



REPUBLIC OF NAMIBIA
MINISTRY OF JUSTICE

**POLICY & PROPOSED DIVORCED
LAW FOR NAMIBIA, MARCH 2022**

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1. Policy context

This proposed policy and legislative framework relates to divorce in civil marriages in Namibia. Civil marriages being those 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 Namibian law as a valid civil marriage.

Divorce is the termination of civil marriage by an order of the court, therefore a civil marriage can only be terminated by an order of the court. The legal effect of divorce is that it terminates the marriage and has further implications in relation to custody, guardianship and access to children, the maintenance of parties and children, as well as property and financial consequences.

2. Objectives of the proposed policy and legislative framework

- a. To consolidate and reform the divorce law of Namibia, which is currently governed by common law and various pieces of legislation. Most of the law has been rendered obsolete by the enactment of other laws and the current law is not in line with the existing socio-economic conditions of Namibia.
- b. To enhance access to court and speed up finalisation of divorce matters by empowering the magistrate's courts to deal with certain divorce matters.
- c. To allow for a procedure in joint application proceedings in cases where parties to marriage agree that the marriage has irretrievably broken down.
- d. To promote "DIY" divorces, thus reducing the financial burden on the poor and vulnerable who are unable to afford the high legal costs currently associated with divorce.
- e. To remove the fault-based grounds for divorce and introduce a new system based on irretrievable breakdown.

- f. To abolish the mandatory requirement of issuing restitution of conjugal rights, as it has the likelihood of aggravating family conflict and domestic violence.
- g. To review the current fault-based system of spousal maintenance, and also provide for child maintenance and financial or other consequences of divorce.
- h. To provide for periodical allowance, child maintenance, financial and other consequences of annulment of marriage.
- i. To review the current system of forfeiture of patrimonial benefits, to clarify and align the common law to case law.
- j. To provide for recognition of foreign divorces and annulment of marriages;
- k. To provide for the privacy of certain divorce proceedings and proceedings of annulment of marriage to protect children.
- l. To provide for restriction on the publication of certain court proceedings.
- m. To deal with donations and gifts received during marriage or before marriage.

3. Policy Background

3.1 Brief history of the divorce law reform process

Between 2001 and 2004, the Law Reform and Development Commission of Namibia [LRDC] undertook a project for the reform of the divorce law of Namibia. In 2004 LRDC submitted a report to the Minister responsible for justice at the time. For various reasons, the project did not follow through with the law-making process.

In 2017, the Minister responsible for justice at the time reviewed and revived the project and held a public consultation on the proposed reforms.

Some of the issues identified during the 2017 consultations were; 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.

In 2018 the LRDC submitted another report to the Minister responsible for justice at the time. The Minister reviewed the LRDC report and proposed changes to the proposed policy and law.

Cabinet approved the reform of the divorce law. For various reasons the proposed law did not follow through with the rest of the law-making process.

The current minister responsible for justice reviewed the proposed reform of the divorce law and sought input from the Office of the Judiciary as one of the primary implementing institutions of the divorce law.

The policy and legislative proposals reflected in this document are as 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. The Minister also acknowledged and took notice of the work done by the Legal Assistance Centre of Namibia on the reform of the Namibian divorce law.

3.2 Existing law

The principal legislation governing divorce in Namibia is the Roman-Dutch common law, supplemented by other pieces of legislation (as amended) namely: the Divorce Laws Amendment Ordinance, 1935 (Ordinance No. 18 of 1935); the Matrimonial Causes Jurisdiction Act, 1939 (Act No.22 of 1939); the

Matrimonial Causes Jurisdiction Act, 1945 (Act No.35 of 1945); the Matrimonial Affairs Ordinance, 1955 (Ordinance No.25 of 1955); and the Recognition of Certain Marriages Act, 1991 (Act 18 of 1991).

The High Court Act and ancillary Rules and Practice Directives.

