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**Respect, Protect and Fulfill:  
Legislating for Women's Rights  
in the Context of HIV/AIDS**

**Volume One: Sexual and Domestic Violence**  
Module 2: Domestic Violence

Canadian HIV/AIDS Legal Network  
2009



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Volume One: Sexual and Domestic Violence — Module 2: Domestic Violence**

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**About the Canadian HIV/AIDS Legal Network**

The Canadian HIV/AIDS Legal Network ([www.aidslaw.ca](http://www.aidslaw.ca)) promotes the human rights of people living with and vulnerable to HIV/AIDS, in Canada and internationally, through research, legal and policy analysis, education and community mobilization. The Legal Network is one of the world's leading advocacy organizations working on the legal and human rights issues raised by HIV/AIDS.

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If you are using *Respect, Protect and Fulfill* in your work for women's rights or if relevant law reforms are being considered in your country, please contact the Canadian HIV/AIDS Legal Network at: [womensrights@aidslaw.ca](mailto:womensrights@aidslaw.ca)

The Legal Network may be able to offer technical support or collaboration in undertaking national law reform advocacy to protect women's rights in the areas of sexual and domestic violence, and family and property issues. Please send inquiries to: [womensrights@aidslaw.ca](mailto:womensrights@aidslaw.ca).

*Respect, Protect and Fulfill: Legislating for Women's Rights in the Context of HIV/AIDS*  
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## About this publication

Legislation can be instrumental in impeding or promoting initiatives to address the HIV/AIDS epidemic. The widespread legal, social, economic and political ramifications of the epidemic make it necessary to review and reform a broad range of laws. Within a context of entrenched gender discrimination, the devastating impacts of HIV/AIDS, widespread poverty and increasing competition for resources such as property and land, legislative solutions to the denial of women's rights are urgently needed. Law reform is not a complete solution to the HIV epidemic among women, but it is a necessary and often neglected step.

This project draws together international human rights law and illustrative examples from various jurisdictions as the basis for a legal framework to respect, protect and promote women's rights in the context of HIV/AIDS. *Respect, Protect and Fulfill* is intended as a tool to assist advocates and policy-makers as they approach the task of reforming or developing laws to meet the legal challenges posed by the HIV epidemic. It is not intended for any one country or set of countries. The project focuses on sub-Saharan Africa, but it is designed to be adaptable to the needs of countries in other regions.

Comprehensive consultations were conducted during the drafting of this publication. Draft versions of the text were reviewed by various experts, including representatives of women's legal clinics, AIDS service organizations and organizations of people living with HIV, research and policy institutions, and human rights organizations. Three consultation meetings were held in December 2006, October 2007 and January 2008; and the draft text was circulated electronically to a number of persons and organizations for further input. The final document, therefore, has benefited from the feedback of a wide range of experts in the fields of HIV/AIDS, human rights and women's rights.

## How to use this publication

*Respect, Protect and Fulfill* consists of eight modules in two volumes, as follows:

### Volume One: Sexual and Domestic Violence

- (1) Rape and Sexual Assault
- (2) Domestic Violence

### Volume Two: Family and Property Issues

- (1) Marriage
- (2) Domestic Partnerships
- (3) Property in Marriage
- (4) Divorce
- (5) Inheritance
- (6) Implementation Provisions

There is considerable overlap and intersection among all of these issues; readers are thus encouraged to consult all eight modules. In addition, each module is drafted on the

assumption that the country adopting it has implemented similar legislation on the issues set out in the other modules. Accordingly, provisions are cross-referenced to one another. In adapting the legislative provisions to a particular jurisdiction, appropriate revisions and amendments will need to be made.

The issues addressed in these modules also necessarily intersect with other issues and the rights of other groups, such as the rights of children, indigenous communities and persons with disabilities. It is beyond the scope of this project to include provisions specific to all of these issues and groups, but it is important to explicitly note their importance and interdependence. It is our hope that this work on women's rights can be used alongside other human rights-based resources in the development of a comprehensive legislative response to HIV/AIDS.

Each module features a prefatory note, proposed legislative text, and commentaries supporting the provisions in the proposed legislative text. The prefatory notes and commentaries present the rationale for reforming or enacting laws and policies in the areas covered by the modules, and discuss the relevant international and regional human rights conventions. On certain issues, two or more options for legislative texts are provided to allow countries to develop laws that are most suitable to their local contexts. As well, some of the provisions have been labelled as "optional." These provisions may or may not be applicable, depending on the situation in a particular country. Where square brackets appear in a draft article — for example, "[monetary amount]," "[relevant state ministry]" or "[period of time]" — the relevant information needs to be added in order to adapt the provision to a specific country. (This is often used for amounts of fines, time periods, the titles of government departments or officials, and the titles of other legislation, all of which vary from country to country.)

This publication is heavily footnoted. The notes provide additional information on the issues being addressed, as well as full references. If the same source is cited more than once in a module, the second and subsequent references to that source are abbreviated and contain the word "supra."

The modules included in this publication are not intended to comprise a stand-alone bill or act, but rather to be the foundation for progressive, rights-protecting laws on each issue. Some of the issues discussed in the modules have been addressed in legislation only recently or inadequately. Therefore, while all of the proposed provisions are based on the best available evidence and human rights principles, some have yet to be tested. Furthermore, depending on the legislation currently in force in a given country, provisions adapted from this publication may be most appropriately placed within various other pieces of legislation; or sets of provisions could be enacted as specific bills, or expanded to include other technical provisions necessary for the legislation to function within the jurisdiction's legal framework.

# Volume One Introduction

## Women and HIV/AIDS

Over 25 years into the epidemic, it is now widely recognized that laws and policies must affirm and protect women's rights in order to mount an effective response to HIV/AIDS. Governments have repeatedly declared their commitment to respect, protect and fulfill women's rights and acknowledged the linkages between HIV and gender inequality.<sup>1</sup> To this end, the U.N. and other international agencies have developed various programs to respond to the gender dimensions of the epidemic and work towards gender equality.<sup>2</sup> Yet, women's legal, economic and social subordination continues to catastrophically increase their risk of HIV infection and constrain their access to HIV testing, treatment, care and support.<sup>3</sup>

Violence against women is a severe manifestation of gender inequality, with devastating impacts on the lives of women and girls worldwide. The violence is often fuelled by longstanding social and cultural norms that allow it to be tolerated in society. All too often, such violence is overlooked, or its significance is diminished, by police, judges, community and religious leaders, and other authority figures. Violence against women is also a global health crisis, a human rights atrocity, and often both a cause and consequence of HIV.

Women bear a disproportionate burden of the HIV epidemic, especially in sub-Saharan Africa where women are more likely to be infected than men and more likely to be the ones caring for others who are infected with HIV. Young women are particularly affected. In South Africa, for example, women aged 15 to 24 are four times more likely

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<sup>1</sup> See, for example, the *Declaration of Commitment on HIV/AIDS* issued by heads of state and government representatives at the U.N. General Assembly Special Session on HIV/AIDS in 2001, which stresses that "gender equality and the empowerment of women are fundamental elements in the reduction of the vulnerability of women and girls to HIV/AIDS."

<sup>2</sup> For example, a U.N. Secretary General's Task Force on Women, Girls and HIV/AIDS in Southern Africa was established in 2003, The Global Coalition on Women and AIDS was launched by UNAIDS in 2004; see <http://womenandaids.unaids.org> and UNAIDS developed the *UNAIDS Action Framework: Addressing Women, Girls, Gender Equality and HIV* in 2009.

<sup>3</sup> See, for example, Committee on the Elimination of Discrimination against Women (CEDAW Committee), "Concluding Observations: Namibia," U.N. Doc. A/52/38/Rev.1, 1997, para. 79, where the Committee provides, "HIV and AIDS [a]re increasing at an alarming rate, especially among women, as a result of their low social and economic status." According to UNAIDS and the World Health Organization (WHO), in sub-Saharan Africa almost 61 percent of adults living with HIV in 2007 were women: UNAIDS and WHO, *AIDS Epidemic Update*, December 2007, p. 8. Furthermore, young women and girls aged 15–24 who have only recently become sexually active are more than twice as likely to be infected than males in the same age group. The gap is larger still in Southern Africa where, in Zambia and Zimbabwe, girls and young women make up close to 80 percent of all young people aged 15–24 who are living with HIV: UNAIDS, *Facing the Future Together: Report of the Secretary General's Task Force on Women, Girls and HIV/AIDS in Southern Africa*, July 2004, p. 9, online: <http://womenandaids.unaids.org/regional/docs/Report%20of%20SG%27s%20Task%20Force.pdf>.

to be HIV-infected than are young men, and one in three women aged 30 to 34 were living with HIV in 2005.<sup>4</sup>

A combination of factors heighten women's vulnerability to HIV. Women's physiology renders them more likely to become infected if exposed to the virus; and social and cultural factors exacerbate that vulnerability. Violence against women increases their risk of HIV infection which, in turn, elevates the risk that they will face further violence.<sup>5</sup> Unless these connections between violence and HIV are understood and addressed, the epidemic will continue to escalate among women.

While rape, sexual assault and domestic violence are crimes experienced by people of all ages, statistics show that sexual violence and other forms of domestic violence are experienced primarily by women and girls. Worldwide, one in five women are estimated to experience rape or attempted rape in their lifetime and one in three women will be beaten, coerced into sex or otherwise abused, most commonly by a family member or an acquaintance.<sup>6</sup> A 2005 study of 10 countries by the World Health Organization (WHO) reported that between six and 59 percent of women had experienced sexual violence by an intimate partner.<sup>7</sup> The primary targets of sexual violence are often young women and girls.<sup>8</sup> In South Africa, for example, police statistics show that more than 40 percent of rape survivors who reported their assaults to the police in 2002–2003 were girls under 18 years of age, and 14 percent of those who reported were 12 years old or younger.<sup>9</sup>

The same WHO study reported that between 13 percent (in Japan) and 61 percent (in Peru) of women have been physically abused by a male partner at some point in their

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<sup>4</sup> UNAIDS/WHO, *AIDS Epidemic Update: December 2006*, p. 11, online: [www.unaids.org/en/HIV\\_data/epi2006/default.asp](http://www.unaids.org/en/HIV_data/epi2006/default.asp).

<sup>5</sup> See U.N. Commission on Human Rights, "Elimination of Violence Against Women," Resolution 2004/46, Fifty-Sixth Meeting (20 April 2004), which states that

... violence against women and girls, including rape, female genital mutilation, incest, early and forced marriage, violence related to commercial sexual exploitation, including trafficking, as well as economic exploitation and other forms of sexual violence, increases their vulnerability to HIV/AIDS, that HIV infection further increases women's vulnerability to violence, and that violence against women contributes to the conditions fostering the spread of HIV/AIDS. (para. 9)

<sup>6</sup> United Nations Population Fund (UNFPA), *State of World Population 2005 — The Promise of Equality: Gender Equity, Reproductive Health & MDGs*, c. 7, online: [www.unfpa.org/swp/2005/english/ch7/index.htm](http://www.unfpa.org/swp/2005/english/ch7/index.htm).

<sup>7</sup> WHO, *WHO Multi-Country Study on Women's Health and Domestic Violence Against Women*, Summary Report, 2005, p. 6, online: [www.who.int/gender/violence/who\\_multicountry\\_study/summary\\_report/summary\\_report\\_English2.pdf](http://www.who.int/gender/violence/who_multicountry_study/summary_report/summary_report_English2.pdf).

<sup>8</sup> The UNFPA reports that nearly 50 percent of all sexual assaults worldwide are against girls 15 years old or younger: *UNFPA State of World Population 2005* (supra).

