

# COMBATING OF DOMESTIC VIOLENCE AMENDMENT BILL

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## EXPLANATORY NOTE:

\_\_\_\_\_ Words underlined with a solid line indicate insertions in existing provisions.

[ \_\_\_\_\_ ] Words in bold type in square brackets indicate omissions from existing provisions.

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## BILL

To amend the Combating of Domestic Violence Act, 2003 (Act No. 4 of 2003), so as to amend the definition of the term “child” and inset a definition of “primary caretaker”; to amend the definition of “domestic relationship”; clarify the necessity to show urgency in order to obtain an interim protection order on an *ex parte* basis; to amend procedural matters relating to interim protection orders; strengthen safeguards against intimidation of complainants; to apply the provisions for vulnerable witnesses contained in section 158A of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) to proceedings relating to protection orders and domestic violence offences in terms of the Combating of Domestic Violence Act, 2003; to apply section 212 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) to medical records introduced into evidence in protection order proceedings under the Combating of Domestic Violence Act, 2003; to remove the requirement that protection orders must be issued in a prescribed form; to amend the possible terms of protection orders so as to broaden the possible provisions for assisting the complainant and respondent to secure property and to add the possibility of a provision directing the respondent to take part in a counselling or treatment programme; to provide a maximum length for a provision in a protection order pertaining to exclusive occupation of a shared residence on communal land; to clarify the requirements for including provisions pertaining to custody and access in protection orders; to strengthen the safeguards for children who may be affected by domestic violence; to provide that temporary maintenance orders included in protection orders may be enforced, amended or substituted in the same way as maintenance orders under the Maintenance Act, 2003 (Act No. 9 of 2003); to provide for notification of the court which issued a protection orders of any breach of that order; to provide for the initiation of a procedure for suspending a firearm licence if it appears that a person involved in the commission of domestic violence may be unfit to possess an arm; to clarify that protection orders and criminal charges can be pursued simultaneously; to amend the definition of “domestic violence offences” in the First Schedule; to correct an erroneous cross-reference and other minor errors; and to provide for incidental matters.

*(Introduced by the Minister of Justice)*

**BE IT ENACTED** by the Parliament of the Republic of Namibia as follows:

### **Amendment of section 1 of Act No. 4 of 2003**

**1.** Section 1 of Act No. 4 of 2003 (in this Act referred to as the “principal Act”) is amended –

(a) by the substitution for the definition of “child” of the following definition:

“‘child’ means a person who is under the age of 18 years, except where otherwise provided;”

- (b) by the insertion after the definition of “prescribe” of the following definition:

“‘primary caretaker’ means -

(a) a person other than the parent or other legal care-giver of a child, whether or not related to the child, who takes primary responsibility for the daily care of the child with the express or implied permission of a parent or other person with legal custody or guardianship of the child;

(b) a person who cares for a child as a result of an alternative placement under the Child Care and Protection Act, 2015 (Act No. 3 of 2015) or any other law;”

- (c) by the substitution for the definition of “social worker” of the following definition:

“social worker” means a social worker as defined in the [**Social and Social Auxiliary Workers’ Professions Act, 1993 (Act No. 22 of 1993)**] Social Work and Psychology Act, 2004 (Act No. 6 of 2004); and”

- (d) by the deletion in the definition of “weapon” of the comma after the phrase “Arms and Ammunition Act, 1996”.

### **Amendment of section 3 of the principal Act**

2. Section 3 of the principal Act is amended by -

- (a) the insertion before subsection (1) of the following subsection, and the renumbering of the existing subsection (1) as subsection (1A):

“(1) In this section, “child” includes biological or adopted progeny of any age and “minor child” means a person who is under the age of 18 years.”

- (b) the deletion of the phrase “, being of different sexes” in paragraph (b) of subsection (1A), as renumbered herein;

- (c) the insertion after paragraph (d) of subsection (1A), as renumbered herein, of the following paragraphs:

“(dA) they are a primary caretaker and a minor child in the care of that caretaker, during the period when this relationship exists and for one year thereafter;

(dB) they are a primary caretaker and an adult in the care of that caretaker who requires care because of illness or disability, during the period when this relationship exists and for one year thereafter;”

- (d) the substitution for paragraph (d) of subsection (1A), as renumbered herein, of the following paragraph:

“(f) [**they, being of different sexes, are or were in an actual or a perceived intimate or romantic relationship**] they are or were in an actual or a perceived romantic or intimate relationship; or”

- (e) the insertion after paragraph (d) of subsection (1A), as renumbered herein, of the following paragraph:

“(g) one is the current or former spouse, or actual or perceived romantic or intimate partner, of the current or former spouse, or actual or perceived romantic or intimate partner, of the other.”

