work and the Problem of Expert Testimony on Battering" 9 *Women's Rights Law Reporter* 195 (1986); Lenore E Wlaker, "A Response to Elizabeth M Schneider's *Describing and Changing: Women's Self-Defence Work and the Problem of Expert Testimony on Battering*" 14 *Women's Rights Law Reporter* 223 (1986); Diana Russell, "Wife rape and battery as torture" in S Jagwanth, PJ Schwikkard and B Grant, eds. *Women and the Law* (1994) at 108-ff.

¹⁶⁴ Elizabeth Sheehy, "Personal Autonomy and the Criminal Law: Emerging Issues for Women", Canadian Advisory Council on the Status of Women (1987).

¹⁶⁵ 97 NJ 178, 478 A 2d 364 (1984).

¹⁶⁶ 88 Wash. 2d 221, 559 P.2d 548 (1977).

¹⁶⁷ *Wanrow*, 559 P 2d 548, at 558.

¹⁶⁸ Deborah L Rhode, *Justice and Gender* (1991) at 242.

¹⁶⁹ [1990] 1 S.C.R. 852, 55 C.C.C. (3d) 97.

¹⁷⁰ 55 C.C.C. (3d) at 118.

¹⁷¹ [1998] 1 S.C.R. 123.

¹⁷² [1998] 1 S.C.R. 123 at paragraph 36 (L'Heureux-Dubé and McLachlin JJ, concurring).

¹⁷³ [1998] 1 S.C.R. 123 at paragraph 43 (L'Heureux-Dubé and McLachlin JJ, concurring).

¹⁷⁴ J Burchell and J Milton, *Principles of Criminal Law* (1991) at 112.

¹⁷⁵ *Id.* at 119.

¹⁷⁶ *Id.* at 232.

¹⁷⁷ *Ibid.*

¹⁷⁸ *S v Arnold* 1985 (3) SA 256 (C). See also *S v van Vuuren* 1983 (1) SA 12 (A) and *S v Lesch* 1983 (1) SA 814 (O).

¹⁷⁹ Two judges held that the emotional stress which could lead to an acquittal need not be a mental illness of defect, but could be a non-pathological condition such as intoxication or severe emotional stress, while one judge was of the opinion that only a mental defect or illness could be the basis of such a defence. *S v Campher* 1987 (1) SA 940 (A).

The principle put forth by the majority in *Campher* was again accepted in principle in a

1988 case, although the male accused in was found on the facts to have had criminal capacity (although diminished). *S v Laubscher* 1988 (1) SA 163 (A).

180 *S v Wiid* 1990 (1) SACR 561 (A).

181 *S v Potgeiter* 1994 (1) SACR 61 (A).

182 *S v Di Blasi* 1996 (1) SACR 1 (A).

183 *Id.*

184 *State v Killian*, unreported judgement, Case No. CC119/19, 1991/11/12.

185 J Burchell and J Milton, *Principles of Criminal Law* (1991) at 238 (footnotes omitted).

186 Elizabeth M Schneider, "Describing and Changing: Women's Self-Defence Work and the Problem of Expert Testimony on Battering" 9 *Women's Rights Law Reporter* 195 (1986).

187 Elizabeth Sheehy, "Personal Autonomy and the Criminal Law: Emerging Issues for Women", Canadian Advisory Council on the Status of Women (1987).

188 Papua New Guinea Law Reform Commission, *Final Report on Domestic Violence*, Report No. 14 (1992) at 53. j

189 Mrs O G Abrahams, Namibian Women's Association.

190 Guyana Domestic Violence Act 1996, section 44.

191 Domestic Abuse Prevention and Intervention Act, section 4.1.

192 *Violence against Women, Government Bill 1997/98: 55*, Fact Sheet from the Swedish Government Offices, February 1998.

193 Domestic Violence (Amendment) Act (No 2), Act 37 of 1997, section 4.

194 For example, Bell Atlantic Mobile provides this service in Lenoir, North Carolina. *Lenoir News-Topic*, 3 September 1998.

195 Lori Heise *et al*, *Violence against Women: The Hidden Health Burden* (1994) (World Bank Discussion Paper 255) at 34.

196 See Papua New Guinea Law Reform Commission, *Final Report on Domestic Violence*, Report No. 14 (1992) at 74-ff.

197 See, for example, Papua New Guinea Law Reform Commission, *Final Report on Domestic Violence*, Report No. 14 (1992) at 79-ff.

198 *Id.* at xvii.

199 Lori Heise *et al*, *Violence against Women: The Hidden Health Burden* (1994) (World Bank Discussion Paper 255) at 39.

See *Agenda 37* (1998).