<sup>9</sup> Human Rights Watch (HRW), *Deadly Delay: South Africa's Efforts To Prevent HIV in Survivors of Sexual Violence*, 2004, c. 4, online: <http://hrw.org/reports/2004/southafrica0304/>.

lives.<sup>10</sup> It further reported that between six percent (in Japan) and 59 percent (in Ethiopia) of women had experienced sexual violence by an intimate partner.<sup>11</sup> Instead of the home being a “safe haven” for women, in many countries women are more likely to experience violence in their domestic relationships than in other aspects of their lives.

With violence against women being as pervasive and as global as these statistics suggest, the imperative to take action is clear. It is noteworthy, however, that such statistics do not represent the full extent of violence against women; it has long been established that only a small percentage of sexual assaults are reported to police or reflected in surveys.<sup>12</sup> In other words, reporting rates do not necessarily reflect crime rates.<sup>13</sup>

## Women, violence and human rights

Admittedly, there remains much to be done in order to adequately address the issue of violence against women, but the international community has increasingly recognized that violence against women is a human rights violation which intersects with HIV/AIDS, and that combatting sexual and domestic violence requires the empowerment of women.<sup>14</sup> For example, the U.N. Commission on Human Rights has stressed that the advancement of women and girls is the key to reversing the HIV/AIDS epidemic.<sup>15</sup> Moreover, the Commission emphasized that violence against women and girls increases their vulnerability to HIV, that HIV infection further increases women’s vulnerability to violence, and that violence against women contributes to the conditions fostering the spread of HIV.<sup>16</sup> Similarly, both the 2001 U.N. General Assembly Special Session

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<sup>10</sup> WHO, *WHO Multi-Country Study on Women’s Health and Domestic Violence Against Women* (supra), p. 6. The ten countries were: Bangladesh, Brazil, Ethiopia, Japan, Namibia, Peru, Samoa, Serbia and Montenegro, Thailand and Tanzania.

<sup>11</sup> *Ibid.*, p. 7.

<sup>12</sup> U.N. Commission on Human Rights, *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences (R. Coomarasamy): Integration of The Human Rights of Women and the Gender Perspective: Violence Against Women*, Addendum 1: “International, regional and national developments in the area of violence against women 1994–2003,” 2003, Fifty-Ninth Session, U.N. Doc. E/CN.4/2003/75, para. 13, online: [www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.2003.75.Add.1.En?Opendocument](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.2003.75.Add.1.En?Opendocument).

<sup>13</sup> According to the Eighth Survey of the *United Nations Survey of Crime and Criminal Justice Systems* (UNCJS) (covering the period 2000–2001), out of 53 countries that provided data on the rate of reported rapes per 100 000 people, South Africa ranked first (with 121), Canada second (with 77), Namibia third (with 46–49), and the U.S. fourth (with about 32). The Legal Assistance Centre (LAC) in Namibia noted that high levels of reporting could be a result of positive factors such as higher official sensitivity to rape; well established bureaucratic recording practices; increased awareness of the crime on the part of both police and members of the public; and progressive empowerment of women. See LAC, *Rape in Namibia: An Assessment of the Operation of the Combating of Rape Act 8 of 2000*, 2006, c. 2.

<sup>14</sup> See U.N. General Assembly, “Intensification of Efforts to Eliminate All Forms of Violence Against Women,” Resolution 63/155, 30 January 2009.

<sup>15</sup> U.N. Commission on Human Rights, “The Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health,” Resolution 2004/27, 16 April 2004.

<sup>16</sup> U.N. Commission on Human Rights, “Elimination of Violence Against Women” (supra), para. 9.

(UNGASS) *Declaration of Commitment on HIV/AIDS* and the 2006 U.N. General Assembly Resolution, *Political Declaration on HIV/AIDS*, emphasize the need to integrate the rights of women and girls into the global struggle against HIV/AIDS.<sup>17</sup> The *International Guidelines on HIV/AIDS and Human Rights* further highlight the need for legislation addressing discrimination and violence against women.<sup>18</sup>

In legislating in the area of sexual violence, countries must necessarily have regard to their obligations under applicable international law. Of particular relevance with respect to legislating against sexual and domestic violence are the following human rights:

- the right to the highest attainable standard of health;<sup>19</sup>
- the right to life;<sup>20</sup>
- the right to freedom from cruel, inhuman or degrading treatment or punishment;<sup>21</sup>
- the right to be free from slavery and servitude;<sup>22</sup>
- the right to liberty and security of the person;<sup>23</sup>
- the right to non-discrimination and equal protection of the law;<sup>24</sup> and
- the right to be protected from violence.<sup>25</sup>

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<sup>17</sup> U.N. General Assembly, *Declaration of Commitment on HIV/AIDS*, (Twenty-Sixth Special Session), U.N. Doc A/RES/S-26-2, 2 August 2001, para. 61; U.N. General Assembly, *Political Declaration on HIV/AIDS*, 87<sup>th</sup> plenary meeting, 2 June 2006, U.N. Doc A/RES/60/262, paras. 30–31.

<sup>18</sup> UNAIDS and Office of the High Commissioner for Human Rights (OHCHR), *International Guidelines on HIV/AIDS and Human Rights, 2006 Consolidated Version*, 2006, guideline 8. Online: [www.ohchr.org/english/issues/hiv/guidelines.htm](http://www.ohchr.org/english/issues/hiv/guidelines.htm).

<sup>19</sup> International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 U.N.T.S. 3 (entered into force 3 January 1976) [ICESCR], art. 12; Convention on the Elimination of all Forms of Discrimination Against Women, 18 December 1979, 1249 U.N.T.S. 13 (entered into force 3 September 1981) [CEDAW], art. 12; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 13 September 2000, O.A.U. Doc. CAB/LEG/66.6 (entered into force 25 November 2005) [Protocol on the Rights of Women in Africa], art. 14.

<sup>20</sup> *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976) [ICCPR], art. 6; Protocol on the Rights of Women in Africa, art. 4.

<sup>21</sup> ICCPR, art. 7; Protocol on the Rights of Women in Africa, art. 4.

<sup>22</sup> ICCPR, art. 8.

<sup>23</sup> ICCPR, art. 9 and 10; Protocol on the Rights of Women in Africa, art. 4.

<sup>24</sup> ICCPR, art. 26; Protocol on the Rights of Women in Africa, art. 8.

<sup>25</sup> Women's right to be free from sexual violence is explained in General Recommendation No. 19 of the CEDAW Committee, para. 24(b): "States parties should ensure that laws against family violence and abuse, rape, sexual assault and other gender-based violence give adequate protection to all women, and respect their integrity and dignity. Appropriate protective and support services should be provided for victims. Gender-sensitive training of judicial and law enforcement officers is essential for the effective implementation of the Convention [on the Elimination of All Forms of Discrimination Against Women]": CEDAW Committee, "General Recommendation No. 19: Violence Against Women," (Eleventh Session, 1992), U.N. Doc A/47/38, 1993, paras. 24(b) and (k), online: [www1.umn.edu/humanrts/gencomm/genr19.htm](http://www1.umn.edu/humanrts/gencomm/genr19.htm).

**The right to health:**

Violence violates bodily integrity and the security of the person, and poses serious threats to physical and psychological health. The normative content of the right to the highest attainable standard of physical and mental health — Article 12 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) — contains the right of every person to control one’s health and body, which includes the right to make autonomous decisions over one’s sexuality without interference.<sup>26</sup>

**The right to life:**

The right to life has been characterized as “the supreme right,” from which no derogation is permitted.<sup>27</sup> The right to life is put at risk directly through sexual assault, rape and physical attacks, as injuries sustained can be life-threatening and can cause severe emotional distress. HIV transmission occurring as a result of sexual violence poses a further risk to the right to life. As with other rights, the right to life requires that states adopt positive measures to fulfil their obligations. In addition to preventing and punishing crimes of sexual and domestic violence, the provision of HIV post-exposure prophylaxis and appropriate reproductive health services to survivors of sexual violence may be required.<sup>28</sup>

**The right to be free from torture and other cruel, inhuman or degrading treatment or punishment:**

Article 7 of the *International Covenant on Civil and Political Rights* (ICCPR), which prohibits torture or other forms of cruel, inhuman or degrading treatment or punishment, is aimed at protecting the dignity and integrity of the individual. It covers not only acts that cause physical pain, but also those that cause mental suffering to the survivor.<sup>29</sup> Ensuring the right to be free from torture and cruel, inhuman or degrading treatment, therefore, includes protection from sexual violence and its consequences. For example, the U.N. Special Rapporteur on torture looked at questions concerning torture directed disproportionately or primarily against women, and found that rape and other forms of sexual assault could constitute torture. He commented that when sexual abuse occurred in the context of custodial detention, interrogators were said to have used rape to extract

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<sup>26</sup> U.N. Committee on Economic, Social and Cultural Rights, “General Comment No. 14: The Right to the Highest Attainable Standard of Health,” 8 November 2000, U.N. Doc. E/C.12/2000/4, Twenty-Second Session, para. 8. The Committee on Economic, Social and Cultural Rights is the U.N. body responsible for monitoring compliance with the ICESCR. Online: [www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/40d009901358b0e2c1256915005090be?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/40d009901358b0e2c1256915005090be?Opendocument).

<sup>27</sup> U.N. Human Rights Committee, “General Comment No. 6: The Right to Life (Article 6),” 1982, Sixteenth Session, para. 1, online: [www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/84ab9690ccd81fc7c12563ed0046fae3?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/84ab9690ccd81fc7c12563ed0046fae3?Opendocument).

<sup>28</sup> The term “survivor” is used throughout this volume to refer to a person who has experienced rape, sexual assault or violence. Many anti-violence advocates prefer the term “survivor” to “victim” as it is felt to be more empowering and connotes the holistic life experience of the person following her or his experience or experiences of violence.

<sup>29</sup> U.N. Human Rights Committee, “General Comment No. 20: Article 7,” 1992, Forty-Seventh Session, paras. 2 and 5, online: [www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/6924291970754969c12563ed004c8ae5?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/6924291970754969c12563ed004c8ae5?Opendocument).

confessions or information, to punish detainees or to humiliate them. He found that rape was an especially traumatic form of torture for the survivor, with insidious correlative consequences.<sup>30</sup>

### **The right to non-discrimination and equal protection under the law:**

States are obligated to take measures to eliminate violence against girls and women, to ensure the law protects them equally, and to provide them with access to health and social services without discrimination.<sup>31</sup> The Committee on the Elimination of Discrimination Against Women (CEDAW Committee), which oversees the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW), has recommended that these obligations extend beyond the justice system and encompass violence prevention and protection measures, including counselling and support services for survivors of rape and sexual assault.<sup>32</sup> International human rights organizations have reaffirmed this point, arguing that protective measures ought to “include provision of medical and psychological assistance to girls who are survivors of violence.”<sup>33</sup>

### **The right to be protected from violence:**

Under international human rights law, governments are responsible for preventing, eradicating and punishing sexual violence whether it occurs in the public or private sphere.<sup>34</sup> Article 2 of CEDAW requires that states parties pursue a policy of eliminating discrimination against women and, to that end, “take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.”<sup>35</sup> General Recommendation 19 of the CEDAW Committee states that violence against women, including violence against the

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<sup>30</sup> U.N. Commission on Human Rights, *Report of the Special Rapporteur on Torture (N.S. Rodley): Question of the Human Rights of all Persons Subjected to Any Form of Detention or Imprisonment, in Particular: Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Doc E/CN.4/1995/34, 1995.

<sup>31</sup> See art. 26 of the ICCPR. The *Declaration on the Elimination of Violence Against Women* urges states, in art. 4(c), to “exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons”: *Declaration on the Elimination of Violence Against Women*, 20 December 1993, U.N. G.A. res. 48/104, UN Doc. A/48/49 (1993) [DEVAW]; CEDAW, art. 12; Protocol on the Rights of Women in Africa, art. 14.

<sup>32</sup> See CEDAW Committee, “General Recommendation No. 19 (supra), paras. 24(b) and (k).

