

REPUBLIC OF NAMIBIA

NATIONAL ASSEMBLY

**COMBATING OF DOMESTIC
VIOLENCE AMENDMENT BILL**

(As read a First Time)

(Introduced by the Minister of Justice)



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. |

BILL

To amend the Combating of Domestic Violence Act, 2003, so as to insert a definition of “primary caretaker”; to extend the scope of “domestic relationship” to the primary caretaker of a child and clarify that a domestic relationship between a child and a parent continues even after the child has attained the age of 18 years; to strengthen safeguards against intimidation of complainants; to 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; to apply the provisions for vulnerable witnesses contained in the Criminal Procedure Act, 1977 to proceedings relating to protection orders and domestic violence offences; to apply provisions of the Criminal Procedure Act, 1977, in relation to production of medical records in evidence in protection order proceedings; to amend the terms of protection orders so as to add a provision directing the respondent to take part in a counselling or treatment programme; to provide a maximum period pertaining to exclusive occupation of a shared residence on communal land; to provide for the issuing of emergency protection orders; to clarify 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 be treated in the same way as maintenance orders under the Maintenance Act, 2003; to provide for notification of any breach of a protection order to the court; to provide for the initiation of a procedure for suspending a firearm licence in relation to a person involved in the commission of domestic violence; to clarify that protection orders and criminal charges can be pursued simultaneously; to amend the definition of “domestic violence offences” in the First Schedule; and to provide for incidental matters.

BE IT ENACTED as passed by the Parliament, and assented to by the President, of the Republic of Namibia, as follows:

Amendment of section 1 of Act No. 4 of 2003

1. Section 1 of the Combating of Domestic Violence Act, 2003 (Act No. 4 of 2003) (in this Act referred to as the “principal Act”) is amended -

(a) by the insertion after the definition of “child” of the following definition:

“Child Care and Protection Act” means the Child Care and Protection Act, 2015 (Act No. 3 of 2015);”;

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

‘ “Criminal Procedure Act” means the Criminal Procedure Act, 1977 (Act No. 51 of 1977);”;

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

‘ “primary caretaker” means -

(a) a person, other than the parent or care-giver, as defined in section 1 of the Child Care and Protection Act, 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 custody or guardianship of the child; or

(b) a person who cares for a child as a result of placement in alternative care under the Child Care and Protection Act or any other law;”;

- (d) by the substitution for the definition of “protection order” of the following definition:

‘ “protection order” means an interim, **[or]** a final or an emergency protection order granted under this Act;”;

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

‘ “social worker” means a social worker as defined in section 1 of 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

- (f) by the substitution for the definition of “weapon” of the following definition:

‘ “weapon” includes an arm as defined in section 1 of the Arms and Ammunition Act, 1996 **[,]**(Act No. 7 of 1996) or any other object designed or used to inflict or cause physical bodily harm.”.

Amendment of section 3 of Act No. 4 of 2003

2. Section 3 of the principal Act is amended -

- (a) in subsection (1) by the insertion after paragraph (d) of the following paragraphs:

“(dA) they are or were a primary caretaker and a child in the care of that caretaker;

(dB) they are or were a primary caretaker and an adult in the care of that caretaker who requires care because of an illness or a disability;”; and

(b) by the substitution for subsection (2) of the following subsection:

“(2) Subject to subsection (3), where a “domestic relationship” is based directly or indirectly on -

(a) past marriage or engagement;

(b) past cohabitation;

(c) any other past actual or perceived romantic or intimate relationship; or

(d) a past relationship of care between a primary caretaker and a child or adult,

such “domestic relationship” continues for one year after its dissolution, cessation or termination.”; and

(c) by the insertion after subsection (2) of the following subsection:

“(2A) Despite subsection (2), where a child is born to or is the adoptive child of any couple, their “domestic relationship” continues throughout the lifetime of that child and for one year after the death of the child regardless of whether the child in question has attained the age 18 years or more.”.

Amendment of section 4 of Act No. 4 of 2003

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 Act No. 4 of 2003

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 the application 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, immediately upon becoming aware that the application appears to be abandoned -

(a) must in the prescribed manner contact -

(i) the station commander of the relevant police station;

(ii) a social worker; or

(iii) both the station commander and social worker; and

- (b) may in the prescribed manner contact the applicant or the complainant,

for the purposes of investigating whether the applicant or the complainant is safe and establishing whether the complainant or applicant is being threatened, coerced or unduly pressured to abandon the application.

- (2) The clerk of court referred to in subsection (6A) must submit the information that he or she has been obtained from an investigation conducted in terms of that subsection to the relevant magistrate for directions.”.