Other laws relating to divorces law amongst others are; the Married Persons Equality Act, 1996 and the Child Care and Protection Act, 2015.

a. Divorce Laws Amendment Ordinance, 1935 (Ordinance No. 18 of 1935)

At common law, there were only two grounds for divorce; namely adultery and malicious desertion.

This Ordinance introduced two additional grounds namely mental illness and habitual criminals.

b. Matrimonial Causes Jurisdiction Act, 1939 (Act No.22 of 1939)

This Act deals with jurisdiction over matrimonial causes (divorce proceedings). The two grounds establishing the jurisdiction of the court are residence for a period of at least one year and domicile.

This Act also provides for the recognition of divorce orders made in a country in which the husband is not domiciled.

c. Matrimonial Causes Jurisdiction Act, 1945 (Act No. 35 of 1945)

This Act extends jurisdictional matters over divorce proceedings.

This Act also provides for the validity of certain foreign divorces orders.

d. Matrimonial Affairs Ordinance, 1955 (Ordinance No. 25 of 1955)

This law provides that the court in divorce proceedings may make orders for sole custody or sole guardianship of minor children and that a spouse with sole guardianship may by testament grant the right of guardianship and custody to any other person.

It also provides that the court may make orders that the guilty spouse must provide maintenance for an innocent spouse until death or remarriage; and also, that court can make a settlement agreement by spouses for maintenance of either of them an order of the court.

e. Recognition of Certain Marriages Act, 1991 (Act 18 of 1991)

This Act provides for the recognition of marriages contract in terms of the SWAPO Family Act, 1977

4. Problem statement

4.1 Outdated, inaccessible and unknown divorce law

The current divorce law is inaccessible, not known and outdated. The divorce law is unknown and inaccessible to the majority of the population, as it is found in various old pieces of legislation and common law. Furthermore, most of the current divorce law has either been amended or repealed by case law or legislation enacted after independence nor is it in line with the current socio-economic circumstance of Namibia.

4.2 Grounds for divorce

a) Currently, there are four grounds of divorce namely adultery; malicious desertion; mental illness and habitual criminal. These grounds (with the exception of mental illness) are based on the principle of fault, meaning the person instituting a divorce action must state and prove the facts establishing at least one of the four grounds. The other party can accept or deny these facts. The court will only grant a divorce order if it is satisfied that the party who instituted the divorce action has proved one of these four grounds.

- b) The current law confines the party/parties to the marriage seeking a divorce order to the restrictive four grounds. It is common knowledge that marriages break down on grounds other than those that are required by the current law. For example, domestic violence [by it physical, verbal, economical, etc.], rape or other sexual offences committed with the family, or the two parties simply agree to divorce because they believe that their marriage has irretrievably broken down.
- c) The fact that the party/parties to the marriage have to state and prove the grounds for is a factor that aggravates family conflict and can likely lead to domestic violence.
- d) Divorces proceedings are held in open court, meaning the party/parties have to appear in court and lead evidence. This process also psychologically impacts the parties who have to stand in open court and lead evidence to establish fault. Furthermore, divorce proceedings are of such nature that the identity of a child or offence of sexual nature linked to a child can be revealed.

4.3 Lengthy process and orders for restitution of conjugal rights

Granting a divorce is a two-stage process in which the court will first grant a conditional order (the “rule nisi” which order is called the order for restitution of conjugal rights). To finalise the divorce and legally end the marriage, the plaintiff must wait at least six weeks from the granting of the rule nisi and can then apply to the court for the decree of divorce to be made final (decree absolute). Due to various reasons, divorce proceedings can last for more than 3 months.

The current law obliges the court to first grant order restitution of conjugal rights order before the final order for divorce is granted. This may not always be conducive and appropriate in cases where domestic violence is involved and thus can aggravate the family conflict.

4.4 Access to courts

Access to divorce courts is limited to the High Court (Main Division and Northern local Division) sitting only in two towns namely Windhoek and Oshakati. This makes courts inaccessible to the larger population of the country consisting of the poor and vulnerable members of society.