<sup>33</sup> HRW, *Deadly Delay* (supra).

<sup>34</sup> The 2006 report (E/CN.4/2006/61) of the Special Rapporteur on Violence Against Women, Its Causes and Consequences to the U.N. Commission on Human Rights focuses on the due diligence standard as established in the *Declaration on the Elimination of Violence Against Women*. Article 4(c) of that instrument provides that states shall “[e]xercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons.” The CEDAW Committee has stated that the obligation of eradicating discrimination against women, including rape and sexual assault, is not restricted to those actions carried out by or on behalf of governments. See CEDAW Committee, “General Recommendation No. 19” (supra).

<sup>35</sup> CEDAW, art. 2(f).

family, is discrimination within the terms of CEDAW.<sup>36</sup>

Some regional treaties set out specific obligations with respect to protecting women from violence. For example, Article 4 of the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* (Protocol on the Rights of Women in Africa) sets out that, amongst other things, states parties

shall take appropriate and effective measures to: a) enact and enforce laws to prohibit all forms of violence against women including unwanted or forced sex whether the violence takes place in private or public; b) adopt such other legislative, administrative, social and economic measures as may be necessary to ensure the prevention, punishment and eradication of all forms of violence against women, and; c) identify the causes and consequences of violence against women and take appropriate measures to prevent and eliminate such violence.

Article 5(d) of the Protocol on the Rights of Women in Africa mandates that states parties must protect women who are at risk of being subjected to harmful practices, including all forms of violence, abuse and intolerance.

## Due diligence

Under international human rights law, states have an obligation to act with due diligence to protect human rights. Whether or not the violation is committed by a state or non-state actor, they must take action to prevent and redress human rights violations. In 2003, the U.N. Human Rights Commission reiterated the obligation of states to exercise due diligence to prevent, investigate and punish acts of violence against women and girls.<sup>37</sup> Consistent with this, the U.N. Special Rapporteur on Violence Against Women, Its Causes and Consequences noted that

if we continue to push the boundaries of due diligence in demanding the full compliance of States with international law, including to address the root causes of violence against women and to hold non-State actors accountable for their acts of violence, then we will move towards a conception of human rights that meets our aspirations for a just world free of violence.<sup>38</sup>

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<sup>36</sup> Para. 31, A/47/38.

<sup>37</sup> U.N. Human Rights Commission, *Resolution on the Elimination of Violence Against Women*, 2003/45, para. 14, online: [www.unhcr.ch/Huridocda/Huridoca.nsf/0/92369a7e29927af3c1256d1f004196ce?Opendocument](http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/92369a7e29927af3c1256d1f004196ce?Opendocument). See also, U.N., *Report of the Ad-hoc Committee of the Whole of the Twenty-Third Special Session of the General Assembly*, Twenty-Third Special Session, Supplement No. 3, U.N. Doc. A/S-23/10/Rev.1, 2000, para. 13, online: [www.un.org/womenwatch/daw/followup/as2310rev1.pdf](http://www.un.org/womenwatch/daw/followup/as2310rev1.pdf).

<sup>38</sup> U.N. Human Rights Commission, *Report of the Special Rapporteur on Violence, Its Causes and Consequences (Y. Ertürk): Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women — The Due Diligence Standard as a Tool for the Elimination of Violence Against Women*, 2006, U.N. Doc. E/CN.4/2006/21, Sixty-Second Session.

International jurisprudence has also underscored the importance of demonstrating due diligence in the context of preventing sexual violence. The European Court of Human Rights, upon reviewing several national and international laws, has recognized that, under Article 3 (prohibition of degrading treatment) and Article 8 (right to respect for private life) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, member states have a positive obligation both to enact criminal legislation to effectively punish rape, and to apply this legislation through effective investigation and prosecution.<sup>39</sup> Domestically, certain high courts have also recognized that the right to be free from violence is indicative of a legal duty resting on the state to act positively to prevent violent crime, including sexual assault and rape.<sup>40</sup>

In 2001, the Inter-American Commission on Human Rights explicitly applied the due diligence doctrine to the issue of domestic violence, concluding that Brazil had failed to exercise due diligence to prevent and respond to domestic violence.<sup>41</sup> As well, in 2005, the CEDAW Committee made a decision under the *Optional Protocol to CEDAW* on a case concerning domestic violence (*A.T. v. Hungary*, 2005) and found that the state party had failed to fulfil its obligations to prevent violence and protect the complainant against its consequences. The due diligence standard informed its analysis.<sup>42</sup>

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<sup>39</sup> See *M.C. v. Bulgaria* (application no. 39272/98), 2003 (European Court of Human Rights).

<sup>40</sup> See *Ghia Van Eeden (Formerly Nadel) v. Minister of Safety and Security*, 2001(4) SA 646 (T), para. 18 (South African Supreme Court of Appeal); *Carmichele v. Minister of Safety and Security* [2001] ZACC 22, (South African Constitutional Court): A man who was free on bail after being charged with rape attacked and injured another woman. The police and prosecutor were held liable for damages to this second survivor, because they failed to exercise their duties with respect to the bail matter in a reasonable fashion. They were found to have neglected to put relevant information before the court which would have alerted the court to the danger of future violence by the man freed on bail. In Canada, the civil liability of public authorities in the context of sexual assault was significantly broadened by *Jane Doe v Metropolitan Toronto (Municipality) Commissioners of Police*, (1998), 39 O.R. (3d) 487 (Ontario Court, General Division), where police were held liable for breaching their duty of care by failing to warn Jane Doe and other affected women of the danger that the police knew they might face as potential victims of a serial rapist who was targeting women with a particular profile in a particular neighbourhood. The Court also found that the actions of the police constituted gender discrimination and, therefore, violated Jane Doe's rights to equal protection of the law and to security of the person. For further discussion of positive obligations, see H. Combrinck and Z. Skepu, *Bail in Sexual Assault Cases: Complainants' Experiences — Second Research Report: 2002–2003*, 2003, c. 6 (based on research conducted by The Consortium on Violence Against Women: Gender Project, Community Law Centre, University of the Western Cape; the Institute of Criminology, University of Cape Town; and the Rape Crisis, Cape Town), online: [www.communitylawcentre.org.za](http://www.communitylawcentre.org.za).

<sup>41</sup> Inter-American Commission on Human Rights, Report No. 54/01, Case 12.051, Maria da Penha Maia Fernandes (Brazil), 16 April 2001.

<sup>42</sup> CEDAW Committee, "Views of the Committee on the Elimination of Discrimination Against Women under Article 7, Paragraph 3, of the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women*," Communication No. 2/2003, *Ms. A.T. v. Hungary*, (adopted on 26 January 2005, Thirty-Second Session), online: [www.un.org/womenwatch/daw/cedaw/cedaw32/views/A.T.-v-Hungary-2-2003.pdf](http://www.un.org/womenwatch/daw/cedaw/cedaw32/views/A.T.-v-Hungary-2-2003.pdf).

## The need for law reform

In order to fully protect women’s rights and stem the spread of HIV, preventing crimes of violence against women and responding appropriately when they do occur are important priorities for governments to adopt. Reforming existing laws that address sexual and domestic violence, or adopting new laws where laws are lacking, is one important aspect of governments’ response. To be most effective, national legislation should reflect progress in human rights jurisprudence and policy guidance at national, regional and international levels.

There are many challenges to progressive legal reform with respect to issues of violence against women — including a lack of political will, resistance to legislating on matters characterized as “private,” the multifaceted needs of survivors, and limitations to evidence and witness testimony for criminal trials — as well as a widespread recognition amongst anti-violence advocates that legal solutions on their own are insufficient to change the pervasive culture of violence. Despite these challenges, law reform remains an essential component in the struggle to end violence against women, and appropriate legislation can contribute to an enabling environment for the realization of gender equality. With the commitment and advocacy of women, civil society groups, traditional leaders, parliamentarians and others, legislating for women’s human rights holds promise for women’s empowerment and can stem the harms caused by the HIV/AIDS pandemic.



# Module 2: Domestic Violence

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# Prefatory Note

## Women, domestic violence and HIV

Far from being isolated or rare aberrant acts, violent attacks in domestic relationships are a daily reality for millions of women all over the world. Domestic violence is a major contributor to the ill-health of women. The impacts go far deeper than the immediate harms caused to the survivors.<sup>1</sup> In most cases, states have failed to respond to the devastating impacts of domestic violence on the rights of women.

Domestic violence takes many forms and is predominantly committed by men against women.<sup>2</sup> It is both a consequence and a cause of gender inequality, reflecting unequal power relations between the sexes and embedded in the cultural, social, political, economic and institutional practices of many countries. While this complex social issue is still considered by many people as a private or a relatively minor problem, since the 1990s international attention has increasingly focused on the seriousness of the public health and human rights dimensions of the problem.<sup>3</sup>

Domestic violence takes many forms, including physical abuse (for example, slaps, punches, kicks, assaults with a weapon, forcible confinement), sexual abuse (for example, rape, unwanted sexual touching, being forced or coerced into performing sexual acts which are humiliating or degrading), economic abuse (for example, unreasonable deprivation, destroying, damaging or hiding property), intimidation and harassment. Whatever its form, domestic violence constitutes a threat to the health and safety of survivors, and a human rights violation that states and the international community can not justifiably ignore.

A combination of factors heighten women's vulnerability to HIV. Simple physiology makes women more likely to become infected if exposed to the virus, and social and cultural factors exacerbate that vulnerability. Violence against women increases their risk of HIV infection which, in turn, elevates the risk that they will face further violence.<sup>4</sup>

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<sup>1</sup> For the purposes of this draft legislation, the term “domestic violence” often refers to violence that is perpetrated by one partner against another in an intimate relationship; but the term also includes violence against children, the aged, domestic workers, etc.

<sup>2</sup> U.N. Commission on Human Rights, *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences (R. Coomarasamy): A Framework for Model Legislation on Domestic Violence*, U.N. Doc. E/CN.4/1996/53/Add.2, 1996, [hereinafter: “Special Rapporteur, *Framework for Model Legislation*”], para. 29.

<sup>3</sup> World Health Organization (WHO), *Multi-Country Study on Women's Health and Domestic Violence Against Women: Summary Report*, 2005, p. 1. Online: [www.who.int/gender/violence/who\\_multicountry\\_study/summary\\_report/summary\\_report\\_English2.pdf](http://www.who.int/gender/violence/who_multicountry_study/summary_report/summary_report_English2.pdf).

<sup>4</sup> See U.N. Commission on Human Rights, “Elimination of Violence Against Women,” Resolution 2004/46, Fifty-Sixth Meeting (20 April 2004), which states,

Woman may be exposed to direct transmission from unprotected sex.<sup>5</sup> Forced or unwanted sexual intercourse facilitates the transmission of HIV because of the trauma, lacerations and abrasions that occur.<sup>6</sup> Where the survivor of sexual violence is a girl or a young woman, the risk of transmission is also higher because their vaginal tracts are immature and tear easily during sexual intercourse.<sup>7</sup> Forced or coerced sex also facilitates the transmission of HIV because condoms are unlikely to be used in such situations.

Domestic violence has also been shown to undermine HIV prevention efforts. Women in violent relationships are usually unable to negotiate when or how sex will take place.<sup>8</sup> Suggesting condom use may be interpreted as a threat to the masculinity of their partners, or may raise suspicions about their own monogamy, sexual histories or HIV status. As such, raising the subject of condom use can lead to further violence, threats, rejection or abandonment.<sup>9</sup>

Links have also been made between being a survivor of violence and engaging in higher-risk sexual behaviours later in life.<sup>10</sup> Some studies have also found that people who experience sexual abuse during childhood, or whose first sexual encounter during adolescence is forced, may engage in riskier sexual behaviour as adults.<sup>11</sup>

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[V]iolence against women and girls, including rape, female genital mutilation, incest, early and forced marriage, violence related to commercial sexual exploitation, including trafficking, as well as economic exploitation and other forms of sexual violence, increases their vulnerability to HIV/AIDS, that HIV infection further increases women's vulnerability to violence, and that violence against women contributes to the conditions fostering the spread of HIV/AIDS. (para. 9)

<sup>5</sup> Human Rights Watch (HRW), *Just Die Quietly: Domestic Violence and Women's Vulnerability to HIV in Uganda*, 2003, p. 22; *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences (Y. Erturk), Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women, Intersections of Violence Against Women and HIV/AIDS*, E/CN.4/2005/72, 17 January 2005, para. 20.