Amendment of section 8 of Act No. 4 of 2003

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 -

- (i) 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

- (ii) direct the complainant to appear before the court on the return date;”; and

- (b) the substitution for subsection (4) of the following subsection:

“(4) An interim protection order must -

- (a) **[call upon]** direct the respondent, if he or she so wishes to -

- (i) on or before the return date, [show cause] lodge written representations with the clerk of court, giving reasons why the interim protection order should not be confirmed; and

- (ii) appear in court on the return date to oppose the confirmation of the interim protection order; and

- (b) contain any other prescribed information.”;

- (c) the substitution for subsection (5) of the following subsection:

“(5) The return date is 30 days from the date of the interim protection order but the court may extend this period if it is necessary to ensure that it is not less than 10 days after the service of an interim order as contemplated in section 9(1), and the interim protection order remains in force up to the end of the extended return date.

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

“(7) If the interim 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 Act No. 4 of 2003

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 directive referred to in section 8(4)(a) and any other prescribed information must, within the prescribed period and in the prescribed form and manner, be served on the respondent.”; and

- (b) the substitution in subsection (3) for the phrase “section 17” of the phrase “section 16”.

Repeal of sections 10 and 11 of Act No. 4 of 2003

7. Sections 10 and 11 of the principal Act are repealed.

Amendment of section 12 of Act No. 4 of 2003

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

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

“(1) On the return date referred to in section 8(5) [set out under section 11], the court must enquire into the matter of confirmation of the interim protection order.”;

- (b) the insertion after subsection (6) of the following subsections:

“(6A) Subsections (7A) and (12) of section 212 of the Criminal Procedure Act relating to medical records and the giving of oral evidence or written interrogatories, apply with such changes as may be required by the context 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 with such changes as may be required by the context;

- (b) apply the provisions of section 166(3) to (6) of the Criminal Procedure Act relating to the cross-examination of witnesses with such changes as may be required by the context;
- (c) admit any previous statements by a child younger than 14 years as provided for in section 216A of the Criminal Procedure Act in which case the relevant provisions of that section apply with such changes as may be required by the context.”;
- (c) 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, but taking into account any representations, if any, made by the respondent under section 8(4)(a)(ii); 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[.]; or
- (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 such 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 regarding service on the respondent as may be required in the circumstances.”;
- (d) the substitution for paragraph (a) of subsection (14) of the following subsection:
- “(a) if it is -

- (i) in receipt of a written statement from the applicant or complainant indicating his or her withdrawal of the application; or
 - (ii) otherwise satisfied that the applicant or complainant no longer wishes to pursue the matter, dismiss the application; or”;
- (e) 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 in order to consider a written report from the station commander on steps taken in terms of paragraph (a);
 - (c) if no written report has been received from the station commander seven days prior to the enquiry date, summon the station commander to appear in court in person on the enquiry date to provide the relevant information; and
 - (d) after considering the information provided by the station commander, make an order for any further police action as may be required to protect the complainant or applicant.”; and
- (f) 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, 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;
- (b) must extend any interim protection order which is in place until the next enquiry 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 enquiry date.”.

Amendment of section 13 of Act No. 4 of 2003

9. Section 13 of the principal Act is amended by the substitution in subsection (3) for the word “comander” of the word “commander”.

Amendment of section 14 of Act No. 4 of 2003, as amended by section 257 of Act No. 3 of 2015

10. Section 14 of the principal Act is amended by -

- (a) the substitution in paragraph (b) of subsection (2) for the phrase “no-contact provisions which -” of the phrase “a no-contact provision[s] which -”
- (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)](i) 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]** left the common residence to **[assure]** ensure his or her safety or the safety of any child or other person in the care of the complainant;
- [(bb)](ii) 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)]~~(iii) any undue hardship that may be caused to the respondent or to any other person as a result of such order;

~~[(dd)]~~(iv) 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;”;

(d) 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 residence, 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 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;”;~~

(e) 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 a specified child, or with the complainant’s exercise of the role of primary caretaker over a specified child;”;~~

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

~~“(i) a provision granting temporary sole custody [-~~

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

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

of a child born to, or jointly adopted by, the complainant and the respondent, to the complainant or to another suitable custodian, if the court is satisfied that there is serious and imminent danger to the child in question, in which case the court must refer the matter to a designated social worker, as defined in section 1 of the Child Care and Protection Act, [2015 (Act No. 3 of 2015)] for an investigation to be completed within the period specified by the court, upon which the court may,

notwithstanding the absence of a party to the proceedings, make a final order regarding sole custody;”

- (g) 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;”;

- (h) 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) may 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.”; and -

- (i) the addition after subsection (2) of the following subsections:

“(3) For purposes of -

- (a) subsection (2)(i), "custody" refers to custody as a component of parental rights and responsibilities over a child or children; and
- (b) subsection (2)(j), "contact" refers to access to a child which is a component of parental rights and responsibilities over a child or children, as distinct from the ordinary meaning of the term "contact" as it is used in that subsection.
- (4) No provision contemplated in subsection (2)(i) or (j) 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 of subsection (2)(i) or (j) to be included in a protection order as an application under section 100 or 102 of the Child Care and Protection Act, 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 Act No. 4 of 2003

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;”.