It also congests the High Court roll leading to lengthy divorce proceedings.

4.5 High legal fees costs

Parties have a choice to prepare their own divorce proceedings or may make use of the services of legal practitioners. Although do-it-yourself divorces are allowed due to the complexity of some cases and lack of knowledge it may not always be possible for the poor and vulnerable to make use of this means.

As a result, most divorces are dealt with by legal practitioners acting on behalf of a party to the marriage. The fees legal practitioners can charge are as determined in terms of the rules of court. The amount the parties to the marriage have to squeeze out to finalise divorce proceedings can go up to N\$ 20 000 and more. The parties instituting divorce are often poor and vulnerable and unable to pay the fees. Although the Director of Legal Aid, in terms of the Legal Aid Act, assists the poor by assigning legal practitioners, it does not always have the means to do so and the coverage of prospective clients is limited due to the Legal Aid Act, 1990 (Act No. 29 of 1990) Regulations.

5. Commentary on the proposed law [The Bill]

Schedule 2: Jurisdiction of magistrates' courts

To enhance access to courts, the Bill empowers magistrates' courts to deal with divorces. In this sense, it amends the Magistrates Court Act, 1944 as indicated in Schedule 2 to the Bill.

Clause 1: Definitions

Provides for the definitions of keywords in the Bill. Note the definitions of divorce, divorce proceedings and children of the marriage, amongst others.

Clause 2: Ground for divorce

Establishes that the only ground for divorce is the irretrievable breakdown of the marriage.

Abolishes the common law grounds for divorce and repeals the existing grounds for divorce.

Clause 3: Instituting divorce proceedings

A party to a marriage or the parties jointly can institute divorce proceedings with or without the assistance of a legal practitioner.

This clause introduces a new option of joint application. To allow parties to a marriage to jointly institute divorce proceedings by application on the ground of irretrievable breakdown of the marriage.

In terms of the proposed law, the court is no longer obliged to make an order for restitution of conjugal rights before making a final order.

To cater for an element of the proposed law gives the court discretion in contested divorce proceedings to allow a period of one month or less or a longer period to allow such reconciliation to take place. The court will be informed by the nature of the case, any evidence and attitude of the parties, amongst others.

Clause 4: Best interests of the child

Gives emphasis to the importance of considering the child's best interest when making decisions about a child of the marriage.

Clause 5: Resolution of disputes and mediation

- a) Obliges parties to divorce proceedings to attempt to resolve disputes relating to the division of assets, custody, guardianship of, or access to a child of the marriage and the maintenance of a child of the marriage unless in the circumstance of the cases it is not possible to do so.
- b) A legal practitioner who undertakes to represent a party/parties to a divorce proceeding has the duty to inform such parties of the availability of mediation and should encourage mediation unless in the circumstance of the cases it is not possible to do so.
- c) A party/parties to the marriage instituting divorce proceedings may apply to the court for court-connected mediation or may choose to appoint a mediator at their own cost to resolve disputes relating to the division of assets, custody, guardianship of, or access to a child of the marriage and the maintenance of a child of the marriage.
- d) The rules of the court will determine the process relating to mediation.
- e) The party/parties instituting divorce proceedings and the legal practitioner where party/parties are represented must prove that this clause has been complied with. This will be dealt with in the rules of court.

Clause 6: Where there are children of the marriage

- a) Deals with divorce proceedings where there is a child of the marriage. The court may not grant a divorce unless the matters relating to the custody, guardianship of, or access to a child of the marriage and the maintenance of a child of the marriage have been dealt with.
- b) Parties often enter into settlement agreements for this purpose and the court may make such agreements an order of court or court or the court may require a report from a social worker for this purpose.