<sup>6</sup> HRW, *Deadly Delay: South Africa's Efforts To Prevent HIV in Survivors of Sexual Violence*, 2004.

<sup>7</sup> UNAIDS, *The Global Coalition on Women and AIDS*, 2006, p. 2. Online: [http://data.unaids.org/pub/FactSheet/2006/20060530\\_FS\\_Keeping\\_Promise\\_en.pdf](http://data.unaids.org/pub/FactSheet/2006/20060530_FS_Keeping_Promise_en.pdf); see also, WHO, *World Report on Violence and Health*, 2002, p. 165.

<sup>8</sup> WHO, *Violence Against Women and HIV/AIDS: Setting the Research Agenda*, 2000, p. 6.

<sup>9</sup> See HRW, *Just Die Quietly* (supra), pp. 23–24; R. Jewkes et al, “Gender inequalities, intimate partner violence and HIV preventive practices: finding of a South African cross-sectional study,” *Social Science and Medicine* 56(1) (2003): 127.

<sup>10</sup> See, for example, K. Dunkle et al, “Transactional sex among women in Soweto, South Africa: prevalence, risk factors and association with HIV infection,” *Social Science and Medicine* 59(8) (2004): 1581–1592.

<sup>11</sup> *Ibid.*

Women without economic independence may be afraid to ask their abusive partners for the funds necessary to access testing or treatment.<sup>12</sup> Women who have survived domestic violence may be wary of accessing prevention information and materials for fear of raising suspicions about their own fidelity and health status. Because of the stigma attached to HIV infection, and the abuse inflicted on so many women when their male partners or in-laws find out that they are HIV-positive, some women conceal their status or avoid getting tested.<sup>13</sup> In Uganda for example, research has shown that women who are afraid of revealing their HIV status to their violent husbands may disregard medical advice with respect to such things as breastfeeding in order to conceal their status.<sup>14</sup>

Therefore, legislation explicitly prohibiting domestic violence is necessary not only to protect women from violence but also because domestic violence exacerbates their vulnerability to HIV infection. Legislation is only one component of a comprehensive response to domestic violence, but it is a crucial component in terms of the protection it can provide to women facing these types of violence, and the message it conveys about the unacceptability of domestic violence. Moreover, as outlined in the introduction to this volume, states are obligated under international human rights obligations to legislate in this area.

## A. Definition

### NOTE:

The definition of domestic violence should include a comprehensive range of the forms of violence against individuals who are (or have been) in an intimate relationship or in a familial relationship, or who share the same household.

### Article 1. Definition of domestic violence

- (1) “Domestic violence,” in relation to any person, means acts of violence against that person (in this Act referred to as the complainant), including:
- (a) rape and sexual assault, as defined in the [applicable law];
  - (b) physical abuse, meaning:
    - (i) physically assaulting the complainant in any way;
    - (ii) forcibly confining or detaining the complainant; or
    - (iii) physically depriving the complainant of access to adequate food, water, clothing, shelter or rest;
  - (c) economic abuse, meaning:

<sup>12</sup> HRW, *Just Die Quietly* (supra), at 28.

<sup>13</sup> Ibid. See also, *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences (Y. Erturk): Integration of the Human Rights of Women and the Gender Perspective* (supra), para. 56.

<sup>14</sup> HRW, *Just Die Quietly* (supra), p. 29.

- (i) unreasonably depriving or threatening to deprive the complainant of any economic or financial resources to which the complainant is entitled under law, requires out of necessity or has a reasonable expectation of use;
  - (ii) unreasonably disposing, or threatening to dispose of, moveable or immovable property in which the complainant has an interest or a reasonable expectation of use;
  - (iii) unreasonably destroying, damaging, or threatening to destroy or damage, property in which the complainant has an interest or a reasonable expectation of use; or
  - (iv) hiding or hindering the use of property in which the complainant has an interest or a reasonable expectation of use;
- (d) emotional, verbal and psychological abuse, meaning a pattern of conduct which seriously degrades or humiliates the complainant, or deprives the complainant of privacy, liberty, integrity or security;
- (e) intimidation, meaning:
- (i) threatening to assault the complainant;
  - (ii) threatening to assault a third party for the purpose of frightening or coercing the complainant;
  - (iii) threatening to dispose of, damage, or deprive the complainant or a third party of property or resources in which the person has a reasonable expectation of use;
  - (iv) exhibiting a weapon for the purpose of frightening or coercing the complainant; or
  - (v) engaging in any other form of menacing behaviour toward the complainant or toward a third party for the purpose of frightening or coercing the complainant;
- (f) harassment, meaning engaging in a pattern of conduct that induces the fear of harm to a complainant, including:
- (i) repeatedly watching or loitering outside of or near the building or place where the complainant resides, works, carries on business, studies or happens to be;
  - (ii) repeatedly making telephone calls or inducing another person to make telephone calls to the complainant, whether or not conversation ensues; or
  - (iii) repeatedly sending, delivering, or causing the delivery of, letters, telegrams, packages, facsimiles, electronic communications or other objects to the complainant;
- (g) stalking, meaning repeatedly following, pursuing or accosting the complainant;
- (h) entry into the complainant's residence without consent, where the parties do not share the same residence; or
- (i) where applicable, threats or attempts to do any of the acts referred to in this subsection;<sup>15</sup>

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<sup>15</sup> This subsection is derived from Namibia, *Combating of Domestic Violence Act No. 4 of 2003*, art. 2(1); South Africa, *Domestic Violence Act No. 116 of 1998*, art. 1; Ghana, *Domestic Violence Act of 2007*, art. 1; and India, *The Protection Of Women From Domestic Violence Act of 2005*, s. 5.

by a person or persons (in this Act referred to as the prescribed person) in a domestic relationship with the complainant.

- (2) A domestic relationship is an intimate relationship, a familial relationship, or sharing the same household, including:
- (a) being or having been married to each other (including marriage according to any law, custom or religion);
  - (b) living or having lived together in an intimate relationship, although they are not, or were not, married to each other, or are not able to be married to each other;
  - (c) being parents of a child or having or having had parental responsibility for that child (whether or not at the same time);
  - (d) being family members related by consanguinity, affinity or adoption, as long as there is some actual domestic connection between them;
  - (e) being or having been in an engagement, dating or customary relationship (including an actual or perceived romantic, intimate or sexual relationship of any duration); or
  - (f) sharing or having recently shared the same residence, including as a result of the complainant's employment in a residence.<sup>16</sup>

### **Commentary: Article 1**

The majority of domestic violence involves men perpetrating violence against women.<sup>17</sup> While definitions of domestic violence vary by jurisdiction, many of them adopt a gender-neutral definition.<sup>18</sup> The provision above is gender neutral, so as not to exclude any survivors of domestic violence.<sup>19</sup>

Historically, legislation regarding domestic violence has tended to focus on physical violence. However, there are many forms of violence beyond doing physical harm to another person, and the definition above reflects these. According to the provision above, for most forms of domestic violence, a single incident or act is enough (although harassment, stalking and “emotional, verbal and psychological abuse” would require a

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<sup>16</sup> This list comes from South Africa, *Domestic Violence Act No. 116 of 1998*, art. 1(vii) and Namibia, *Combating of Domestic Violence Act No. 4 of 2003*, art. 3. Note that household workers should include not only live-in domestic workers, but also others who have been employed in a household, even if they don't live there.

<sup>17</sup> Statistics show that women bear the brunt of domestic violence. For example, the WHO estimates that the proportion of women per country who have experienced physical or sexual violence, or both, by an intimate partner in their lifetime ranges from 15–71 percent: WHO, *WHO Multi-Country Study on Women's Health and Violence Against Women: Initial Responses on Prevalence, Health Outcomes and Women's Responses*, 2005, online via: [www.who.int](http://www.who.int).

<sup>18</sup> For example, [U.S.] National Council of Juvenile and Family Court Judges, *Model Code on Domestic Violence*; South Africa, *Domestic Violence Act of 1998*.

<sup>19</sup> See Alberta [Canada] Law Reform Commission, *Domestic Abuse: Towards an Effective Legal Response*, 1995, pp. 4, 60.

pattern of events).<sup>20</sup> An explicit enumeration of the types of violence that constitute domestic violence is fundamental to overcoming the systemic bias against state involvement in the domestic sphere, since it allows for less discretion on the part of law enforcement authorities when determining whether a specific act constitutes domestic violence.

Traditionally, laws on domestic violence have been restricted to persons in intimate relationships, usually marriage. However, the definition above establishes a wide range of relationships that are categorized as domestic relationships for the purpose of this law. Radhika Coomaraswamy, the then-U.N. Special Rapporteur on Violence Against Women, recommended that

[t]he relationships which come within the purview of legislation on domestic violence must include: wives, live-in partners, former wives or partners, girlfriends (including girl-friends not living in the same house), female relatives (including but not restricted to sisters, daughters, mothers) and female household workers.<sup>21</sup>

## B. Police Duties

### Article 2. Responding to cases of domestic violence

- (1) Police officers shall respond promptly to every request for assistance and protection when an act of domestic violence may have taken place, including where the person reporting domestic violence is not the complainant but is a witness to the violence, a friend or relative of complainant, a health provider or a professional working at a centre providing support to those who fear or who have experienced domestic violence.
- (2) Police officers shall not assign a lower priority to calls and cases involving alleged incidents of domestic violence by family, household members or other persons known to the complainant, than to calls alleging similar abuse and violations by persons unknown to the complainant.
- (3) In responding to a request for assistance, police officers shall:
  - (a) inform the complainant and prescribed person that domestic violence offences are crimes;

<sup>20</sup> Note that in many jurisdictions, “stalking” may not be a criminal offence. For examples of legislative frameworks establishing stalking as a criminal offence, see Canada, *Criminal Code*, s. 423(1); New South Wales (NSW), Australia, *Crimes (Domestic and Personal Violence) Act of 2007*, art. 13; D. Hubbard, *Stalking: Proposed New Legislation for Namibia*, Monograph No. 3, Legal Assistance Centre (LAC), 2008.

<sup>21</sup> See Special Rapporteur, *Framework for Model Legislation* (supra), para. 7.

- (b) confiscate any weapon involved, or other weapon known to be in the possession of the prescribed person;
  - (c) advise the complainant of his or her rights as outlined in Article 3;
  - (d) interview the parties and witnesses, including children, in separate rooms to ensure that the parties and witnesses have an opportunity to speak freely;
  - (e) provide or arrange transport of the complainant to the nearest hospital or medical facility for treatment and the collection of evidence, if required or requested;
  - (f) provide or arrange transport of the complainant and the complainant's children or dependents to a safe place or shelter, if required or requested;
  - (g) provide or arrange transportation to the complainant's residence to collect personal belongings, if required or requested;
  - (h) take all other steps that are reasonable in the immediate circumstances to ensure that the complainant and his or her dependents and the person who reported the domestic violence (if a different person) are safe;
  - (i) record the complaint in detail; and
  - (j) complete and file a domestic violence report in accordance with Article 4.<sup>22</sup>
- (4) If a police officer reasonably suspects that an act of domestic violence has taken place, the police officer shall arrest the person who is suspected of having committed the act of domestic violence if:
- (a) the survivor exhibits signs of injury caused by an act of domestic violence;
  - (b) an arrest warrant is in effect;
  - (c) the police officer reasonably suspects that the person has been served with a protection order and has violated such an order;
  - (d) there is reason to believe that a weapon has been involved in the commission of an act of domestic violence;
  - (e) a child was present during the incident; or
  - (f) the person has previously been arrested for an act involving domestic violence, or has previously been issued with a warning in respect of such an act.<sup>23</sup>
- (5) If a police officer reasonably suspects that an act of domestic violence has taken place, but none of the conditions in Section (4) are present, then the police officer may, having due regard to the wishes of the complainant, arrest the person without a warrant.<sup>24</sup>

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<sup>22</sup> Some elements of this section have been incorporated from Special Rapporteur, *Framework for Model Legislation* (supra), para. 17. See also, Sierra Leone, *Domestic Violence Act of 2007*, art. 7 and 8.