Insertion of section 15A in Act No. 4 of 2003

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

“Emergency protection orders

15A. (1) A person who requires a protection order and who, for any reason, is unable to make an application to the nearest court which has jurisdiction to grant an interim protection order, may file an affidavit at the nearest police station stating the facts on which the seeking of protection is based, the name of the perpetrator and the name or names of the person or persons seeking protection.

(2) On receipt of the affidavit contemplated in subsection (1), the station commander must contact, either telephonically, by electronic mail or by fax, a magistrate who has jurisdiction in the area where the person requiring protection resides for purposes of obtaining an emergency protection order.

(3) The magistrate contemplated in subsection (2), having considered the provisions of section 7, may, on being made aware of the facts on which the seeking of protection is based and if satisfied that protection from domestic violence is warranted, issue an emergency protection order, either telephonically, by electronic mail or by fax, indicating the steps to be taken by the station commander and the nature of the protection granted.

(4) In the event that the emergency protection order is granted telephonically, the station commander must record the wording of such order in writing, a copy of which must be remitted, by fax or electronic mail, to the magistrate issuing the order.

(5) An emergency protection order as contemplated in this section remains in force until such time as application is made for a temporary protection order in terms of section 8 but no longer than seven days from the date on which it was issued.

(6) The station commander must cause the emergency protection order to be served on the person cited in such order without delay and the police officer who serves the order must explain to such person, in a language which he or she understands –

- (a) the purpose, terms, duration and effect of such order; and
- (b) the consequences that may follow if the person concerned fails to comply with the terms of the order, including the provisions of section 16(1).

Amendment of section 16 of Act No. 4 of 2003

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

“(8) Where a criminal charge of breach of a protection order has been laid, the police officer 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 in Act No. 4 of 2003

14. The principal Act is amended by the insertion after section 16 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 Act No. 4 of 2003

15. Section 22 of the principal Act is amended by the addition 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 the police officer who opens a docket in a domestic violence complaint must advise the complainant of the possibility of applying for a protection order while the criminal charge is pending.”.

Insertion of section 29A in Act No. 4 of 2003

16. The principal Act is amended by the insertion after section 29 of the following section:

“Initiation of procedure to declare person unfit to possess arms

29A. (1) If, in any proceedings involving a protection order or a domestic violence offence, it appears to a court that a person involved in the commission of domestic violence may be unfit to possess an arm due to the existence of any of the circumstances contemplated in subsection (1) of section 10 of the Arms and Ammunition Act, 1996 (Act No. 7 of 1996), the person presiding in that court must treat the matter as if it were a report referred to a magistrate in terms of that subsection and the provisions of section 10 of that Act, with such changes as may be required by the context, apply in relation to proceedings to declare that person unfit to possess an arm.

(2) If the proceedings referred to in subsection (1) are before a presiding officer other than a magistrate, the presiding officer must refer the matter to the magistrate of the district where the person resides and that magistrate must proceed with matter in terms of section 10 of the Arms and Ammunition Act, 1996 (Act No. 7 of 1996).

Amendment of section 32 of Act No. 4 of 2003

17. Section 32 of the principal Act is amended by the substitution in paragraph (d) of subsection (1) for the word “ensuing” of the word “ensuring”.

Amendment of First Schedule to Act No. 4 of 2003

18. 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 Act No. 51 of 1977

19. The Criminal Procedure Act is amended -

- (a) in subsection (3A) of section 153 by the substitution for paragraph (c) of the following paragraph:

“(c) any domestic violence offence as defined in the Combating of Domestic Violence Act, 2003 (Act No. 4 of 2003);”; and

- (b) in subsection (3A) of section 158A 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 **[any offence involving violence has been committed by a close family member or a spouse or a partner in any permanent relationship].**”

Short title and commencement

20. (1) This Act is called the Combating of Domestic Violence Amendment Act, 2021 and comes into operation on a date to be determined by the Minister by notice in the *Gazette*.

(2) Different dates may be determined in terms of subsection (1) for different provisions of the Act.