Clause 7: Safeguards in respect of diminished mental capacity or continued unconsciousness

Provides for the appointment of a *curator ad litem* [a legal practitioner appointed by the court to represent the interest of persons lacking mental capacity] in respect of persons with diminished mental capacity or who suffer from continued unconsciousness and are party to a divorce or annulment of marriage proceeding.

Clause 8: Settlement agreements

In divorce proceedings or proceedings of an annulment of marriage where parties to the marriage have entered into a settlement agreement, the court may make such agreement an order of the court.

Clause 9: Division of assets

- a) A party to a divorce proceeding may apply to the court for an order for division of the assets.

- b) In making such an order, the court must consider factors such as the marital property regime of the parties to the marriage and the provisions of an existing ante-nuptial contract.
- c) The court must also consider factors such as settlement agreements entered into by the parties; duration of the marriage; financial contribution of each party to the marriage and their economic circumstances, the conduct of the party, party to whom custody of the children is accorded; maintenance and any other factors which the court may consider relevant.

Clause 10: Forfeiture of benefits

- a) A party to the marriage who is seeking a divorce order may ask the court for an order of forfeiture of benefits. This is a common law principle that is part of Namibian law: It is based on the principle that ‘No person ought to benefit financially from a marriage which or she causes to fail.’ In terms of this principle a party does not forfeit his/her share of common property, but only the financial benefit he or she would otherwise derive. It is based on fault and two common grounds on which it is sought are; adultery and malicious desertion.
- b) The current Namibian case law reveals that the courts may make general forfeiture orders or specific forfeiture orders but that the party seeking the order must allege and prove certain facts depending on which order the party seeks.
- c) The proposed law clarifies the current law in that the fault is a decisive factor but that the court before making such an order must consider, the nature and severity of the misconduct of the party which led to the breakdown of the marriage; circumstances of the irretrievable breakdown and the duration of the marriage and other factors court considers relevant.

Clause 11: spousal maintenance

A party to the marriage may apply for spousal maintenance, or an interim spousal maintenance pending the granting of the divorce order,

Clause 12: Periodical allowance in the annulment of marriage proceedings

Provides for periodical allowance in the annulment of marriage proceedings. The court may upon application by either party grant an order requiring a party to the annulment of marriage proceedings to secure or pay such periodic sums as the court may deem fit.

Clause 13: Child Maintenance

Authorises the court to make orders relating to child maintenance. Either party to the proceedings may apply for an order of maintenance in respect of a child of the marriage.

Clause 14: Custody or guardianship of, or access to a child of the marriage

Authorises the court to make orders relating to the custody or guardianship of, or access to a child of the marriage, either upon application by a party to the marriage. In arriving at such orders, the court must consider the best interest of the child by having regard to the factors set out in section 3 of the Child Care and Protection Act 3 of 2015.

Clause 15: Joint Custody

Upon application by either party to the marriage, the court may make an order for joint custody of a child of the marriage. In making this order the court will consider factors such as the fitness of the parties to take care of the child; a party's desire for continuous contact with the child; whether the parties are perceived by the child as a source of emotional support; the party's ability to communicate and co-operate in promoting the best interest of the child and whether the parties live in sufficiently close physical proximity to make joint custody workable.

Clause 16: Access to the children of the marriage

Deals with orders relating to the access to the children of the marriage by persons other than the parent of the child. The court must request a social worker's report before deciding on an application made in terms of this clause.

Clause 17: Variation or rescission of orders

Authorises the courts to vary or rescind orders made in respect of child maintenance; spousal maintenance; periodical allowance; custody, guardianship of or access to a child of the marriage.

Clause 18: Recognition of certain foreign divorces and foreign annulment of marriages

Makes provision for the recognition of certain foreign divorces and foreign annulment of marriages. A divorce or an annulment of marriage effected before or after the commencement of this Act in accordance with the law of a foreign country is recognised as valid in Namibia if it complies with the conditions provided for in this clause.

Clause 19: Abolishes orders for the Restitution of conjugal rights and judicial separation.