- (f) the substitution for subsection (2) of the following subsection:

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

#### **Amendment of section 4 of the principal Act**

3. Section 4 of the principal Act is amended by the insertion of a full stop at the end of subsection (3).

#### **Amendment of section 6 of the principal Act**

4. Section 6 of the principal Act is amended by the insertion after subsection (6) of the following subsection:

“(6A) If an application for a protection order is submitted to the clerk of the court but appears to be abandoned by the applicant or the complainant, as the case may be, before a decision is made on an interim protection order or before an enquiry is held in terms of section 12, the clerk of the court must contact the station commander of the relevant police station or a social worker for the purposes of investigating whether the complainant or applicant is safe and finding out if the complainant or applicant is being threatened, coerced or unduly pressured to abandon the application.”.

#### **Amendment of section 8 of the principal Act**

5. Section 8 of the principal Act is amended by

- (a) the substitution for paragraph (a) of subsection (3) of the following paragraph:

“(a) must, if it is satisfied that there is sufficient evidence as contemplated in section 7(1) and a sufficient showing of urgency, grant[**, in the prescribed form and manner,**] an interim protection order notwithstanding the fact that the respondent has not been given notice of the proceedings and an opportunity to be heard, and direct the complainant to appear before the court on the return date;”

- (b) the substitution for subsection (7) of the following subsection:

“(7) If [**the interim**] a protection order involves [**children**] a situation which may have any negative impact on a child, the clerk of the court must send a copy of the order together with the prescribed form, in the prescribed manner, to the Permanent Secretary of the Ministry responsible for child welfare and such copies as

may be prescribed to any other prescribed persons, to consider such action as may be provided for in legislation relating to the care and protection of children.”.

#### **Amendment of section 9 of the principal Act**

6. Section 9 of the principal Act is amended by

(a) the substitution for subsection (1) of the following subsection:

“(1) An interim protection order together with a notice of the return date on which the respondent must appear in court to oppose the order and any other prescribed information must, within the prescribed period and in the prescribed form and manner, be served on the respondent.”

(b) the substitution for subsection (1) for the number “17” of the number “16”.

#### **Deletion of sections 10 and 11 of the principal Act**

7. The principal Act is amended by the deletion of sections 10 and 11.

#### **Amendment of section 12 of the principal Act**

8. Section 12 of the principal Act is amended by -

(a) the insertion after subsection (6) of the following subsections:

“(6A) Subsections (7A) and (12) of section 212 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) apply with the necessary changes to an enquiry conducted under this Act.

“(6B) During an enquiry conducted under this Act the court may, on the request of any party to the court proceedings or on its own initiative –

(a) apply any of the special arrangements provided for in section 158A of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) with the necessary changes;

(b) apply the provisions of section 166(3) to (6) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) with the necessary changes;

(c) admit any previous statements by a child younger than 14 years as provided for in section 216A of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), in which case the relevant provisions of that section apply with the necessary changes.”

(b) the substitution for subsection (13) of the following subsection:

“(13) If, on the date and at the time fixed for the enquiry, the respondent fails to appear in person at the court and -

(a) the court is satisfied that notice of the enquiry was correctly served on the respondent as contemplated in section 9(1), the court may -

[(a)(i) proceed to hear and determine the matter in the absence of the respondent; or

~~[(b)](ii)~~ where the court is satisfied having regard to the material before it, that it is appropriate to do so, postpone the matter and, if necessary, order that the respondent be summoned to appear in court on the date on which the matter has been postponed to.

(b) the court is not satisfied that proper service has been effected on the respondent, the court –

(i) must set a new return date and cause the parties to be informed of the new return date;

(ii) must extend the interim protection order accordingly, unless there is evidence before the court that the interim protection order is no longer warranted; and

(iii) may issue any directions on service which may be required in the circumstances.”

(c) the substitution for paragraph (a) of subsection (14) of the following subsection:

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

(d) the substitution for subsection (15) of the following subsection:

“(15) Unless an application has been dismissed as contemplated in subsection (14)(a), if the applicant fails to appear, either in person or, if applicable, through the representative contemplated in subsection (7), the court must –

(a) direct the station commander of the police station named in the application to enquire into the reasons for such non-appearance, to ensure that no intimidation of the applicant has taken place, to provide appropriate police protection in the event of any intimidation, and to ascertain whether the applicant still wishes to proceed with the application;

(b) postpone the enquiry to consider a written report from the station commander on steps taken in terms of paragraph (a); and

(c) if no written report has been received from the station commander one week prior to the remand date, summon the station commander to appear in court in person on the remand date to provide the relevant information; and

(d) after considering the information provided by the police, make an order for any further police action as may be required to protect the complainant or applicant.

