



Republic of Namibia

MINISTERIAL MOTIVATION

ON THE

DIVORCE BILL

IN THE NATIONAL ASSEMBLY

BY

THE MINISTER OF JUSTICE

MS. YVONNE DAUSAB, MP

11 JUNE 2024

– To be checked against delivery –

Honourable Speaker,
Honourable Members,
Members of the Public,

1. Talking about divorce is not pleasant, because no one gets married to get divorced. We all would like the proverbial “happily ever after to be our lasting reality. But it is also true, that our divorce statistics speaks a different reality. The introduction of this bill, in this August House, follows a protracted process of wide consultations over a period of 20 years.
2. The Divorce Bill aims to consolidate and reform an outdated law concerning divorces related to civil marriages in our country. This proposed legislation is not intended to solve all matrimonial challenges but seeks to mitigate the impact that an already difficult situation has on the life and status of those involved. The focus is to ensure fair and equitable treatment of all parties involved in the divorce proceedings.
3. The Bill is a result of a project which the Law Reform and Development Commission (LRDC) initially started through the Women and the Law Committee (WLC) and consulted on between 2001 and 2004 to reform the divorce law regime in Namibia.
4. The Commission’s current proposal for a no-fault divorce regime has its origins in its first report, “Report on Divorce¹,” published in 2004, which contained a draft Divorce Bill. However, no legislative action was taken between 2004 and 2014, as it became apparent that further consultations with targeted stakeholders were required and that the problems with the current law discussed in the 2004 report persisted.

¹ Law Reform and Development Commission. November 2004. *Report on Divorce*. Available at: https://www.lac.org.na/projects/grap/Pdf/LRDC_13-Divorce-2004.pdf.

5. A Draft Bill, incorporating the LRDC's amendments, was then sent out to various stakeholders for comments, including the Faculty of Law of the University of Namibia, Namibia Financial Institutions Supervisory Authority (Namfisa), High Court Judges, Law Society of Namibia, Legal Assistance Centre, Namibia Lawyers' Association, Ministry of Women Affairs and Child Welfare, and Ministry of Home Affairs, as they were then called.
6. The LRDC further organised a Family Law Workshop in July 2012 to revitalize consultations on these important issues. The workshop delegation included the then Minister of Justice, the Minister of Gender Equality and Child Welfare, the Minister of Home Affairs and Immigration, the Chairperson of the Parliamentary Standing Committee on Security, Constitutional and Legal Affairs, various Deputy Ministers, Special Advisors, Permanent Secretaries and Traditional Leaders, the Council of Churches of Namibia, and senior Government officials from the Ministries involved.

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7. During the workshop, a number of stakeholders expressed concern that some of the issues pertaining to divorce still lacked satisfactory consultation and proposed further consultations, particularly on customary marriages in respect of divorce and other family law-related matters such as custody and control of children and proprietary issues.
8. It was therefore proposed that further consultative meetings be held countrywide at strategic locations to obtain the views of traditional authorities, church leaders, and the public at large. Subsequently, the LRDC compiled a report highlighting the submissions made by the stakeholders consulted, for further action.