<sup>23</sup> This subsection is derived from D. Hubbard and D. Wise, *Domestic Violence: Proposal for Law Reform*, LAC, 1998, c. 12 and New Jersey, U.S., *The Prevention of Domestic Violence Act of 1991*, s. 2C:25–21.

<sup>24</sup> This subsection is derived from Namibia, *Combating of Domestic Violence Act No.4 of 2003*, art. 23(1) and South Africa, *Domestic Violence Act No. 116 of 1998*, art. 3. See also, Ghana, *Domestic Violence Act of 2007*, art. 8.

## Commentary: Article 2

Police officers play an important role in responding to domestic violence. They may be the first contact that survivors of domestic violence have with the law. However, individual police officers may consider domestic violence as an issue best resolved within the home, and not take more serious action, such as arresting those who commit such acts.<sup>25</sup> Women may hesitate to call police because they have little confidence that police will take their complaints seriously.

Various policies have been adopted to respond to this issue. The provision above establishes clear duties on police in cases of domestic violence. A debate exists around the issue of mandatory arrest. Mandatory arrest means that police must arrest a person suspected of committing domestic violence. Some experts have argued that “[c]omplainants are more likely to be assaulted immediately after law enforcement responds to a call where no arrest was made than where arrests were made.”<sup>26</sup> Mandatory arrest may also prevent the perpetrator from pressuring the survivor to drop charges.<sup>27</sup> However, others note that mandatory arrest policies may make survivors reluctant to call the police in the first place, because they may not want the perpetrator arrested and may be uncomfortable with initiating a criminal justice process.<sup>28</sup>

The approach adopted above requires the police to arrest the perpetrator in certain circumstances, such as where there are signs of injury, where a child is involved, or where a protection order or arrest warrant is in place.<sup>29</sup> If these conditions are not met, the police may still arrest if there is probable cause for arrest, but must have regard to the wishes of the survivor. These wishes should be ascertained after the police have interviewed the parties and witnesses privately, so as to give them an opportunity to speak freely.

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<sup>25</sup> S. Bott et al, *Preventing and Responding to Gender-Based Violence in Middle and Low Income Countries: A Global Review and Analysis: World Bank Policy Research Working Paper 3618*, World Bank, 2005.

<sup>26</sup> [U.S.] National Council of Juvenile and Family Court Judges, *Model Code on Domestic and Family Violence*, 1994, p. 8; M. Drumbl, “Civil, constitutional and criminal justice responses to female partner abuse: proposals for reform,” *Canadian Journal of Family Law* 12 (1994): 115–169, at 146.

<sup>27</sup> See, for example, T. Kuennen, “Analyzing the impact of coercion on domestic violence victims: how much is too much?” *Berkeley Journal of Gender, Law & Justice* 22 (2007): 3; J. Armatta, “Getting beyond the law’s complicity in intimate violence against women,” *Willamette Law Review* 33 (1997): 815.

<sup>28</sup> For a thorough overview of the arguments for and against mandatory arrest policies, see D. Hubbard and D. Wise, *Domestic Violence* (supra).

<sup>29</sup> See T. Roberts, *Spousal Assault and Mandatory Charging in the Yukon: Experiences, Perspectives and Alternatives*, Canada Department of Justice, 1996.

## Article 3. Communication of complainant's rights

- (1) The police officer shall communicate to the complainant in a language understood by the complainant, and shall provide his or her name and official identification as a member of a police service.
- (2) The police officer shall provide the complainant with a written statement of the legal procedures available to him or her. The statement shall indicate that:
  - (a) the law provides that the complainant may seek a protection order prohibiting further violence against the complainant, his or her dependents, anyone in his or her household or anyone from whom he or she requests assistance and refuge;
  - (b) the complainant need not hire a lawyer to get such an order;
  - (c) the complainant may apply to the court in the prescribed district or jurisdiction in order to obtain a protection order; and
  - (d) the office of the clerk of the court provides forms and non-legal assistance to persons seeking to obtain protection orders.<sup>30</sup>
- (3) In the event the violence takes place outside business hours, during weekends or during public holidays, the officer shall inform the complainant of emergency procedures available to obtain a protection order.<sup>31</sup>

## Article 4. Domestic violence report

- (1) It shall be the duty of the police officer responding to a report of domestic violence to complete a Domestic Violence Report, a copy of which shall be submitted to the appropriate prosecuting authority and the applicable court.
- (2) The Domestic Violence Report shall be in the prescribed form.<sup>32</sup>

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<sup>30</sup> Some elements of this provision have been derived from Special Rapporteur, *Framework for Model Legislation* (supra), para. 21.

<sup>31</sup> This provision is derived from South Africa, *Domestic Violence Act No. 116 of 1998*, art. 4(5).

<sup>32</sup> Radhika Coomaraswamy, the ex-U.N. Special Rapporteur on Violence against Women, recommended that a report contain, at a minimum: “a. the relationship of the parties; b. the sex of the parties; c. information regarding occupational and educational levels of parties; d. the time and date the complaint was received; e. the time the officer began investigation of the complaint; f. whether children were involved and whether the domestic violence took place in the presence of children; g. the type and extent of the abuse; h. the number and type of weapons used; i. the amount of time taken in handling the case and the actions taken by the officer; j. the effective date and terms of any previous *ex parte* interim order or court order issued concerning the parties; k. any other data necessary for a complete analysis of all circumstances leading to the alleged incident of domestic violence”: Special Rapporteur, *Framework for Model Legislation* (supra), para. 23.

## C. Protection Orders

### Article 5. Who may apply for a protection order

- (1) Any person who is in a domestic relationship may apply for a protection order against another person in that domestic relationship.
- (2) Notwithstanding any other law, an application may be brought on behalf of a complainant by any other person who has an interest in the well-being of the complainant, including but not limited to a family member, a police officer, a social worker, a health care provider, a teacher, traditional leader, religious leader and an employer.
- (3) An application made under Section (2), must be taken to have been made by the complainant.
- (4) An application made under Section (2) must be made with the written consent of the complainant, except in circumstances where the complainant is:
  - (a) a minor;
  - (b) mentally incapacitated;
  - (c) unconscious; or
  - (d) at risk of serious physical harm;but, in the case of subsection (d), the court must approve the making of the application.
- (5) Notwithstanding any other law, a minor may apply for a protection order without the assistance of an adult person if the court is satisfied that the minor has sufficient understanding to make the proposed application.
- (6) A person on whose behalf an application for a protection order is made under this section must not be compelled to give testimony in any subsequent proceedings relating to the same matter.<sup>33</sup>

#### **Commentary: Article 5**

A protection order is a court order designed to stop violent behaviour and to protect the survivor of domestic violence and his or her family from the perpetrator of violence. A protection order may order the perpetrator to stop the violent behaviour, stay away from the person or people who are being abused, or leave the family home.

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<sup>33</sup> This article is derived from South Africa, *Domestic Violence Act No. 116 of 1998*, art. 4 and Namibia, *Combating Domestic Violence Act No.4 of 2003*, art. 4.

Civil protection orders have certain advantages over criminal proceedings. Criminal cases can be long and complex. Furthermore, if only criminal penalties are sought, the victim may have no legal protections from abuse during the proceedings unless the perpetrator is in pre-trial detention during that time. Protection orders provide benefits and remedies to survivors of domestic violence that may supplement the protection of the criminal justice system.<sup>34</sup>

The goal of protection orders is to prevent imminent violence from occurring. When faced with violence in a relationship, a survivor may not be in a position to access the legal system, whereas a third party may be in better position to apply for a protection order. The provision above provides that any person experiencing violence in a domestic relationship can make an application for a protection order, and any other person with an interest in the wellbeing of the applicant can also make the application on behalf of the victim. Many national domestic violence laws specifically allow third parties to apply for a protection order on behalf of the complainant.<sup>35</sup> Radhika Coomaraswamy, the then-U.N. Special Rapporteur on Violence against Women, recommended that

[t]he law shall provide for victims, witnesses of domestic violence, family members and close associates of victims, State and private medical service providers and domestic violence assistance centres to complain of incidents of domestic violence to the police or file [an] action in court.<sup>36</sup>

Some experts have recommended caution in allowing certain third parties to apply for protection orders without the consent of the survivor:

[A]uthorizing third parties to apply for protection orders, independent of the survivor's wishes, may compromise her interests and safety. One of the original purposes of the protection order remedy was to empower the complainant/survivor.... Further, survivors of violence are often the best judges of the danger presented to them by a violent partner and allowing others to apply for such orders removes control over the proceeding from them.<sup>37</sup>

For these reasons, third party applications for protection orders will, in most cases, require the written consent of the complainant. Written consent of the complainant is not required where the complainant is at risk of serious physical harm, but in such a situation the court must approve the application.

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<sup>34</sup> J. Smith, "Battered non-wives and unequal protection-order coverage: a call for reform," *Yale Law & Policy Review* 23(1) (2005): 93–162, at 119.

<sup>35</sup> See, for example, Zimbabwe, *Domestic Violence Act of 2006*, art. 7; Ghana, *Domestic Violence Act of 2007*, art. 12; Victoria, Australia, *Crimes (Family Violence) Act of 1987*, s. 7. See also, E. Schollenberg and B. Gibbons, "Domestic violence protection orders: a comparative review," *Canadian Journal of Family Law* 10 (1992): 191–238, at 211.

<sup>36</sup> See Special Rapporteur, *Framework for Model Legislation* (supra), para. 12.

<sup>37</sup> U.N. Division for the Advancement of Women and U.N. Office on Drugs and Crime, *Good Practices in Legislation on Violence Against Women: Report of the Expert Group Meeting*, 2008, p. 55.

Children themselves may be the target of the violence. Even where children are not the focus of violence, they can nevertheless experience harm associated with being placed in a situation where they can hear or see physical, sexual or psychological abuse of a family member. In a situation where a child lives in a violent domestic situation, he or she should be legally empowered to apply for a protection order if the court is satisfied that he or she has sufficient understanding of the protection order procedure.

## Article 6. Jurisdiction

(1) A court of a district where the:

- (a) the complainant resides (either permanently or temporarily), is employed or carries on business;
- (b) the prescribed person resides (either permanently or temporarily), is employed or carries on business; or
- (c) the domestic violence took place;

has jurisdiction to grant a protection order.<sup>38</sup>

## Article 7. Criteria for granting of temporary protection order

(1) The court must, as soon as is reasonably possible, consider an application submitted to it under the terms of Article 5 and may, for that purpose, consider such additional evidence as it deems fit, including oral evidence or evidence by affidavit.

(2) If the court is satisfied that there is *prima facie* evidence that:

- (a) the prescribed person is committing, or has committed an act of domestic violence; and
- (b) undue hardship may be suffered by the complainant as a result of such domestic violence if a protection order is not issued immediately;

the court must, notwithstanding the fact that the prescribed person has not been given notice of the proceedings contemplated in Section (1), issue a temporary protection order against the prescribed person.<sup>39</sup>

(3) For greater clarity, a temporary protection order may be issued on an *ex parte* basis.<sup>40</sup>

<sup>38</sup> This provision is derived from Namibia, *Combating of Domestic Violence Act of 2003*, art. 5(1); Sierra Leone, *Domestic Violence Act of 2007*, art. 10(2); Special Rapporteur, *Framework for Model Legislation* (supra), para. 18.

