



REPUBLIC OF NAMIBIA

LAW REFORM AND DEVELOPMENT COMMISSION

**LOCUS STANDI
DISCUSSION PAPER**

LRDC 27

Windhoek, Namibia

March 2014

ISSN 1026-8405

ISBN 978-99945-0-072-7

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***Number of publication, ISSN and ISBN numbers not printed on all copies.**

Recommended Citation

Namibia Law Reform and Development Commission: LRDC 27; *Locus Standi Discussion Paper*, March 2014, Windhoek.

LAW REFORM AND DEVELOPMENT COMMISSION

The Namibian Law Reform and Development Commission (the LRDC) is a creature of statute established by **Section 2** of the **Law Reform and Development Commission Act, 1991 (Act No. 29 of 1991)**.

The core mandate of the Commission is to undertake research in connection with all branches of law and to make recommendations for the reform and development thereof.

The current Commission members are–

Mr S Shanghala, Chairperson
Adv J Walters, Ombudsman

Under section 3 of the Law Reform and Development Commission Act, 1991, Commissioners are appointed by the President. Previous Commissioners ceased to hold their office when their term of office for three (3) years lapsed on November 8, 2013. They were –

Ms Dianne Hubbard;
Mr Nixon Marcus;
Ms Damoline Muroko;
Ms Yvonne Dausab; and
Mr Raywood Rukoro

The Secretary to the Commission is Mr J.T. Namiseb who heads the Directorate of Law Reform, an organizational component in the Ministry of Justice. The Directorate of Law Reform serves as Secretariat to the Commission, assisting the Commission in the exercise of its powers and the performance of its duties and functions under the Law Reform and Development Commission Act, 1991. The Commission and Secretariat are housed on the 1st Floor, Mutual Platz Building, Post Street Mall, Windhoek.

All correspondence to the Commission should be addressed to:

The Secretary
Law Reform & Development Commission
Private Bag 13302
Windhoek
Republic of Namibia

Fax: (+264-61) 240064
Tel.: (+264-61) 228593
E-mail:
lawreform@moj.gov.na

CONTENTS

	Page
1. Foreword.....	5
2. Introduction.....	7
3. Namibia's Current Common Law Rules On Standing.....	7
4. Standing Under The Namibian Constitution.....	11
5. Statutory Standing.....	13
6. Concerns With The Common Law Approach To Standing.....	15
7. Options For Expanding Standing.....	18
8. Considerations Regarding Expansion Of Standing.....	20
9. Conclusion And Recommendations.....	22
10. Annexure A: Standing In Civil Actions Bill.....	24

Foreword

Namibia as a State is premised upon the Rule of Law as pronounced by the Namibian Constitution under Article 1(1) thereof. What does this imply?

This implies, for the purposes of this **Discussion Document**, that any disputes shall be determined through and by the courts of law. The reason why the Law Reform and Development Commission (LRDC) became convinced to prioritize the matter of *locus standi in judicio* (standing to bring matters before courts of law) is premised in the *raison d'être* for the existence of the LRDC, as contained under section 6 of the Law Reform and Development Commission Act, 1991 (Act No. 29 of 1991) which is *inter alia*, to research, reform and develop new or more effective procedures for the administration of the law and the dispensing of justice, as well as to make the laws more readily accessible.

The LRDC collaborated with the Legal Assistance Center (LAC) in the production of this document, as it concurs with the need to ensure that those aggrieved persons are assisted, in as far as is possible, with mounting legal challenges and accessing the courts of law, so that the full content of their rights can be realized. Whilst we find common voice with this objective, we do not find it ripe to introduce class actions as yet. Representative standing, as well as public interest standing, in our view, will go a long way to open up further access to the courts, in addition to the access an aggrieved person him or her self has, and in addition to the limited standing which the Ombudsman has.

The ultimate objective of course, is to give meaning to the letter of the law. If citizens are unable to litigate on public interest matters, where not only one person can show a substantial and real connection, then we are unable to give meaning to the content of the law.

State organs should not view this exercise as targeting them for increased litigation, and neither should it be viewed that this reform may amount to over flooding the Courts (which

are already overloaded) with frivolous litigation, as we fully support the introduction of the latest version of the High Court Rules and its inherent case management approach.

To the contrary, this project is being run concurrently with the project on Administrative Justice, as both these projects, *Locus Standi* and Administrative Justice, relate closely with the need to have reasoned action and redress from action of administrative bodies by members of society, and the common law's archaic standing position hinders the vindication of rights and assertion of interests.

Given the high costs of litigation, compounded by a very reluctant-to-change legal profession (with no *pro bono* culture, a hierarchal litigation practice and complex court rules), society needs to respond to the exigencies of the times and ensure that the relevant Courts or Tribunals are accessed by the populace.

This is particularly important if regard is had to the dysfunctional history of access to the courts during the long years of apartheid. Namibia must, therefore, forge on as a leader in access to law, and through this exercise, one may see yet another page turned in this endeavor.