Abolishes orders for restitution of conjugal rights and judicial separation.

The court may not make an order for restitution of conjugal rights or judicial separation in respect of divorce proceedings instituted after the commencement of this Act.

Clause 20: Privacy of certain proceedings

Makes provision for private hearing of divorce proceedings or annulment of marriage proceedings where there is a likelihood that the hearing of any evidence may bring harm to a child of the marriage.

Clause 21: Restriction on publication of certain information

Deals with the Restriction on publication of certain information relating to divorce or annulment of marriage proceedings.

The clause aims to protect information relating to children and other information.

Certain information can be published as set out in this clause.

A contravention of the provisions of this clause attracts penalties of N\$ 100 000,00 or to imprisonment for a period of five years, or to both such fine and such imprisonment.

Clause 22: Donations and gifts

Deals with donations and gifts prior to, after the marriage and set out that a gift given in anticipation of marriage becomes the asset of the person that received it even after the dissolution of the marriage.

Clause 23: Transitional provisions

The provisions of the Bill do not apply to proceedings instituted before the commencement of this Act or which are pending, and such proceedings must be dealt with in accordance with the law which applied before the commencement of this Act.

Clause 24: Repeals and amendment of laws

Deals with repeals and amendments of laws specified in Schedule 1 and 2 to the Bill.

The High Court Act, 1990, and the Magistrates Courts Act, 1944 are amended to make consequential amendments and to align those laws to the proposed divorce law.

Clause 25: Short title and commencement

The proposed law once enacted will only come into operation after the relevant rules of court have been made.

The Minister responsible for Justice will issue a notice to commence the law at the date specified in the notice

Schedule 1

Contains a list of the laws that the Act repeals.

No. of year and law	Short Title	Extend of Repeal
Ordinance No. 18 of 1935	Divorce Laws Amendment Ordinance, 1935	The repeal of the whole.
Ordinance No. 25 of 1955	Matrimonial Affairs Ordinance, 1935	The repeal of the whole.
Ordinance No. 9 of 1967	Matrimonial Affairs Amendment Ordinance	The repeal of the whole.
Act No. 22 of 1939	Matrimonial Causes Jurisdiction Act, 1939	The repeal of the whole.
Act No. 17 of 1943	Matrimonial Causes Jurisdiction Amendment Act, 1943	The repeal of the whole.
Act No. 35 of 1945	Matrimonial Causes Jurisdiction Amendment Act, 1945	The repeal of the whole.
Act No. 37 of 1953	Matrimonial Affairs Act, 1953	The repeal of the whole.

Schedule 2

Contains the laws which the Act amends and sets out the extent to which they are amended. See the Bill.

No. of year and law	Short Title	Section(s) Amended
Act No. 16 of 1990	High Court Act No.16 of 1990	Section 1 Section 18 Section 16 (substitution) Section 39
Act No. 32 of 1944	Magistrates Courts Act 32 of 1944	Section 1 Section 2 Section 8 A (insertion) Section 25 Section 28

		Section 29 Section 29 A (insertion) Section 46
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6. Financial Implications

The financial implications involved are:

- a) Capacity building for judicial offices and staff members;
- b) Developing rules of court and practice directives;
- c) Public education;
- d) Allocation of resources to give effect to implement the law;
- e) Public education;
- f) Capacity building for social workers.

7. Access to Related Documents

The following documents can be accessed at the stated places:

1. The Bill is available at the Ministry of Justice website: <http://www.moj.gov.na> or can be obtained on request from the contact persons listed on page one of this document.
2. Law Reform and Development Commission Report on Divorce, 2004 and 2018 can be obtained via the NamibLII website <http://namiblii.org> or from the public relations officer listed on page one of this document
3. Feedback Report on Consultations, 2017 can be obtained from the public relations officer listed on page one of this document.
4. Legal Assistance Centre Divorce Law proposals are available at: <http://www.lac.org.na>