<sup>39</sup> This article is derived from South Africa *Domestic Violence Act of 1998*, art. 5, and Sierra Leone, *Domestic Violence Act of 2007*, art. 12.

- (4) Where an application for a protection order is based on behaviour which appears minor or trivial or unlikely to recur, the court must nevertheless consider whether the behaviour forms part of a pattern of behaviour that establishes a need for protection.<sup>41</sup>

### **Commentary: Article 7**

This article provides for the issuance of temporary protection orders in emergency situations and is intended to apply where there is an immediate danger of domestic violence.

In court proceedings, an order is said to be *ex parte* when it is granted for the benefit of one party only, without being contested by a person adversely affected.<sup>42</sup> The above provision gives courts the power to issue temporary protection orders without waiting for a hearing involving the prescribed person. In many cases, the person seeking relief from domestic violence is in an urgent situation. For example, an emergency could arise either during or immediately after an abusive incident, or when there is reasonable apprehension of imminent harm unless the violent person is restrained.

The *ex parte* nature of the proceedings is important in several other aspects. Firstly, it aims to address the concerns of those complainants who fear violence if the prescribed person were to be served with an application for a protection order. Secondly, survivors seek protection orders less frequently if the process of obtaining them is particularly onerous; hence, the remedy should be available with few procedural impediments.<sup>43</sup>

Since a protection order may be issued on an *ex parte* basis, it is of a temporary nature and is intended to address the most immediate and pressing issues, namely ordering that violence or threats of violence must stop.<sup>44</sup>

## **Article 8. Conditions of a temporary protection order**

- (1) It is a condition of every temporary protection order that the prescribed person must not commit any act of domestic violence against the complainant(s).
- (2) It is a condition of every temporary protection order that:

<sup>40</sup> This article is derived from the NSW, Australia, *Crimes Amendment (Apprehended Violence) Act of 2006*, art. 562 G.

<sup>41</sup> This section is derived from Namibia, *Combating Domestic Violence Act No. 4 of 2004*, art. 7(3).

<sup>42</sup> See the definition of *ex parte* in H. Black, *Black's Law Dictionary*, 6<sup>th</sup> ed., (St. Paul: West publishing Co., 1990).

<sup>43</sup> See E. Schollenberg and B. Gibbons, "Domestic violence protection orders: a comparative review," *Canadian Journal of Family Law* 10 (1992): 191–238.

<sup>44</sup> Courts have upheld the constitutionality of such *ex parte* orders, since a temporary order becomes one of longer duration only after the prescribed person has appeared before the courts. See *Omar v Government of the Republic of South Africa and Others*, 2005 ZACC 17 (Constitutional Court of South Africa).

- (a) the prescribed person must not possess, or have under his or her control, any firearm;
  - (b) the prescribed person must not hold a firearms licence; and
  - (c) the prescribed person must:
    - (i) as soon as practicable after the service on him or her of a copy of the protection order, but in any case no later than 24 hours after such service; or
    - (ii) on demand made, at any time, by any member of the police force, surrender to a member of the police force:
      - (i) any firearm in the prescribed person's possession or under the prescribed person's control, whether or not any such weapon is lawfully in the prescribed person's possession or under the prescribed person's control; and
      - (ii) any firearms licence held by the prescribed person.<sup>45</sup>
- (3) At any time other than when the complainant and the prescribed person are living in the same dwelling house with the express consent of the complainant, a temporary protection order may, having due regard to the complainant's wishes, order that the prescribed person must not:
- (a) watch, loiter near, or prevent or hinder access to or from, the complainant's place of residence, business, employment, educational institution or any other place that the complainant visits often;
  - (b) follow the complainant about, or stop or accost the complainant in any place;
  - (c) without the complainant's express consent, enter or remain on any land or building occupied by the complainant;
  - (d) where the complainant is present on any land or building, enter or remain on that land or building in circumstances that constitute a trespass; or
  - (e) make any other contact with the complainant (whether by telephone, correspondence or otherwise), except contact:
    - (i) as is reasonably necessary in any emergency;
    - (i) as is permitted under any order or written agreement relating to the role of providing day-to-day care for, contact with, or custody of, any minor; or
    - (ii) as is permitted under any special condition of the protection order.<sup>46</sup>

### **Commentary: Article 8**

The standard conditions of the protection order are that the domestic violence must cease and that the perpetrator must surrender his or her firearm and firearm licence, where applicable. If he or she desires, the complainant may also request a no-contact order. The provision above is intended to support the complainant's autonomy by establishing the no-contact provision as an option. As one commentator has observed:

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<sup>45</sup> This Section is derived from New Zealand, *Domestic Violence Act of 1995*, art. 21.

<sup>46</sup> *Ibid.*

If orders permitting ongoing contact are not available (and for many women today, they are not), the result is that the law of civil protection orders gives a battered woman only two choices. If she obtains a protection order, her partner will be prohibited from seeing or contacting her. If she does not obtain a protection order, the law will do nothing to help redress the imbalance of power between herself and her partner. This all-or-nothing approach excludes the middle ground that many women would prefer: an order that would help restructure the relationship without ending it....<sup>47</sup>

The effect of this Section is that the perpetrator can only remain in the same dwelling as the protected person with his or her consent. If the complainant does not want this arrangement, then the no-contact order prevents the perpetrator from making contact with the protected person. Such protection would then extend to a range of places where the protected person frequently visits.

## Article 9. Service of temporary protection order

- (1) A temporary protection order, together with any other prescribed information must, within the prescribed period and in the prescribed form and manner, be served on the prescribed person, and must call upon the prescribed person to show cause on the return date specified in the temporary protection order as to why a final protection order should not be issued.
- (2) On receipt of a return of service of the protection order,<sup>48</sup> the clerk of the court must, within the prescribed period and in the prescribed form and manner, serve a certified copy of the temporary protection order on the complainant.
- (3) A temporary protection order has the same legal effect as a final protection order and, once it has been served on the prescribed person, it is enforceable under Article 20.<sup>49</sup>

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<sup>47</sup> See S. Goldfarb, “Reconceiving civil protection orders for domestic violence: can law help end the abuse without ending the relationship?” *Cardozo Law Review* 29(4) (2008): 1487–1551, at 1501.

<sup>48</sup> A return of service is written confirmation under oath by a process server declaring that the legal documents were personally delivered to the addressee.

<sup>49</sup> This section is derived from Namibia, *Combating of Rape Act No. 8 of 2000*, art. 9 and South Africa, *Domestic Violence Act No. 116 of 1998*, art. 5(2). See also, Special Rapporteur, *Framework for Model Legislation*, (supra), paras. 31 and 32.

## Article 10. Temporary protection order to become a final protection order

- (1) Where the court makes a temporary protection order, the order must contain a notice to the prescribed person that clearly states:
  - (a) that the prescribed person is entitled to notify the court that he or she wishes to be heard on whether a final order should be substituted for the temporary order;
  - (b) that if the prescribed person does not take any steps in the proceedings, the temporary order becomes final by operation of law [number] days after the date on which it is made; and
  - (c) that a final order may include any conditions as stipulated in Article 13 that a court considers appropriate.<sup>50</sup>
- (2) A temporary order may only become a final order pursuant to Section (1) if the prescribed person has not notified the court that he or she wishes to be heard.
- (3) Where the prescribed person notifies the court that he or she wishes to be heard, the Registrar must assign a hearing date, which must be:
  - (a) as soon as practicable; and
  - (b) unless there are special circumstances, in no case later than [number] days after the receipt of the prescribed person's notice.

## Article 11. Court may require hearing before order becomes final

- (1) Where, on or after making a temporary order, the court considers that there is good reason why the order should not become final without a hearing at which the complainant or the prescribed person, or both, are present or represented, the court, of its own motion, may direct that there be a hearing.
- (2) A direction made under Section (1) may:
  - (a) relate to the whole or to specified parts of the order made or sought; and
  - (b) be made even though the prescribed person does not wish to be heard.

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<sup>50</sup> See Ghana, *Domestic Violence Act of 2007*, s. 14. According to this provision, an interim protection order shall be for a period of under three months. It will become final if the prescribed person does not appear to show cause why it should not be made final. See also, Sierra Leone, *Domestic Violence Act of 2007*, ss. 12(4) and 12(5). In Namibia, *Combating of Domestic Violence Act No. 4 of 2003*, the prescribed person must show cause why the interim protection order should not be confirmed on or before “the return date.” The return date is 30 days from the date the protection order was issued (and must be at least 10 days after the prescribed person received the temporary protection order): See art. 8(4) and 8(5).

- (3) Where the direction under Section (1) relates to specified parts of the order made or sought, the remaining parts of the order may become final.
- (4) Where the court directs that there be a hearing, the Registrar must assign a hearing date, which must be:
  - (a) as soon as practicable; and
  - (b) unless there are special circumstances, in no case later than [number] days after the receipt of the prescribed person's notice.

### ***Commentary: Articles 10 and 11***

The provision above provides that a temporary protection order will automatically become a final order if the prescribed person does not object to the order within a certain time (often referred to as the “return date”). It is intended to prevent a temporary protection order from lapsing inadvertently. However, a temporary protection order will not automatically become final if the prescribed person indicates that he or she wishes to be heard on whether a final order should be substituted for the temporary one. The provisions above also allow for the court, on its own initiative, to hold a hearing before any temporary protection order becomes final.

## **Article 12. Criteria for granting of final protection order**

- (1) Where the court conducts a hearing in accordance with Article 10 or 11, the court may at the hearing:
  - (a) discharge the temporary protection order;
  - (b) vary the terms of the temporary protection order; or
  - (c) impose a final protection order, including any conditions as stipulated in Article 13 it considers appropriate.
- (2) Where the court proceeds to hear the matter on the request of the prescribed person or on its own motion, the court must:
  - (a) consider any evidence previously received; and
  - (b) consider such further affidavits or oral evidence as it may direct.
- (3) The court must, after a hearing as contemplated in Section (1) or (2), issue a protection order in the prescribed form if it finds, on a balance of probabilities, that the prescribed person has committed or is committing an act of domestic violence.
- (4) Upon the issuing of a protection order, the clerk of the court must in the prescribed manner cause:
  - (a) the original of such order to be served on the prescribed person; and

(b) a certified copy of such order to be served on the complainant.<sup>51</sup>

## Article 13. Conditions of a final protection order

- (1) A final protection order must include the standard conditions of a temporary protection order and may impose any further conditions that are reasonably necessary, in the opinion of the court, to protect the complainant from further domestic violence by the prescribed person.
- (2) A protection order may, at the request of the complainant or on the court's own motion, include any of the following provisions:
- (a) a “no-contact” provision that:
- (i) forbids the prescribed person to be, except under conditions specified in the order, at or near specified places frequented by the complainant or by any child or other person in the care of the complainant, including but not limited to:
    - (A) the residence, workplace or educational institution of the complainant, or any child or other person in the care of the complainant;
    - (B) a shelter or other residence where the complainant is temporarily living; or
    - (C) the residences of specified family members; and
  - (ii) forbids the prescribed person from making, except under conditions specified in the order, any communication to the complainant, any child or other person in the care of the complainant or specified members of the complainant's family, including direct or indirect personal, written, telephonic or electronic contact;
- but a “no-contact” provision may be extended to a person other than the complainant or any child or other person in the care of the complainant, only where consent has been given by that person, and in the case of any other child, only where consent has been given by a parent of that child or by a person under whose care that child is;
- (b) if an act of physical violence has been committed, a provision granting the complainant and dependents 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 prescribed person from the residence; or
  - (iii) a provision authorizing the prescribed person to collect personal belongings from the residence under police supervision;

<sup>51</sup> See South Africa, *Domestic Violence Act No. 116 of 1998*, art. 6.