Sakeus Edward Twelityaamena Shanghala
Chairman: Law Reform and Development Commission

1. INTRODUCTION

1.1. *Locus standi in judicio* (*locus standi* or standing) is the set of principles that governs whether an individual or group may bring an action in court with respect to a specific issue. The current rules on *locus standi* in Namibia are based on the common law and are particularly narrow and restrictive.

1.2. The Law Reform and Development Commission has decided to make law reform on the issue of *locus standi* a priority. This is a fundamental issue, as the rules regarding standing directly affect the ability of individuals and groups to approach the courts to vindicate their substantive and procedural rights, including those protected by the Namibian Constitution.

1.3. The Law Reform and Development Commission's consideration of this issue has benefitted from the research done by the Legal Assistance Centre (LAC) on this topic, and we thank the LAC for its contribution to the discussion.

1.4. This Issue Paper is intended to serve as the basis for further consultation within the legal profession, the judiciary and the general public.

2. NAMIBIA'S CURRENT COMMON LAW RULES ON STANDING

2.1. *Locus standi* depends on the relationship between the applicant seeking redress and the right that has been violated.¹ Under Namibia's common law on standing, an applicant must show a "direct and substantial interest" in the subject matter and the outcome of the application.²

¹ Cheryl Loots, "*Locus Standi* to Claim Relief in the Public Interest in Matters Involving the Enforcement of Legislation", 104 SALJ 131 (1987) at p.132.

² *Trustco Insurance t/a Legal Shield Namibia and Another v Deed Registries Regulation Board and Others* 2011 (2) NR 726 (SC) at para 16; *Mweb Namibia (Pty) Ltd v Telecom Namibia Ltd and Others* 2012 (1) NR 331 (HC) at para 11; *Clear Channel Independent Advertising v Transnamib Holdings* 2006 (1) NR 121 (HC) at para 45, quoting *United Watch and Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another* 1972 (4) SA 409 (C) at 415B.

2.1.1. Courts have interpreted “direct and substantial interest” to require an applicant to show a “legal interest” in the case,³ and not merely an indirect financial or commercial interest.⁴

2.1.2. In addition, an applicant’s interest must be “current” and “actual”; standing cannot be based on an interest that is abstract, academic, hypothetical, or remote.⁵

2.1.2.1. This means that an interest that has not yet come into existence or an interest that has been extinguished cannot support standing.⁶ For example, a party usually lacks a current interest in the constitutionality of a statute that is no longer in force.⁷ The Supreme Court, however, has held that an applicant retains sufficient interest to support standing if the question of constitutionality is an issue in another case in which the applicant is a party.⁸

2.1.2.2. Importantly, a threatened violation of constitutional rights is sufficient to provide standing to challenge that unconstitutional law or act - even though it is uncertain whether the applicant’s rights will ultimately be

³ *Trustco Insurance t/a Legal Shield Namibia and Another v Deed Registries Regulation Board and Others* 2011 (2) NR 726 (SC) at para 16; *Mweb Namibia (Pty) Ltd v. Telecom Namibia Ltd and Others* 2012 (1) NR 331 (HC) at para 11; *Clear Channel Independent Advertising v Transnamib Holdings* 2006 (1) NR 121 (HC) at para 45, quoting *Henri Viljoen (Pty) Ltd v Awerbuch Brothers* 1953 (2) SA 151 (O) at 166A.

⁴ *Trustco Insurance t/a Legal Shield Namibia and Another v Deed Registries Regulation Board and Others* 2011 (2) NR 726 (SC) at para 16; *United Watch and Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another* 1972 (4) SA 409 (C) at 415F-H, quoted in *Kerry McNamara Architects Inc and Others v Minister of Works, Transport and Communication and Others* 2000 NR 1 (HC) at 7D-F; *Henri Viljoen (Pty) Ltd v Awerbuch Brothers* 1953 (2) SA 151 (O) at 170H; *Alexander v Mbumba and Others* (A 179/2007) [2012] NAHC 303 (6 August 2012).

⁵ *Mweb Namibia (Pty) Ltd v Telecom Namibia Ltd and Others* 2012 (1) NR 331 (HC) at para 11; *Uffindell v Government of Namibia* 2009 (2) NR 670 (HC) at para 12.

⁶ *Clear Channel Independent Advertising v Transnamib Holdings* 2006 (1) NR 121 (HC) at para 49, citing *Plettenberg Bay Entertainment v Minister van Wet en Orde* 1993 (2) SA 396 (C) at 401 E.

⁷ See, for example, *JT Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others* 1997 (3) SA 514 (CC).

⁸ *Namunjepo v Commanding Officer, Windhoek Prison* 1999 NR 271 (SC).

violated, he or she is not required to wait until that violation actually occurs before initiating a challenge.⁹

2.2. Under the common law, an applicant has standing only to protect his or her own interests.

2.2.1. Standing cannot be founded on a derivative interest in the subject of the litigation.¹⁰ For example, the beneficiaries of a will have standing to bring suit to safeguard their own rights to inheritance, but not to assert the rights of the estate against a third party.¹¹

2.2.2. As a result of this limitation, under Namibia's common law, individuals cannot bring actions on behalf of other individuals or groups whose rights have been violated (known as "representative standing"), and organisations are precluded from bringing actions on behalf of their members ("organisational standing"). Such forms of standing are common in many other countries such as the Republic of South Africa, the Republic of Canada and the Republic of India.