9. Following this consultative process, the LRDC sought additional input from a broader range of affected parties that were not initially considered or included. To this end, from 12 February to 19 March 2015, the LRDC conducted further consultations across the country, visiting the areas of Eenhana, Gobabis, Katima Mulilo, Keetmanshoop, Ondangwa, Ongwediva, Opuwo, Outapi, Otjiwarongo, Rehoboth, Rundu, Swakopmund, and Windhoek.
10. The nationwide consultations revealed that the fault-based divorce system was considered outdated, and parties involved in divorce proceedings sought more flexibility to accommodate their diverse reasons and circumstances for seeking a divorce.
11. The perspectives of various churches were also considered. Several religious leaders expressed concerns about the potential consequences of making divorce applications ostensibly easier, arguing that it could undermine the institution of marriage. They urged the government to preserve the sanctity of marriage and emphasised the importance of supporting and preserving marriages to maintain social and family stability. These conversations were not easy but necessary, and recognised that there is a need for a more targeted role by the church to protect the integrity of family, to avoid the desperation that many feel when in loveless and abusive marriages.
12. A final round of consultations was held jointly by the Ministry of Justice and the Ministry of Home Affairs, Safety, and Immigration under the theme of family law in September 2017, looking at issues of accessibility of courts for purposes of divorces, high legal costs relating to divorces, escalating cases of domestic violence, and their relationship to orders for restitution of conjugal rights to be made before a final divorce order is made.
13. The reforms were further approved by Cabinet in 2019, enabling the Bill to follow through the law-making process. However, in 2020, the Ministry sought further input with regard to jurisdictional matters from the Office of the Judiciary as one

of the primary implementing institutions of the divorce law. Therefore, the policy and legislative proposals reflected in this document are a result of the review of the 2004 and 2018 LRDC Divorce Law Reports, the inputs from the stakeholder consultation held in 2017, and the inputs from the Office of the Judiciary.

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14. It is, therefore, clear that the issues we aim to address with this Bill have been longstanding challenges for over 20 years since the project was first initiated. Although this law should have been enacted long ago, the reforms underwent numerous reviews. We are now confident that this new draft piece of legislation meets the needs of the people and compensates for the delayed actions.
15. This legislative framework relates to divorce in civil marriages in Namibia. Civil marriages are those marriages concluded or registered in terms of the Marriage Act, 1961 (Act No. 25 of 1961), marriages recognised in terms of the Recognition of Certain Marriages Act, 1991 (Act No. 18 of 1991) and marriages recognised, in terms of any other law in Namibia, as a valid civil marriage. The proposed legislative framework does not apply to customary marriages and termination of customary marriages. The definitional aspects of marriage are not considered for purposes of this legislation as it will be dealt with in the appropriate marriage and other legislation.
16. It is important to address at this point that the proposed law is not aimed at making divorce easier to break families. When laws are made, we must carefully consider and balance the rights and needs of all individuals involved. Moreover, the proposed reforms seek to address the reality that current divorce laws may not adequately support individuals in untenable and harmful marital situations.

17. The intention is not to undermine the institution of marriage but to provide a legal framework that offers necessary relief and protection to those in desperate situations, such as victims of domestic abuse or irreparable marital breakdowns.
18. Currently, to obtain a divorce, is quite cumbersome. It is often necessary for one party to cite a fault on the part of the other. However, making allegations about a spouse's conduct within matrimonial proceedings to legally dissolve a marriage has been shown to create or exacerbate conflict during already difficult circumstances. It has also often been used to embarrass and humiliate spouses that would otherwise still want to remain in the marriage.
19. As seen in the case of *Voigts v Voigts*², where the plaintiff had brought a divorce action based on the defendant's admitted adultery, could not succeed because the plaintiff had voluntary sexual contact with another man. The only remaining ground was constructive and/or malicious desertion by the defendant. The onus was on the plaintiff to prove both the facts of desertion and the firm intention to leave on the part of the defendant. This is an example that if this law was enacted already, we would not have to deal with issues like this one.
20. In that case the judge said, "to the best of my knowledge, not a single modern constitutional democracy where the fault bases principle of divorce has not been abandoned in favour of "irretrievable breakdown" or some other more flexible criteria such as the parties having lived apart for a certain period.
21. The state of our law is such that even if a court is satisfied that a marriage between two people has no hope ever of being salvaged, the court must keep them together as long as one spouse wants to remain married. Stating further, that it was argued and supported by archaic authority, that under our law, love is an irrelevant consideration when it comes to whether a deserted spouse who does not want to

² *Voigts v Voigts* (I 1704/2009) [2013] NAHCMD 176 (24 June 2013)

continue with a marriage, should be granted their wish. The judge further lamented, “a more fertile ground for violence in the family is hardly imaginable”.