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

- (iv) the length of time that the residence has been shared by the complainant and the prescribed person, 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;
  - (v) 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 well-being of the complainant or any child or other person in the care of the complainant; and
  - (vi) any undue hardship that may be caused to the prescribed person or to any other person as a result of such order;
- (c) a provision directing the prescribed person to:
- (i) pay rent for the complainant by a specified date of each month in respect of a residence; or
  - (ii) otherwise make arrangements for any other accommodation or shelter sufficient for the reasonable needs of the complainant and any child or other person in the care of the complainant, if the prescribed person is legally liable to support the complainant and the complainant does not wish to have exclusive occupation of the joint residence, or the court determines that it is more just in the circumstances for the prescribed person to remain in the joint residence;
- (d) a provision directing a police officer to accompany, within a specified time, the complainant or another person designated by the complainant, to the joint residence to supervise the removal of personal belongings of the complainant or any child or other person in the care of the complainant;
- (e) a provision granting either party possession of specified personal property, including but not limited to, means of transport, agricultural implements, livestock, furniture, cheque books, credit cards, children's clothing and toys, identification documents, keys, personal documents and other necessary personal effects;
- (f) a provision restraining the complainant or the prescribed person or both from taking, converting, damaging or otherwise dealing in property in which the other party may have an interest or a reasonable expectation of use;
- (g) a provision temporarily directing the prescribed person to make periodic payments in respect of the maintenance of the complainant, and of any child of the complainant, if the prescribed person is legally liable to support the complainant or the child, as an emergency measure where no such maintenance order is already in force;
- (h) a provision granting temporary sole custody:
- (i) of a child of the complainant to any appropriate custodian other than the prescribed person; or
  - (ii) of a 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;
- (i) a provision temporarily:
    - (i) forbidding all contact between the prescribed person and any child of the complainant;
    - (ii) specifying that contact between the prescribed person and a child of the complainant 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; and
- (j) any other provisions that the court deems reasonably necessary to ensure the safety of the complainant or any child or other person who is affected.<sup>52</sup>

- (3) Where the court imposes a condition under this section, it may specify the period during which the condition is to have effect, otherwise a condition has effect for the duration of the protection order, unless sooner varied or discharged.

### **Commentary: Article 13**

The provisions above establish the conditions of final protection orders. A condition that domestic violence must cease applies in every case. All final protection orders will also require the perpetrator to surrender his or her firearm and firearm licence, where applicable. The other provisions are not obligatory, because final protection orders must be flexible enough to deal with a variety of individual situations and contexts. Some of the conditions the prescribed person must follow are listed below. Note that while they are referred to as “final protection orders,” such orders are not meant to replace standard legal measures for resolving disputes found in family and property law, such as maintenance orders or the division of property following divorce.

The order may contain no-contact conditions, which may include that the prescribed person must not come to the complainant’s home, place of employment or educational institution, or contact the complainant by any means (such as by phone, mail, fax or electronic means). In cases where there has been physical violence, the order may include an order to move out of the joint household. The court will consider how long the joint residence has been shared, the accommodation needs of the complainant and any special hardship that might result for the prescribed person or any other person who might be sharing the residence. The order might also include a requirement to arrange alternative accommodation for the complainant (such as paying rent for such alternative accommodation).

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<sup>52</sup> This subsection is derived from Namibia, *Combating of Domestic Violence Act No. 4 of 2003*, art. 14. See also, Sierra Leone, *Domestic Violence Act No. 20 of 2007*, art. 15; South Africa, *Domestic Violence Act No. 116 of 1998*, art. 7; Ghana, *Domestic Violence Act of 2007*, art. 17.

The order may also require either person to give certain personal property to the other (for example, it may be necessary to give certain personal property to the prescribed person if the complainant is the person to remain in the joint household.) The order may also direct either party not to deal with property in which the other person has a reasonable expectation of use. The protection order may also include a temporary order for child maintenance or a temporary order concerning custody of, or access to, the children.<sup>53</sup>

## Article 14. Duration of final protection orders

- (1) Unless the court decides otherwise, a final protection order has the following durations:
  - (a) a provision granting the complainant exclusive occupation of a residence owned:
    - (i) by the complainant, remains in force for any period set by the court;
    - (ii) by the prescribed person, remains in force for any period set by the court up to a maximum of [number] months; or
    - (iii) jointly by the complainant and the prescribed person, remains in force for any period set by the court up to a maximum of [number] months;
  - (b) a provision granting the complainant exclusive occupation of a leased residence remains in force for any period set by the court, but must not extend beyond the duration of the current lease period;
  - (c) a provision directing that the complainant enjoys possession of household effects must, if made in conjunction with an order granting the complainant exclusive occupation of a joint residence, remain in force for the same period as the provision in that order;
  - (d) a provision concerning temporary custody of a child and access to a child remains in force until it is superseded by another order of a relevant court;
  - (e) a provision concerning maintenance remains in force for any period set by the court up to a maximum of [number] months; and
  - (f) any other provision of a final protection order remains in force for [number] months.<sup>54</sup>

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<sup>53</sup> See LAC, *Guide to The Combating of Domestic Violence Act 4 of 2003*, 2004.

<sup>54</sup> This provision is derived from Namibia, *Combating of Domestic Violence Act No. 4 of 2003*, art. 15. Other acts place a limit of 12 months on the duration of a final protection order: see Sierra Leone, *Domestic Violence Act No. 20 of 2007*, art. 14; Ghana, *Domestic Violence Act of 2007*, art. 16.

## Article 15. Power to vary and discharge a temporary or final protection order

- (1) The court may, if it thinks fit, on the application of the complainant or the prescribed person, discharge a temporary or final protection order.<sup>55</sup>
- (2) The court may, on the application of the complainant or the prescribed person, vary a temporary or final protection order:
  - (a) by varying or discharging any condition of the protection order; and/or
  - (b) by imposing any condition as stipulated in Article 13 it considers appropriate.<sup>56</sup>
- (3) If the application in either Section (1) or (2) is made by the complainant, the court must, on receipt of the application, grant the application if it is satisfied on the evidence that the application is in accordance with the wishes of the complainant, made freely and voluntarily, and that the discharge or variation of the order will not endanger the complainant or any child or other person concerned in the matter.<sup>57</sup>
- (4) If the application in either Section (1) or (2) is made by the prescribed person, the court may, whether or not it appears that it is the wish of the complainant to oppose the discharge or the variation of the order, grant the prescribed person's request only if it is satisfied, on the basis of all the information before it, that such discharge or variation will not endanger the complainant or any child or other person concerned in the matter.<sup>58</sup>
- (5) Where only some of the terms of a protection order are discharged or varied, the rest of the protection order remains in force.

## Article 16. Existence of other proceedings

- (1) A court must not decline to make a protection order (whether temporary or permanent) merely because there exist other legal proceedings between the complainant and the prescribed person, whether or not those proceedings also relate to any other person (including, but not limited to, proceedings relating to the role of providing day-to-day care for, contact with, or custody of, a minor.)

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<sup>55</sup> To discharge a protection order is to cancel or withdraw it.

<sup>56</sup> See South Africa, *Domestic Violence Act No. 116 of 1998*, art. 10.

<sup>57</sup> This section is derived from Namibia, *Combating of Domestic Violence Act No. 4 of 2003*, art. 17(3).

<sup>58</sup> *Ibid.*, art. 17(6).

## D. Criminal Law Offences

### Article 17. Copies of protection orders to be sent to police

- (1) On the making of a temporary protection order or a final protection order (including any order varying or discharging an order), the Registrar of the court in which the order is made must ensure that a copy of the order is made available, without delay, to the District Commander at the appropriate Police District Headquarters.
- (2) Where a copy of an order is made available to a District Commander, the District Commander must ensure that a copy of that order, or a copy of that copy, is made available, without delay, to the officer in charge of the police station nearest to where the complainant resides — or, if the case requires, where each complainant resides.

### Article 18. Domestic violence offences

- (1) The following offences are domestic violence offences when they are committed or alleged to have been committed against a person, or in relation to a person, with whom the person charged with those offences has a domestic relationship:
  - (a) murder;
  - (b) rape, including rape within a marriage or other relationship;
  - (c) assault;
  - (d) assault with intent to do grievous bodily harm;
  - (e) sexual assault;
  - (f) kidnapping;
  - (g) trespassing;
  - (h) destruction of property; and
  - (i) stalking.
- (2) Any person found guilty of a domestic violence offence is liable on conviction to the penalties ordinarily applicable to the offence in question.<sup>59</sup>

### Article 19. National instructions and training for police and prosecutors with respect to domestic violence offences

- (1) The National Commissioner of the [relevant] Police Service must, in consultation with the [relevant] Minister(s), issue and publish national instructions regarding all matters which must be followed by all police officers who are tasked with receiving

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<sup>59</sup> Ibid., art. 21 and schedule 1.

reports of, and the investigation of, domestic violence offences, including the following:

- (a) the manner in which the reporting of an alleged domestic violence offence is to be dealt with by police officers; and
- (b) the manner in which domestic violence offences are to be investigated by police officers, including the circumstances in which an investigation in respect of a domestic violence offence may be discontinued.<sup>60</sup>

(2) The National Commissioner of the [relevant] Police Service must develop a training course for police officers that must:

- (a) include training on the national instructions referred to in Section (1);
- (b) include social context training in respect of domestic violence offences; and
- (c) provide for, and promote the use of, uniform norms, standards and procedures;

with a view to ensuring that as many police officers as possible are able to deal with domestic violence offence cases in an appropriate, efficient and sensitive manner.<sup>61</sup>

(3) The National Director of the [relevant Prosecuting Authority] must, in consultation with the [relevant] Minister(s), issue and publish directives regarding all matters which are to be followed by all members of the prosecuting authority who are tasked with conducting prosecutions of domestic violence offence cases, which have a bearing on complainants of such offences, including the following:

- (a) the manner in which domestic violence offence cases should be dealt with in general, including the circumstances in which a charge may be withdrawn or a prosecution stopped;
- (b) the circumstances in which the court must consider directing that the proceedings not take place in open court and in which the court must consider prohibiting the publication of the identity of the complainant; and
- (c) the information to be placed before the court during sentencing, including pre-sentence reports.<sup>62</sup>

(4) The National Director of the [relevant Prosecuting Authority] must develop training courses for Public Prosecutors that must:

- (a) include training on the directives referred to in Section (3);
- (b) include social context training in respect of domestic violence offences; and
- (c) provide for, and promote the use of, uniform norms, standards and procedures;

<sup>60</sup> This article is adapted from South Africa, *Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007*, s. 66(1)(a).

<sup>61</sup> *Ibid.*, s. 66(1)(b).

<sup>62</sup> *Ibid.*, s. 66(2)(a).

with a view to ensuring that as many prosecutors as possible are able to deal with domestic violence offence cases in an appropriate, efficient, and sensitive manner.<sup>63</sup>

### **Commentary: Articles 18 and 19**

Many governments continue to see domestic violence as a private matter and therefore outside of their purview as legislators of public behaviour.<sup>64</sup> Whereas the privacy of the home and the importance attributed to intimate relations are valued, privacy and intimacy too often cloak violence and provide a justification for non-interference. The fact that domestic violence may occur within the private realm does not absolve states of their responsibility to protect women. Criminal legislation and proceedings must be enacted because states have an obligation to exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women.<sup>65</sup>

The provisions above do not create any new offences. The provisions clarify that certain offences exist (or should exist) in general criminal law and perpetrators should be punished accordingly. However the provisions also establish that certain offences, if they take place in a domestic relationship, are designated as domestic violence offences, and that police officers and prosecutors must establish standard protocols and training to guide the process of investigation and prosecution of domestic violence offences.