2.2.3. Although few Namibian courts have directly addressed the issue, the common law also does not appear to "recognise standing on the basis of a citizen's action to vindicate the public interest".¹² This means that an

⁹ *Alexander v Minister of Justice* 2010 (1) NR 328 (SC); *Gomes v Prosecutor-General* (A 61/2012) NAHCMD 240 (9 August 2013) (HC); *Mweb Namibia (Pty) Ltd v Telecom Namibia Ltd and Others* 2012 (1) NR 331 (HC) at para 15 ("The applicant's rights do not even have to be infringed by the conduct of the first respondent, a mere threat of such infringement would allow it to approach a competent court for relief.").

¹⁰ *Kerry McNamara Architects Inc and Others v Minister of Works, Transport and Communication and Others* 2000 NR 1 (HC). Similarly, an agent does not have standing in respect of the interests of the principal. *Vaatz v Registrar of Deeds: In re Grootfontein Municipality* 1993 NR 170 (HC) at 170A-171E; *Konga Clearing Agencies CC v Minister of Finance* 2011 (2) NR 623 (HC), citing *Sentrakoop Handelaars Bpk v Lourens and Another* 1991 (3) SA 540 (W). Similar principles apply in respect of parent companies and their subsidiaries. *Oranjerivierwynkelders Kooperatief Beperk and Another v Professional Support Services CC and Others* 2011(1) NR 184 (HC) at para 19.

¹¹ *Stellmacher v Christians* 2008 (2) NR 587 (HC) at para 13.

¹² *Uffindell v Government of Namibia* 2009 (2) NR 670 (HC) at para 13; see *Dalrymple v Colonial Treasurer* 1910 TS 372, 378 ("[N]o man can claim damages in a civil action unless he has himself been injured. . . . And the rule applies to wrongful acts which affect the public, as well as to torts committed against private

individual's status as a member of the public is typically insufficient by itself to confer standing, regardless of the public importance of the subject matter.¹³

2.3. The same common law standing requirements generally apply to individuals seeking a declaratory order.¹⁴ A court has discretion whether or not to grant declaratory relief, but at a minimum the applicant must be a "person interested in an existing, future or contingent right or obligation".¹⁵

2.4. Courts have recognised a few limited exceptions to the common law rules on standing.

2.4.1. In some circumstances, an applicant will be allowed to make an application to protect the liberty interest of another, provided a sufficiently good reason is shown why the individual cannot make the application on his or her own behalf.¹⁶ This may be allowed, for example, in cases where the interested person is in detention or fears victimisation.¹⁷

individuals."); *Nguvauva v Ovambanderu Tribal Authority and Others*, A 312/2010 [2010] NAHC 182 (4 Nov 2011) (unreported).

¹³ Note, however, that a local ratepayer and taxpayer has standing to challenge municipal actions relating to municipal funds and property. *Grobelaar v Council of the Municipality of Walvis Bay* 2007 (1) NR 259 (HC).

¹⁴ *Southern Engineering and Another v Council of the Municipality of Windhoek* 2011 (2) NR 385 (SC); *Nekwaya and Another v Nekwaya and Another* (A 262/2008) [2010] NAHC 11 (17 January 2010); *Kauesa v Minister of Homes Affairs and Others* 1994 NR 102 (HC); *Maletsky and Others v The Attorney-General and Others* [2010] NAHC 173 (HC); *Mushwena v Government of the Republic of Namibia* 2004 NR 94 (HC).

¹⁵ *Southern Engineering and Another v Council of the Municipality of Windhoek* 2011 (2) NR 385 (SC); see also High Court Act 16 of 1990, section 16(d).

¹⁶ *Uffindell v Government of Namibia* 2009 (2) NR 670 (HC) at para 13. The Supreme Court has also referred to this exception to the usual common law rules of standing "to prevent the injustice that might arise where people who have been wrongfully deprived of their liberty are unable to approach a court for relief". *Trustco Insurance t/a Legal Shield Namibia and Another v Deed Registries Regulation Board and Others* 2011 (2) NR 726 (SC) at para 16.

¹⁷ *Wood and Others v Ondangwa Tribal Authority* 1975 (2) SA 294 (A); *Vaatz v. The Municipal Council of Windhoek* [2011] NAHC 178 (22 June 2011). See also *Uffindell v Government of Namibia* 2009 (2) NR 670 (HC) at para 13; *Trustco Insurance t/a Legal Shield Namibia and Another v Deed Registries Regulation Board and Others* 2011 (2) NR 726 (SC) at para 16.

2.4.2. Where a particular law was designed to protect a certain group, South African courts have allowed a member of that group to bring suit pertaining to that law without showing actual damage.¹⁸ As part of the common law at the time of Namibia's independence, this rule should remain good law,¹⁹ although a search of the case law has not revealed any cases in which a Namibian court has applied this exception.