(e) the insertion after subsection (15) of the following subsection:

“(15A) If the court has insufficient information to make a final decision on a protection order at an enquiry, after hearing both sides of the story, the court –

- (a) may postpone the enquiry for a maximum of 15 days and request a social worker or another appropriate professional to investigate the matter and report back to the court; and
- (b) must extend any interim protection order which is in place until the next court date, unless there is evidence before the court that the interim protection order is no longer warranted; and
- (c) must cause the parties to be informed of the next court date.”.

#### **Amendment of section 13 of the principal Act**

9. Section 13 of the principal Act is amended by -
- (a) the deletion in subsection (1) of the phrase “must be in the prescribed form and”; and
  - (b) the substitution in subsection (3) for the word “comander” of the word “commander” to correct a misspelling.

#### **Amendment of section 14 of the principal Act**

10. Section 14 of the principal Act is amended by -
- (a) the substitution in paragraph (b) of subsection (2) for the word “forbids” of the word “forbid” at the beginning of both subparagraph (i) and subparagraph (ii);
  - (b) the substitution for paragraph (c) of subsection (2) of the following paragraph:
    - “(c) if an act of physical violence has been committed, a provision granting the complainant and dependants of the complainant exclusive occupation of a joint residence, regardless of whether the residence is owned or leased jointly by the parties or solely by either one of them~~[, which may also include if appropriate~~
      - ~~(i) a provision directing that the contents of the joint residence (or certain specified contents) remain in the residence for the use of the person given possession;~~
      - ~~(ii) a provision directing a police officer to remove the respondent from the residence;~~
      - ~~(iii) a provision authorising the respondent to collect personal belongings from the residence under police supervision;]~~

but, the court must take the following factors into consideration in respect of any order under this paragraph -

- (aa) the length of time that the residence has been shared by the complainant and the respondent, but without prejudicing the complainant 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 or other person in the care of the complainant;
- (bb) the accommodation needs of the complainant and any other occupants of the residence, considered in light of the need to secure

the health, safety and wellbeing of the complainant or any child or other person in the care of the complainant; and

- (cc) any undue hardship that may be caused to the respondent or to any other person as a result of such order;
- (dd) in the case of communal land, the respective customary law or practice which governs the rights of ownership to or occupation of that communal land;”

(c) the insertion after paragraph (c) of subsection (2) of the following paragraphs:

“(cA) a provision directing that the contents (or certain specified contents) of a joint residence remain in that place, or be moved to another residence occupied or to be occupied by the respondent or the complainant, with due regard to the parties’ respective financial contributions to any such contents;

(cB) a provision directing a police officer to remove the respondent from a residence owned, occupied or to be occupied by the complainant;

(cC) a provision authorising the complainant or the respondent to collect personal belongings from a residence under police supervision;”

(d) the insertion after paragraph (g) of subsection (2) of the following paragraph:

“(gA) a provision directing a respondent not to interfere with the complainant’s exercise of legal custody or control over specified children, or with the complainant’s exercise of the role of primary caretaker over specified children;”

(e) the substitution for paragraph (i) of subsection (2) of the following paragraph:

“(i) a provision granting temporary sole custody a child born to or jointly adopted by the complainant and the respondent, to the complainant or to another appropriate custodian -

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

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

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

(f) the substitution for paragraph (j) of subsection (2) of the following paragraph:

“(j) a provision temporarily -

(i) forbidding all contact between the respondent and any child born to or jointly adopted by [of] the complainant and the respondent;

(ii) specifying that contact between the respondent and a child born to or jointly adopted by [of] the complainant and the respondent, must 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 complainant, any child who may be affected, and any other family members,

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

- (g) the insertion after paragraph (j) of subsection (2) of the following paragraph:

“(jA) a provision directing the respondent to take part in a counselling or treatment programme approved by the ministry responsible for health and social services or the ministry responsible for gender equality and child welfare, if -

(i) an appropriate programme is available in reasonable proximity to the respondent’s residence; and

(ii) the complainant has no reasonable objections to such an order;

but the court -

(aa) must not require a complainant against his or her will to participate in any such programme together with the respondent; and

(bb) may include a provision under this paragraph only after an enquiry at which the respondent has been heard.”

- (h) the insertion after subsection (2) of the following subsections:

“(3) (a) “Custody” in paragraph (i) of subsection (2) refers to custody as a component of parental rights and responsibilities over minor children.