### **Article 20. Offence to contravene temporary or final protection order**

- (1) Every person commits an offence who:
  - (a) does any act in contravention of a temporary or final protection order; or
  - (b) fails to comply with any condition of a protection order.
- (2) Every person who commits an offence under Section (1) is liable to imprisonment for a term not exceeding [number] months or to a fine not exceeding [monetary amount].
- (3) Every person who commits an offence under Section (1) is liable on conviction to imprisonment for a term not exceeding [number] years, where that person has previously been convicted on at least two different occasions of an offence.

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<sup>63</sup> Ibid., s. 66(2)(b). See also, Special Rapporteur, *Framework for Model Legislation* (supra), para. 44.

<sup>64</sup> K. Kelly, *Domestic Violence and the Politics of Privacy* (Ithaca: Cornell University Press, 2003), p. 209.

<sup>65</sup> *Declaration on the Elimination of Violence Against Women*, 20 December 1993, U.N. G.A. Resolution 48/104, U.N. Doc. A/48/49 (1993) [DEVAW], art. 4.

## Article 21. Power to arrest for breach of temporary or final protection order

- (1) Where a temporary or final protection order is in force, any police officer may arrest, without warrant, any person who the member of the police has good cause to suspect has committed a breach of the order.
- (2) In considering whether or not to arrest a person pursuant to Section (1), the police officer must take the following matters into account:
  - (a) the risk to the safety of any complainant if the arrest is not made;
  - (b) the seriousness of the alleged breach of the protection order;
  - (c) the length of time since the alleged breach occurred; and
  - (d) the restraining effect on the person liable to be arrested of other persons or circumstances.

## E. General

### Article 22. Costs

- (1) The court may only make an order as to costs against any party if it is satisfied that such party has acted frivolously, vexatiously or unreasonably.<sup>66</sup>

### Article 23. Annual domestic violence report to National Assembly

- (1) It is the duty of the [relevant head of police department] to compile the data collected from all Domestic Violence Reports filed pursuant to Article 4 and to submit an annual report to Parliament that includes, but is not necessarily limited to:
  - (a) the total number of reports received;
  - (b) the number of reports investigated;
  - (c) the average time lapse in responding to each reports; and
  - (d) the type of police action taken in disposing of cases, including the number of arrests.<sup>67</sup>

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<sup>66</sup> This provision is derived from South Africa, *Domestic Violence Act No. 116 of 1998*, art. 15.

<sup>67</sup> Some elements of this section have been incorporated from the Special Rapporteur, *Framework for Model Legislation* (supra), para. 25. See also Namibia, *Combating of Domestic Violence Act No. 4 of 2003*, art. 28.

## Article 24. National instructions and training for health care practitioners with respect to domestic violence

- (1) The Director of the [national health authority] must, in consultation with the [relevant] Minister(s) and key stakeholders, issue and publish national instructions regarding all matters which are to be followed by all medical practitioners and any other relevant persons when dealing with domestic violence cases, with particular reference to:
- (a) the manner in which the reporting of an alleged domestic violence case is to be dealt with if the offence is reported to a designated public health establishment;
  - (b) the manner in which assistance in the investigation and prosecution of domestic violence cases, generally, must be provided; and
  - (c) the manner in which health care settings are to screen patients for domestic violence, including during HIV testing and counseling.
- (2) The Director of the [national health authority] must develop training courses for health care workers, which:
- (a) include training on the directives referred to in Section (1);
  - (b) include social context training in respect of domestic violence cases; and
  - (c) provide for and promote the use of uniform norms, standards and procedures;
- with a view to ensuring that as many medical practitioners and any other relevant persons as possible are consistently able to deal with domestic violence cases in an appropriate, efficient and sensitive manner.<sup>68</sup>
- (3) The State shall bear the cost of the care, treatment, testing, prevention and counselling as referred to in this section.

### **Commentary: Article 24**

Health care providers are often the members of the public sector with whom women have the greatest contact.<sup>69</sup> In many circumstances, the health consequences of domestic violence lead survivors to seek health care services. Many women self-report domestic violence during emergency medical treatment related to the domestic violence or during routine interaction (for example, antenatal care) with health providers.<sup>70</sup> Health care providers are thus in a unique position to identify survivors of domestic violence and to

<sup>68</sup> This article is adapted from South Africa, *Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007*, s. 66(3)(a)–(b).

<sup>69</sup> See, for example, S. Mayhew and C. Watts, “Reproductive health services and intimate partner violence: shaping a pragmatic response in sub-Saharan Africa,” *International Family Planning Perspectives* 30(4) (2004): 207–213, at 208.

<sup>70</sup> See, for example, S. Frayne et al, “Prevalence of domestic abuse among patients in three ambulatory care internal medicine clinics,” *Journal of General Internal Medicine* 6 (1991): 317–322.

initiate support and referral interventions.<sup>71</sup> The provision above establishes that health care settings must establish standard protocols and training to guide the sensitive handling of domestic violence cases.

Domestic violence screening is a process whereby a service provider seeks to identify domestic violence, usually through a set of standardized questions, thus allowing for subsequent interventions designed to support and protect the survivor. Evidence suggests that screening programs increase the rate of identification of domestic violence in comparison to those settings without such screening.<sup>72</sup> Screening serves as an entry point to other services. It also seeks to prevent future incidents of domestic violence. Screening programs may also have long term effects by changing perceptions about domestic violence. As noted in one qualitative study, discussion about domestic violence provides survivors, whether they disclose or not, with verification that domestic violence is wrong, a sense of hope, and encouragement to seek help.<sup>73</sup> Screening, therefore, may increase disclosure rates of domestic violence in the future.<sup>74</sup> There are a number of examples of such screening guidelines from both developed and developing country contexts.<sup>75</sup>

It is well documented that fear of domestic violence impacts on HIV testing and disclosure decisions.<sup>76</sup> Such fear is not unreasonable. Evidence supports a relationship between testing, disclosure and increased risk of domestic violence.<sup>77</sup> For pregnant

<sup>71</sup> See, for example, R. Jewkes et al, “Prevalence of emotional, physical and sexual abuse of women in three South African Provinces,” *South African Medical Journal* 91 (2001): 421–428.

<sup>72</sup> See, for example, L. Bateman et al, “Assessing for abuse: self-report versus nurse interview,” *Public Health Nursing* 8 (1991): 245–250.

<sup>73</sup> See, for example, J. Chang et al, “Health care interventions for intimate partner violence: what women want” *Women’s Health Issues* 15 (2005): 21–30, at 26; B. Gerbert et al, “A qualitative analysis of how physicians with expertise in domestic violence approach the identification of victims,” *Annals of Internal Medicine* 131 (1999): 578–584, at 583.

<sup>74</sup> See, for example, K. Doolan, “Missing piece in the puzzle: the health sector’s role in implementing the DVA,” *SA Crime Quarterly* 12 (2005): 9–12, at 11.

<sup>75</sup> California Department of Health Services, *HIV Partner Counseling and Referral Services: Standards and Recommendations*, 2000, online: [ww2.cdph.ca.gov/programs/AIDS/Documents/PCRSguidelines2000-05.pdf](http://ww2.cdph.ca.gov/programs/AIDS/Documents/PCRSguidelines2000-05.pdf); T. Jacobs and L. Martin, *Screening for Domestic Violence: A Policy and Management Framework for the Health Sector*, (Cape Town: University of Cape Town, 2003); International Planned Parenthood Federation, Western Hemisphere Region, *Improving the Health Sector Response to Gender-Based Violence: A Resource Manual for Health Care Professionals in Developing Countries*, 2003; New York State Department of Health, *Guidelines for Integrating Domestic Violence Screening into HIV Counseling, Testing, Referral & Partner Notification*, 2002, online: [www.health.state.ny.us/nysdoh/rfa/hiv/guide.htm](http://www.health.state.ny.us/nysdoh/rfa/hiv/guide.htm).

<sup>76</sup> See, for example, S. Maman et al, “Women’s barriers to HIV-1 testing and disclosure: challenges for HIV-1 voluntary counselling and testing,” *AIDS CARE* 13 (2001): 595–603, at 596; R. North and K. Rothenberg, “Partner notification and the threat of domestic violence against women with HIV infection,” *New England Journal of Medicine* 329 (1993): 1194–1196.

<sup>77</sup> K. Rothenberg et al, “Domestic violence and partner notification: implications for treatment and counseling of women with HIV,” *Journal of the American Medical Women’s Association* 50(3-4) (1995): 87–93, at 90; A. Gielen et al, “Women’s lives after an HIV-positive diagnosis: disclosure and violence”

women, this risk may be further compounded by the fact that domestic violence risk is already elevated during pregnancy.<sup>78</sup> Given the increased risk of domestic violence risk following HIV testing, screening should be implemented during both pre- and post-test counselling. Some guidelines distinguish between recommended and required screening in post-test counselling, depending on serostatus. For example, the New York State [U.S.] Department of Health *Guidelines for Integrating Domestic Violence Screening into HIV Counseling, Testing, Referral & Partner Notification* recommend that screening occur during pre-test counselling for all patients and during post-test counselling for HIV negative patients. They also *require* that screening occur during post-test counselling for HIV positive patients.<sup>79</sup>

It should be observed that while domestic violence screening in the health care sector is widely endorsed, studies indicate persistently low rates of screening by health care providers.<sup>80</sup> As noted by one set of guidelines on domestic violence screening in healthcare settings:

In some cases, a victim of domestic violence may refuse, out of fear, cultural or individual concepts of loyalty to the batterer, lack of self-awareness that they are in a domestic violence situation, or for other reasons, to participate in the domestic violence screening. This may be especially true when the person is under stress, and the screener is an unfamiliar person not known to the victim.<sup>81</sup>

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*Maternal and Child Health Journal* 4(2) (2004): 111–120; S. Maman et al, “HIV-positive women report more lifetime partner violence: findings from a voluntary counseling and testing clinic in Dar es Salaam, Tanzania,” *American Journal of Public Health* 92(8) (2002): 1331–1337; A. Medley et al, “Rates, barriers and outcomes of HIV serostatus disclosure among women in developing countries: implications for prevention of mother-to-child transmission programmes,” *Bulletin of the World Health Organization* 82(4) (2004): 299–307, at 301–303.

<sup>78</sup> See, for example, C. Murphy et al, “Abuse: a risk factor for low birth weight? A systematic review and meta-analysis,” *Canadian Medical Association Journal* 164(11) (2001): 1578–1579; J. Richardson et al, “Identifying domestic violence: cross sectional study in primary care” *British Medical Journal* 324 (2002): 274–277.

<sup>79</sup> New York State Department of Health, *Guidelines* (supra); see also, California Department of Health Services, *HIV Partner Counseling and Referral Services: Standards and Recommendations*, 2000, online: [ww2.cdph.ca.gov/programs/AIDS/Documents/PCRSguidelines2000-05.pdf](http://ww2.cdph.ca.gov/programs/AIDS/Documents/PCRSguidelines2000-05.pdf).

<sup>80</sup> See, for example, J. Waalen et al, “Screening for intimate partner violence by health care providers: barriers and interventions,” *American Journal of Preventative Medicine* 19 (2000): 230–237, at 230; L. Elliott et al, “Barriers to screening for domestic violence,” *Journal of General Internal Medicine* 17 (2002): 112–116; J. Abbott, “Domestic violence against women: incidence and prevalence in an emergency department population,” *Journal of the American Medical Association* 273 (1995): 1763–1767; A. Marais et al, “Domestic violence in patients visiting general practitioners — prevalence, phenomenology, and association with psychopathology,” *South African Medical Journal* 89 (1999): 635–640.

<sup>81</sup> New York State Department of Health, *Guidelines* (supra).