2.4.3. The High Court has suggested that a broadened approach to standing may be justified where necessary to curb an abuse of public power, but no such exception has actually been recognised in Namibia to date.²⁰

3. STANDING UNDER THE NAMIBIAN CONSTITUTION

3.1. The Namibian Constitution addresses standing in respect of certain constitutional rights.

3.2. Article 25(2) of the Namibian Constitution states that "aggrieved persons" may approach the courts alleging a violation of a fundamental right or freedom.

3.3. Article 18 of the Namibian Constitution similarly states that "persons aggrieved" by the acts of administrative bodies and administrative officials shall have the right to seek redress.

3.4. The Namibian Constitution, however, does not define "aggrieved persons" or "persons aggrieved". As a result, Namibian courts initially interpreted standing under Articles 25(2) and 18 with reference to the common law's "direct and substantial interest" requirement.²¹

¹⁸ See *Macropulos v Mullinos* 1966 (1) SA 477 (W).

¹⁹ Namibian Constitution, Article 140(1).

²⁰ *Uffindell v Government of Namibia* 2009 (2) NR 670 (HC) at para 13.

²¹ See *Kerry McNamara Architects Inc and Others v Minister of Works, Transport and Communication and Others* 2000 NR 1 (HC).

3.4.1. Significantly, however, the Namibian Constitution's text does not reference the common law standing requirements, and nowhere does it require that a person have a "direct and substantial interest" in the subject of the litigation in order to have standing. Thus, there do not appear to be any Constitutional barriers to broadening standing beyond the rigid confines of the common law.

3.4.2. In addition, the language of Articles 25(2) and 18 do not even expressly require that an "aggrieved" person claim that his or her *own* rights were violated. This allows for the possibility of organisational, representative, or public interest standing.

3.5. Several recent High Court cases have suggested a more expansive approach to standing in the context of constitutional issues.²² However, this approach has not been adopted uniformly.²³ The Supreme Court has yet to squarely address the question,²⁴ although it has made references to the importance of citizens' ability to access the courts, stating that the "rules of standing should not ordinarily operate to prevent citizens from obtaining legal clarity as to their legal entitlements."²⁵

²² See *Uffindell v Government of Namibia* 2009 (2) NR 670 (HC); *Lameck and Another v President of Republic of Namibia and Others* 2012 (1) NR 255 (HC) at para 11; *Jack's Trading CC v The Minister of Finance* 2013 (2) NR 491 (HC); *Petronaft International Glencor Energy UK Ltd and Another v Minister of Mines and Energy and Others* [2011] NAHC 125. The Supreme Court recently set aside the High Court's order in *Petronaft* without addressing the parties' standing. *Minister of Mines and Energy and Others v Petronaft International Ltd and Others* 2012 (2) NR 781 (SC).

²³ See *Labuschagne and Others v. Master of the High Court of Namibia and Others* (A 283/2010) [2012] NAHC 187 (10 July 2012); *Maletsky and Others v Attorney-General and Others* [2010] NAHC 173 (HC).

²⁴ See *Trustco Insurance t/a Legal Shield Namibia and Another v Deed Registries Regulation Board and Others* 2011 (2) NR 726 (SC).

²⁵ *Trustco Insurance t/a Legal Shield Namibia and Another v Deed Registries Regulation Board and Others* 2011 (2) NR 726 (SC) at para 18. See also *Aussenkehr Farms v Namibia Development* 2012 (2) NR 671 (SC) (describing "free access to the courts" as a "fundamental right" in the context of the court's power to summarily dismiss an action).

3.6. One goal of the Law Reform and Development Commission's proposed *locus standi* legislation is to clarify that the meaning of "aggrieved" in the context of constitutional claims is broader and more flexible than the common law's "direct and substantial interest" requirement. The Law Reform and Development Commission believes this approach is warranted given the importance of protecting the fundamental rights and enforcing the affirmative duties contained in the Namibian Constitution.

3.7. The Namibian Constitution also permits aggrieved persons to approach the Ombudsman, who, pursuant to the Ombudsman Act, 1990 (Act No. 7 of 1990) and Article 25(2) of the Namibian Constitution, has the power to investigate and initiate legal proceedings regarding a range of issues, including violations of fundamental rights and freedoms, abuses of power and corruption by government officials, and overuse or misuse of natural resources.

3.7.1. Although this could be a useful avenue through which citizens could access the courts, in practice a lack of resources prevents the Ombudsman's office from fully investigating all of the complaints it receives.²⁶

3.7.2. In addition, the Ombudsman does not have independent standing to approach the courts. Instead, the Ombudsman can only act upon the request of an aggrieved person. By definition, such an aggrieved person would also have standing to bring an action in court on his or her own behalf. As a result, although the Office of the Ombudsman is a useful institution and serves many important democratic functions, it does not meaningfully expand individuals' access to the courts.

4. STATUTORY STANDING

²⁶ See Office of the Ombudsman, Annual Report (2010) at p. 31.

4.1. Some Namibian statutes specify standing rules applicable to the enforcement or challenge of that particular statute.