22. The current Namibian divorce law, which the court referred to as an "anachronism," requires an innocent deserted spouse to accept back the deserter if the latter tender's restitution *bona fide*, regardless of whether the innocent party has lost love and affection for the deserter or has no interest in being further married to the deserter considering the desertion. This law urgently needed and needs reform.
23. Furthermore, people have a constitutional right to choose whether they want to remain in a marriage. No religion, moral belief system, or law should force them to stay married. We have revisited this issue for many years, and the previous Ministers of Justice in this August house are aware of the discussions. We have consulted extensively, including with churches and all views were considered and where appropriate were included in the reforms, to address the concerns.

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24. Therefore, the primary focus of the Bill is to:
 - 24.1 promote accessibility of the divorce law;
 - 24.2 promote access to law by bringing the courts closer to the people through extending jurisdiction to the magistrates' courts to hear and finalise divorce proceedings;
 - 24.3 promote a divorce system aimed at promoting reconciliation, reducing trauma experienced by parties to divorce proceedings and children of the marriage, amongst others; and

- 24.4 Provide for incidents where public proceedings would be restricted, and privacy considerations will guide proceedings.
25. To do this, firstly, the Bill abolishes the common law grounds for divorce as well as the grounds that were applied under previous legislation. This reflects the changing contemporary societal values and norms.
26. Secondly, the Bill abolishes orders for restitution of conjugal rights and judicial separation. These concepts are relics of a bygone era and do not serve the needs of our society, particularly because sometimes couples who are in physically abusive relationships are expected to return home to reconcile.
27. In their place, the Bill introduces provisions for the custody, guardianship and access to children of the marriage. This ensures that the best interests of the children are always the primary consideration in divorce proceedings.
28. Moreover, the Bill provides comprehensive guidelines for spousal and child maintenance, addressing the financial and other consequences of divorce. Another important subject addressed in the Bill is the issue of forfeiture of benefits with the aim to ensure that neither party unfairly benefits from the dissolution of the marriage, or is prejudiced because of the separation.

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29. As you can imagine, divorce proceedings are inherently difficult, and to protect both parties, the Bill includes provisions for safeguarding of privacy. The Bill restricts access to and the publication of certain divorce proceedings, to ensure confidentiality and the dignity of the parties is maintained.

30. Furthermore, and very important, the Bill includes necessary amendments to the High Court Act, 1990 (Act No. 16 of 1990) and the Magistrates' Courts Act, 1944 (Act No. 32 of 1944). These amendments are intended to confer jurisdiction on magistrates' courts to deal with divorce proceedings, thereby making the process more accessible and efficient for all Namibians. This means people will not need to travel long distances to access courts as they will attend court in the magisterial districts they live.
31. Currently divorce proceedings costs anything between N\$10,000 - N\$30,000 making it prohibitive for many. This has led to many couples remaining married, until death, despite not living together and often only reconciling in death in some instances for inheritance purposes. This scenario often has very devastating consequences for families and children as spouses would have moved on without getting a divorce. Again, because it is so difficult and sometimes, the one party understandably refuses to let go.
32. The intention is not to make divorces easier and to contribute to the break in the important societal anchor, called the family. Rather, it is intended to contribute to keeping families together that want to be together.
33. It is hoped that this Bill will help our citizens who have found themselves in uncomfortable situations which could not be resolved based on the common law grounds, by providing a more comprehensive and modern legal framework to those facing difficult marital circumstances.

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34. In closing, the Divorce Bill represents a significant step forward in our efforts to modernise and reform our legal system. It aims to provide a fair and equitable framework for dealing with divorce and its related consequences, reflecting our commitment to justice and the rule of law. I therefore urge all members of this

esteemed August House to support the Bill, ensuring that our legal system continues to evolve and remains adaptable and responsive to the needs of our people.

I thank you and so submit.