(b) “Contact” in paragraph (j) of subsection (2) refers to access to a child which is an component of parental rights and responsibilities over minor children, as distinct from the ordinary meaning of the term “contact” as it is used in paragraph (b) of subsection (2).

(4) No provision contemplated in paragraphs (i) or (j) of subsection (2) may be included in a protection order if a divorce action between the complainant and the respondent is pending.

(5) A court may treat a request for a provision contemplated in paragraphs (i) or (j) of subsection (2) to be included in a protection order as an application under section 100 or 102 of the Child Care and Protection Act, 2015 (Act No. 3 of 2015), as the case may be, and proceed as if an application pertaining to custody or access had been brought under one or both of those sections.”

### **Amendment of section 15 of the principal Act**

11. Section 15 of the principal Act is amended by the substitution for paragraph (a) of the following paragraph:

- “(a) a provision granting the complainant exclusive occupation of a residence owned by, or situated on communal land allocated to,-
- (i) **[by]** the complainant, remains in force for any period set by the court;
  - (ii) **[by]** the respondent, remains in force for any period set by the court up to a maximum of six months;
  - (iii) **[jointly by]** the complainant and the respondent jointly, remains in force for any period set by the court up to a maximum of one year;”.

#### **Amendment of section 16 of the principal Act**

12. Section 16 of the principal Act is amended by the insertion after subsection (7) of the following subsection:

“(8) Where a criminal charge of breach of a protection order has been laid, the member of the police who opens the docket must notify the clerk of the court which issued the protection order in the prescribed manner and on the prescribed form, and the clerk of the court must enter a notation to this effect on the relevant file and place a copy of the notification form therein.”.

#### **Insertion of section 16A into the principal Act**

13. The principal Act is amended by the insertion of the following section:

##### **“Provisions on temporary maintenance in protection orders**

16A. A provision in a protection order in terms of section 14(2)(h) directing a respondent to make periodic payments in respect of the temporary maintenance of any person may be enforced, amended, substituted or discharged in the same way as a maintenance order under the Maintenance Act, 2003 (Act No. 9 of 2003).”.

#### **Amendment of section 22 of the principal Act**

14. Section 22 of the principal Act is amended by the insertion after subsection (4) of the following subsection:

“(5) Nothing in this Act prohibits a person from laying a criminal charge and applying for a protection order at the same time, and a police officer who opens a docket in a domestic violence offence must advise the complainant of the possibility of applying for a protection order while the criminal charge is pending.”.

#### **Insertion of section 29A into the principal Act**

15. The principal Act is amended by the insertion of the following section:

##### **“Initiation of procedure to declare a person unfit to possess arms**

29A. (1) If it appears to a court in any proceeding involving a protection order or a domestic violence offence that a person involved in the commission of domestic violence may be unfit to possess an arm, the court must initiate a procedure in terms of section 10(3)-(8) of the Arms and Ammunition Act, 1996 (Act No. 7 of 1996), with the necessary changes.

(2) The magistrate who presides over the proceeding in terms of section 10(3)-(8) of the Arms and Ammunition Act, 1996 (Act No. 7 of 1996) to determine whether the person in question is unfit to possess an arm must not have been previously involved with any proceeding involving a protection order or a domestic violence offence in respect of the same person.”.

#### **Amendment of section 32 of the principal Act**

16. Section 32 of the principal Act is amended by -
- (a) the substitution for paragraph (a) of subsection (1) of the following subsection:  
“(a) any prescribed forms referred to in this Act, and forms for interim and final protection orders which may be utilised at the discretion of the presiding officer;”
  - (b) the substitution in paragraph (d) of subsection (1) for the word “ensuing” of the word “ensuring”.

#### **Amendment of First Schedule to the principal Act**

16. The First Schedule to the principal Act is amended by -
- (a) the substitution in paragraph 5 for the word “victim” of the word “complainant”; and
  - (b) the insertion in paragraph 9 after the word “murder” of the words “or culpable homicide”.

#### **Amendment of Second Schedule to the principal Act**

17. The Second Schedule to the principal Act is amended by the insertion of the following paragraph at the end of the part entitled “**AMENDMENT OF THE CRIMINAL PROCEDURE ACT, 1977 (ACT NO. 51 OF 1977)**” -

- “(d) in section 158A(3) by the substitution for paragraph (c) of the following paragraph:  
“(c) against whom a domestic violence offence as defined in the Combating of Domestic Violence Act, 2003 (Act No. 4 of 2003) has been committed;”.”