4.2. Recent legislation demonstrates a distinct trend toward a more liberal approach to standing, thus enabling greater access to the courts than would be possible under the stricter common law approach. Examples of this trend include the Combating of Domestic Violence Act, 2003 (Act No. 4 of 2003), Maintenance Act, 2003 (Act No. 9 of 2003), Liquor Act, 1998 (Act No. 6 of 1998) and the draft Child Care and Protection Bill prepared by the Ministry of Gender Equality and Child Welfare.²⁷ A recent Labour Court decision even suggests that statutes, which are necessarily subject to the Namibian Constitution, should not be read “to whittle away the provisions of Article 18” allowing “persons aggrieved” to seek redress.²⁸

4.3. Section 15(1) of the Supreme Court Act, 1990 (Act No. 15 of 1990) permits the Attorney-General to approach the Supreme Court directly as a court of first instance on constitutional questions. This power flows from Article 79(2) of the Namibian Constitution, which authorises the Supreme Court to “deal with matters referred to it for decision by the Attorney-General under this Constitution”.

4.3.1. Notably, the Attorney-General may refer matters to the Supreme Court as a court of first instance - unlike cases brought by individuals, which must be “current” and “actual”.²⁹ This enables the Supreme Court to consider the constitutionality of statutes or practices that might otherwise be insulated from review as a result of the strict common law standing requirements.³⁰

²⁷ See Combating of Domestic Violence Act, 2003 (Act No. 4 of 2003), section 4(2); Maintenance Act, 2003 (Act No. 9 of 2003), definition of “complainant” in section 1 read together with section 9; Liquor Act, 1998 (Act No. 6 of 1998), section 9(3); Child Care and Protection Bill, draft dated 12 January 2012, section 47(2).

²⁸ *Methealth Namibian Administrators (Pty) Ltd v Mbengela NO and Others* (LC 97/2011) [2012] NALC 32 (23 August 2012).

²⁹ *Uffindell v Government of Namibia* 2009 (2) NR 670 (HC) at para 12.

³⁰ One concern with the court entertaining and ruling on abstract or hypothetical issues is the difficulty of determining the constitutionality of a statute or practice devoid of a factual context. This is especially true in the case of statutes that are not facially invalid, but which could nonetheless run afoul of the Constitution in practice. This concern could be addressed, for example, by limiting the scope of the court’s review in

4.3.2. The Attorney-General's power is limited, however, by the Supreme Court's sole and unappealable discretion to decide whether to exercise its jurisdiction. The Attorney-General may also face budgetary, political, or other pressures that reduce the likelihood of initiating constitutional challenges. Indeed, in practice the Attorney-General has referred only three matters to the Supreme Court.³¹

4.3.3. Thus, the Attorney-General's power to approach the Supreme Court is an insufficient substitute for broader citizens' access to the courts.

5. CONCERNS WITH THE COMMON LAW APPROACH TO STANDING

5.1. Namibia's narrow common law standing rules may serve to obstruct meaningful access to justice by making it difficult, if not impossible, for parties to approach courts to challenge unlawful government action or seek redress for violations of rights.

5.1.1. For example, in many instances an individual may be reluctant to approach the court on their own to challenge a government law or action, perhaps fearing retribution or victimisation. Individuals are also often reluctant to raise family law issues in court on their own, because of social and family pressures.

5.1.2. Rigid standing requirements also fail to recognise and account for the administrative, financial, and other logistical barriers to initiating litigation,

abstract or hypothetical cases to the facial constitutionality of the statute or practice, thereby leaving the door open to future "as-applied" challenges by aggrieved persons.

³¹ *Ex parte Attorney-General: In re Corporal Punishment* 1991 NR 178 (SC); *Ex parte Attorney-General: In re The Constitutional Relationship Between the Attorney-General and the Prosecutor-General* 1998 NR 282 (SC); *Attorney-General of Namibia v Minister of Justice and others* Case No.: (P.12/2009) [2013] NASC 3, delivered on 4 April 2013.

which have a disproportionate effect on low-income, poorly-educated, or otherwise marginalised groups and can prevent them from accessing the courts.

5.2. The common law “direct and substantial interest” requirement may also create rule-of-law problems.

5.2.1. The common law standing rules can effectively immunize certain unlawful or unconstitutional statutes or conduct from judicial scrutiny, because no individual has a sufficient “direct and substantial interest” to bring a challenge.

5.2.1.1. This risk is particularly acute in the context of unlawful conduct that negatively affects a large number of people (or even the entire public), yet does not affect the legal interest of any specific individual or entity. For example, suppose the government grants permission for a corporation to withdraw significant quantities of groundwater. This could harm nearby farmers, but the farmers could lack standing to challenge the permit if they do not have a legal interest in the groundwater.

5.2.1.2. Similarly, narrow standing rules make it difficult to enforce broadly applicable but imprecise constitutional guarantees, such as the rights to equality³² and human dignity.³³ The resulting risk is that the government could neglect its duty to secure and enforce these rights of citizens, and the public would have limited recourse.

5.2.1.3. *Ultra vires* government actions - meaning actions that are beyond the scope of the authority granted to the government - are inherently unlawful, but they could also be unchallengeable in court if no individual

³² Namibian Constitution Article 10(1).

³³ Namibian Constitution Article 8(1).

could establish standing under a narrow interpretation of a “direct and substantial interest”.³⁴

5.2.2. The Namibian Constitution, in addition to enshrining fundamental rights and freedoms, also imposes many affirmative duties upon the State. The traditional common law standing rules, which were developed to protect a narrow set of private law rights, are less useful within this modern constitutional framework and its creation of duties owed by the Government to the public.³⁵

5.3. By expanding access to the courts, more flexible standing requirements have the potential to improve Government accountability and advance participatory democracy.

5.3.1. An essential component of a constitutional democracy is the power of citizens to hold the government accountable. Rigid standing rules with the potential to insulate certain government conduct from challenge are inconsistent with this goal. Instead, standing rules should be sufficiently broad and flexible to enable citizens - individually and collectively - to access the courts to ensure the government is meeting its constitutional obligations.

5.3.2. This is especially true with respect to historically disadvantaged or marginalised peoples, who are often unable to assert their rights through the political process. Broadening standing requirements to make it easier for such individuals and groups to access the courts would allow them to participate more fully in the democratic process.

³⁴ See *Thorson v Attorney General of Canada* [1975] 1 SCR 138 at 141 (Judson J, dissenting).

³⁵ See *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 at 229.

6. OPTIONS FOR EXPANDING STANDING

6.1. The common law requirement of demonstrating a “direct and substantial interest” to establish standing can be overly restrictive, especially in the context of constitutional claims or violations of fundamental rights and freedoms. Instead, consistent with the language in Articles 25(2) and 18 of the Namibian Constitution, standing could be based on the broader and more flexible concept of whether a person is “aggrieved”.

6.2. Such an approach would recognise standing in certain circumstances regardless of whether an individual could demonstrate a direct and substantial legal interest in the matter. Such circumstances could include public interest standing, representative standing, and organisational standing.

6.3. Public interest standing would enable any member of the public - or any group or organization - to bring an action to challenge the legality or constitutionality of laws, policies, or other government actions, without the need to meet the common law standing requirements.

6.3.1. Public interest standing could allow laws to be challenged as unconstitutional on their face, without needing to establish that a specific individual’s rights have been violated. This would ensure that laws or conduct cannot be insulated from challenge just because no individual is able to demonstrate a “direct and substantial interest”.

6.3.2. Public interest standing is common in many other countries, including South Africa, India, and Canada. The Indian Supreme Court, in particular, has

spoken repeatedly of the importance of public interest litigation as a means of enforcing collective and social rights.³⁶

6.4. Representative standing would permit an individual to bring legal action on behalf of another individual or group whose rights have been violated.

6.4.1. Representative standing accounts for the fact that many individuals and groups face practical barriers that prevent them from accessing the courts. These barriers could include cost, physical distance from the courthouse, ignorance of rights, lack of familiarity with court rules and procedures, and even fear of retribution or victimisation.

6.4.2. As previously mentioned, Namibian courts have recognised a limited version of representative standing where the individual whose liberty interest has been violated is unable to bring the action on his or her own behalf.³⁷ The Law Reform and Development Commission recommends expanding the availability of representative standing beyond this narrow common law exception.

6.5. Organisational standing would permit groups such as unions, churches, or civil society organisations to bring legal action on behalf of one or more of their members.

6.5.1. Organisational standing recognises that, in many instances, individuals may fear acting alone to challenge government conduct. Allowing an organisation to pursue a claim on behalf of such individuals could provide a more effective avenue of securing the individuals' rights.

³⁶ See *SP Gupta v Union of India* 1982 SC 149 at para 19; *PUDR v India* A.I.R. 1982 SC 1473, 1476; *People's Union for Civil Liberties v Union of India and Ors* Petition (Civil) No 196/2001 (Supreme Court of India, 2 May 2003).

³⁷ *Uffindell v Government of Namibia* 2009 (2) NR 670 (HC) at para 13.

6.5.2. Organisational standing can also help overcome the many obstacles - political, financial, logistical - that often prevent groups of similarly-situated individuals from joining together to bring a claim. By facilitating collective action, organisational standing also serves to empower marginalised groups.

6.5.3. Procedural requirements could be established to deter frivolous litigation and to ensure that the organisation has a sufficient interest in the case. For example, organisational standing could be limited to cases where the action being challenged or the relief being sought is relevant to the organisation's goals or purposes.

6.6. Class actions, which permit large numbers of individuals with common issues to consolidate their claims or defences into a single action lead by a representative party, are permitted in many other countries, including South Africa.³⁸ However, in addition to their potential advantages, class actions also present unique challenges. The Law Reform and Development Commission believes further research is required before it can make recommendations regarding the advisability of authorising class actions in Namibia. It is anticipated that this will be the subject of a future report.

7. CONSIDERATIONS REGARDING EXPANSION OF STANDING

7.1. The rules of *locus standi* serve a judicial gatekeeping function, admitting only deserving litigants while denying entry to those advancing abstract or even frivolous claims. This allows courts to devote their limited time and resources to genuine disputes among interested parties, rather than wasting them on baseless legal challenges. As a result, some might worry that a broader approach to

³⁸ See for example: *Ngxuzza and Others v Permanent Secretary, Department of Welfare, Eastern Cape, and Another* 2001 (4) SA 1184 (SCA); *Highveldridge Residents Concerned Party v Highveldridge Transitional Local Council and Others* 2002 (6) SA 66 (T).

standing could result in increased litigation that might strain judicial resources. However, the possibility that broadened standing rules will result in a flood of spurious litigation appears remote.³⁹

7.1.1. The normal costs of litigation are likely sufficient to deter frivolous litigants. The potential that the court will impose a costs order on an unsuccessful plaintiff serves as a further deterrent.

7.1.2. In addition to these deterrents, procedural mechanisms can be established to avoid any potential flood of litigation. For example, specific criteria can be established for public interest standing, and an applicant could be required to seek leave from the court before proceeding on a representative basis.

7.1.3. It is also worth keeping in mind that an increased caseload is not inherently undesirable: to the extent current standing rules are preventing individuals from vindicating their rights or challenging unlawful government actions, then more legal actions are *desirable*. The Law Reform and Development Commission believes that the proposed legislation strikes an appropriate balance.

7.2. There is also reason to believe that allowing various forms of representative and organizational standing would actually improve judicial efficiency by consolidating multiple claims with common issues into a single action.

7.2.1. For example, assume an unlawful administrative action has harmed a community. Rather than requiring every member of the community to file an individual legal challenge - which would entail multiple hearings and

³⁹ *Ngxuza and Others v Permanent-Secretary, Department of Welfare, Eastern Cape and Another* 2001 (2) SA 609 (E); *Nguvauva v Ovambanderu Tribal Authority and Others*, A 312/2010 [2010] NAHC 182 (4 Nov 2011) (unreported).

necessitate an individualized determination of each person's legal interest and injury - an organisation representing the community as a whole could be permitted to bring a consolidated challenge on behalf of all of its residents. This consolidated approach would conserve resources and increase efficiency.

7.3. There may be some concern that broader standing rules - in particular public interest standing - could lead to "judicial policymaking", which lies outside the courts' constitutional function and violates the separation of powers.

7.3.1. In the opinion of the Law Reform and Development Commission, this concern is addressed through existing limits on courts' jurisdiction, as well as the contents of substantive laws, many of which restrict the rights that courts can recognize and the nature of relief they can grant. A court can legitimately craft policy only to implement or enforce a recognised legal right, and it must craft that policy to fit the shape and nature of the right itself.

7.3.2. Moreover, the Legislature and Executive will continue to serve as an effective check on judicial encroachment of the legislative sphere.

7.4. The Law Reform and Development Commission believes the concerns cited can be minimized and that, on balance, they are outweighed by the societal and rule-of-law benefits of a broader approach to standing.

8. CONCLUSION AND RECOMMENDATIONS

8.1. The Law Reform and Development Commission welcomes the judicial development of an expanded approach to standing in constitutional cases and believes that such an approach is consistent with the language and overall framework of the Namibian Constitution.

8.2. However, the Law Reform and Development Commission recommends that Namibia introduces a statute to reform both the common law on standing and standing in Constitutional cases. The key components of this statute should be a relaxation of the “direct and substantial interest” requirement and a recognition of public interest standing, representative standing, and organisational standing.

8.3. The Law Reform and Development Commission understands that judicial resources are limited and believes that representative and organisational standing could actually improve efficiency in the court system. The Law Reform and Development Commission also believes that existing laws, as well as the Executive and Legislative branches, can prevent unchecked judicial policymaking.

8.4. The expansion of standing recommended by the Law Reform and Development Commission is consistent with the practice of many other countries, as well as various international tribunals.

8.5. Further research is required before the Law Reform and Development Commission is prepared to make a recommendation regarding the advisability of allowing class actions in Namibia.

End.

ANNEXURE A

STANDING IN CIVIL ACTIONS BILL

To expand standing in civil actions to include organizational standing, representative standing, and public interest standing, and to define Constitutional standing under Articles 18 and 25(2) of the Namibian Constitution.

(Introduced by the Minister of Justice)

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

Definitions

1. In this Act, unless the context otherwise indicates,

“action” means any proceeding instituted in a court, whether by way of summons or notice of motion;

“court” means

(a) the Supreme Court of Namibia as constituted under Article 79(1) of the Namibian Constitution;

(b) the High Court of Namibia as constituted under Article 80(1) of the Namibian Constitution;

(c) the Labour Court as constituted under section 15 of the Labour Act, 1992 (Act No. 6 of 1992) and continued by virtue of section 115 of the Labour Act, 2007 (Act No. 11 of 2007);

(d) magistrate courts established under the Magistrates Courts Act, 1944 (Act No. 32 of 1944); and

(e) any other court designated by the Minister;

“person” means a natural or legal person, or an association of persons which is not vested with legal personality;

“organisation” means a group of individuals, whether incorporated or unincorporated, including but not limited to unions, churches, voluntary associations, trusts, partnerships, community groups and civil society organisations;

“public interest action” means an action instituted by a representative in the interest of the public generally, or in the interest of a section of the public, but not necessarily in that representative’s own interest;

“representative” means a person approved by the court to bring an action on behalf of another person; and

“standing” means the qualification of a particular applicant to seek redress from the courts in respect of a particular issue, which is sometimes referred to as “*locus standi*”.

Objective

2. (1) The objective of this Act is to establish rules for *locus standi* in Namibian courts that will increase access to justice by ensuring that individuals and groups have the ability-

(a) to bring actions in courts to vindicate substantive and procedural rights;

(b) to challenge allegedly unlawful or unconstitutional government actions or conduct; and

(c) to bring actions aimed at protecting the public interest.

(2) Any ambiguity in statutory language shall be interpreted in light of this objective.

Standing in civil actions

3. Subject to section 7, the forms of standing set forth in sections 4-6 shall apply in addition to common law standing in all civil cases, including declaratory judgements.

Organisational standing

4. An organisation shall have standing to bring an action on behalf of the interests of one or more of its members: Provided that the subject matter of the action or the nature of the relief being sought is relevant to the organisation’s stated or demonstrated mission, purpose, goals, or objectives.

Representative standing

5. (1) A representative may bring an action in a court on behalf of another person, with approval of the court, provided that such other person-

(a) would have standing on his or her own at common law or in terms of this or any other relevant statute or under the Namibian Constitution;

(b) is unable or unwilling to bring an action on his, her, or its own behalf; and

(c) has provided written consent to the filing of the action by the representative in question.

(2) When considering whether a person is unable or unwilling to bring an action on his, her, or its own behalf, the court must consider the following factors in light of the particular facts and circumstances of the case:

(a) physical access to the courts or other relevant geographical factors;

(b) access to legal representation;

(c) education level and knowledge of rights;

(d) socioeconomic factors, such as poverty or membership in a traditionally marginalised group;

(e) social or family pressures;

(f) political or ideological pressures; and.

(g) any other factor which the court deems relevant.

(3) Regardless of anything else contained in this section, where a law was designed to protect a particular group, any member of that group shall have standing to bring an action pertaining to that law, regardless of whether that member can show actual interest.

Public interest standing

6. (1) Any person, acting on behalf of the public interest, may institute an action in a court, with the approval of the court, irrespective of whether such person has any direct, indirect, or personal interest in the relief claimed –

(a) where such action challenges the legality or constitutionality of laws, policies or government acts;

(b) where such action alleges an abuse of public power; or

(c) where such action challenges government action as being *ultra vires* (beyond the scope of the authority granted to the government authority in question).

(2) Before approving an action as a public interest action, the court must satisfy itself that the person bringing such action does so in good faith and is acting genuinely and objectively in the public interest, after considering the following factors in light of the particular facts and circumstances of the case:

(a) the nature of the challenged conduct or the rights allegedly infringed;

- (b) the consequences of the alleged illegality or infringement;
- (c) the nature of the relief sought, in particular the extent to which it is of general and prospective application;
- (d) the range of persons or groups that may be directly or indirectly affected by an order of the court in the case in question;
- (e) the degree of vulnerability of the persons affected; and
- (e) any other factor which the court deems relevant.

Standing in Constitutional cases

7. (1) This section is intended to give full effect to Article 18 and Article 25(2) of the Namibian Constitution by conferring standing on all persons aggrieved by allegedly unconstitutional action.

(2) For the purposes of Article 18 of the Namibian Constitution, persons aggrieved with standing to bring an action relating to administrative actions shall include

- (a) any person acting in his or her own interest;
- (b) any organisation acting on behalf of one or more of its members;
- (c) any person acting on behalf of another, subject to the requirements of section 5; and
- (d) any person acting in the public interest, subject to the requirements of section 6; and

administrative “acts” or “actions” shall be broadly interpreted to include decisions, conduct, actions, inactions or unreasonable delays of any government body or official.

(3) For the purposes of Article 25(2) of the Namibian Constitution, aggrieved persons with standing to bring an action relating to any of the fundamental rights or freedoms shall include:

- (a) any person acting in his or her own interest;
- (b) any organisation acting on behalf of one or more of its members;
- (c) any person acting on behalf of another, subject to the requirements of section 5; and
- (d) any person acting in the public interest, subject to the requirements of section 6.

Standing in particular statutes

8. Notwithstanding anything contained in this Act, any statute may specify rules on standing which are applicable to the enforcement or challenge of that particular statute: Provided, however, that such statutory standing rules –

- (a) may not limit the standing of aggrieved persons or persons aggrieved in constitutional cases, as provided in section 7
- (b) may not deprive organisations or representatives of the right to bring an action as provided in sections 4 and 5; and
- (c) may not provide for public interest standing which is more restrictive than that provided for in section 6 of this Act.

Multiple sources of standing

9. (1) A person or an organisation may have standing under more than one provision of this Act and may assert standing under multiple provisions of this Act in the alternative.

(2) The fact that a person or an organisation has or may have standing under another statute or under the common law will not be interpreted as preventing that person or organization from asserting standing under this Act.

Short title

10. This Act shall be known as the Standing in Civil Actions Act, 2014 (Act No. x of 2014).

NOTES:

