



LEGAL ASSISTANCE CENTRE
Fighting for human rights in Namibia since 1988



Pro Bono

INFORMATION ABOUT NAMIBIA'S LAW

A Sex Offender Register For Namibia? Right Idea, Wrong Solution

In 2017, hundreds of people gathered outside a house in Katutura in reaction to reports that the occupants were abducting and dismembering children. According to news reports, police deployed 20 police vehicles and a helicopter, and ended up having to use tear gas and rubber bullets to disperse the crowd. At least two people were injured in the chaos, and several police vehicles and the house in question were damaged. The rumours that led to the riot were entirely untrue.¹

This was not an isolated incident of frightening vigilante action. A man was beaten to death in Katutura in 2018 by members of the public, after being caught red-handed with stolen property.² In 2019, in Omusati, three people suspected of poisoning a man were attacked by a group of 31 people, but rescued by police who took them to hospital.³ In 2021, an 18-year-old was murdered in Windhoek by members of the public who allegedly saw him grab someone's cell phone.⁴ Similarly, a 17-year-old in Walvis Bay died in April 2022 from injuries received at the hands of a group of people who reportedly saw him grab someone's phone.⁵

Against this backdrop, the idea of making a list of sex offenders available to the public raises chilling possibilities of mob revenge.

However, some countries have set up sex offender registers that make information about persons convicted of sexual offences available only to police, or for other limited purposes. Does Namibia need such a register?

What is a sex offender register?

A sex offender register is a list of persons who have committed certain criminal offences, often with information about their current place of residence and employment. The register may also have identifying information and a photograph of the offender – and in some countries, even a DNA sample.

The offences covered differ from country to country. Some registers include only persons who have committed crimes against children or persons with mental disabilities. Others are wider, sometimes basing coverage of the register on the type of crime combined with the length of the sentence imposed. One point of debate is whether persons who have committed “hands-off” offences such as possession of child

¹ See the following news reports of the incident: www.namibian.com.na/171732/archive-read/Mischievous-boys-lead-mob-on-a-false-trail;neweralive.na/posts/fake-news-incites-mob-to-besiege-katutura-house. Video footage of the event can be accessed here: www.facebook.com/informantenam/photos/mob-justice-victim-opens-case-by-zorena-jantzewindhoek-joshua-ihuhua-the-owner-o/1540402382693383/; www.facebook.com/183476948385940/posts/mob-justice-victim-opens-case-by-zorena-jantzewindhoek-joshua-ihuhua-the-owner-o/1540402949359993/.

² www.thevillager.com.na/articles/13377/mob-justice-in-havana-leads-to-death/.

³ www.namibian.com.na/81503/read/Police-warn-public-against-mob-justice.

⁴ www.observer24.com.na/suspected-robber-killed-in-mob-justice-attack/.

⁵ www.namibian.com.na/111384/read/Kuisebmond-community-shocked-over-teens-stabbing; www.namibian.com.na/111385/read/Suspects-arrested-over-Walvis-Bay-teens-murder.

pornography should be included at all, or treated differently from perpetrators of offences involving physical contact, such as rape. Another question is whether juvenile offenders should be covered.

Most countries make such registers available only to law enforcement officials, or for the purposes of vetting potential employees for certain positions (such as those seeking posts that involve access to children or persons with mental disabilities, or positions in care homes for the elderly).

In a few countries, such as the United States, information from such registers is available to the general public. In some other countries, members of the public can request information from the register about a specific individual if they can show a justification for the request, but are expected to keep the information confidential.

Some registration schemes place restrictions on where sex offenders may live, or require notice of international travel.

Inclusion on a sex offender register typically lasts only for a specified time, which may differ according to the severity of the underlying offence, and in some cases extends for a lifetime. Some schemes have mechanisms whereby offenders can apply for removal from the register if they have not re-offended after a number of years.⁶

What is already in place in Namibia?

The Criminal Records Office of the Namibian Police already has a sophisticated, efficient and up-to-date system for issuing “Certificates of Conduct” which either confirm that the person in question has no criminal convictions in Namibia, or else list that person’s convictions along with the crimes in question and the relevant date. The Nampol database covers all criminal convictions since shortly after the date of independence, and it is regularly updated. The information that is entered into the database comes from police dockets which contain forms completed by the investigating officer after the court case is concluded, along with notations by the state prosecutor on the docket cover.

Anyone can request a Certificate of Conduct containing information about their own criminal records. The applicant must take an ID, passport or birth certificate to their local police station, where their fingerprints will be taken (with most stations already using digital technology instead of ink). Using fingerprints ensures that name changes or the use of multiple names will not hide the record of a conviction or confuse the identities of two persons with the same name. The certificates cost N\$100 each. All applications are sent to Windhoek for processing, and a result can be produced in just 10 days.

Anyone who wants to dispute the information on convictions returned by the system can take the matter to court to verify the fingerprints, which will be re-taken in front of the presiding officer to ensure accuracy.

The only crimes which might not show up are those where the fingerprints of the offender were not taken for some reason – but this would most often happen only in cases where the person in question paid an admission of guilt fine without being formally arrested – and that option is not available in the case of serious crimes.

Given the existence of this database, it seems unnecessary duplication to construct a separate register to record specific categories of crimes.

⁶ Overviews of sex offender registration laws can be found in US Department of Justice, Office of Justice Programs, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking, “SMART SUMMARY: Global Survey of Sex Offender Registration and Notification Systems”, 2016, <https://smart.ojp.gov/global-survey-2016-final.pdf> and Stephen Schulhofer, “Sex offense registries in Europe and around the world”, Collateral Consequences of Criminal Conviction and Restoration of Rights, 2020, <https://ccresourcecenter.org/2020/11/24/sex-offense-registries-in-europe-and-around-the-world/>.

In fact, these certificates are the basis of the mechanism in the Child Care and Protection Act aimed at ensuring that people who have been convicted of serious violent or sexual crimes do not get access to children. This law, which is already in force, requires two categories of persons to get certificates: persons involved in managing or operating an institution that provides welfare services to children, or persons who work with or have direct access to children at such institutions.

This requirement also covers persons in posts where they are in a position of authority or supervision over a child, or have responsibility for the care of a child, in the public or private sector (such as leaders of Scout troops or Girl Guides, sports coaches or nannies).

Social workers who perform services under the law must also produce police certificates, and police certificates are a prerequisite for adoptive parents, foster parents, and other alternative caregivers.

The Child Care and Protection Act does not give any employers or institutions access to information about anyone's previous criminal convictions; it rather places the burden on the individual seeking the post to present a recent police certificate. This approach avoids compromising individual privacy, since a prospective employee who does not want to reveal information about past convictions could simply withdraw the job application.

These rules have already led to a significant increase in requests for police certificates, indicating that they are being implemented in practice.

These provisions in the Child Care and Protection Act could be improved, to provide more clarity on the institutions that are covered by the rules (since the law does not define "welfare services"), to sort out some issues concerning time frames, and to provide more efficient ways of updating the information provided on police certificates. But the overall approach makes sense. People who repeatedly abuse children may seek out positions that put them in contact with children – so this mechanism is a sound protective measure.

Are sex offender registers constitutional?

A sex offender register is likely to infringe a number of Constitutional rights. Even someone who has committed a vile sexual offence still has constitutional rights to privacy and dignity, and sex offender registers might constitute discrimination on the basis of social status. Depending on who has access to the register and what restrictions it incorporates, the register might interfere with the offender's rights to move freely, to reside in any part of Namibia and to carry on any occupation, trade or business.

These Constitutional rights are not absolute, but infringements of constitutional rights are justifiable only if they are necessary to serve a legitimate public interest, and if they constitute the least restrictive means of serving that interest. This is where sex offender registers may violate the Namibian Constitution.

In the United States – where sex offender registers in the various states are typically open to the public – some aspects of state registers have been ruled unconstitutional. Examples are laws requiring retroactive registration by persons convicted before the register came into force, severe restrictions on residence rights, prohibitions on the use of social media by offenders, the lack of a process for individual sex offenders to present arguments on why they should *not* be included in the register, and lifetime listing without any procedure to request removal from the register.

The South African Constitutional Court held in 2014 that it is unconstitutional to include the names of juvenile offenders on the register automatically, without giving them an opportunity to present reasons why being on the register would not be in their best interests.⁷

⁷ *J v National Director of Public Prosecutions and Another (Childline South Africa, Teddy Bear Clinic for Abused Children and National Institute for Crime Prevention and the Reintegration of Offenders as Amici Curiae)* 2014 (2) SACR 1 (CC),

Are sex offender registers effective?

No. There is no evidence that sex offender registers in other countries have reduced re-offending.⁸ Research from other countries highlights several flaws with these registers.

Many sexual offences are never reported, especially those committed against child victims. This is compounded by the fact that most sexual offences (in Namibia and elsewhere) are perpetrated by family members or other persons known to the victim. The result is that a sex offender register – which is bound to be incomplete – might provide a false sense of security that could reduce vigilance.

Sex offenders who do appear on the list may be driven underground. For example, they may resort to using a different name or otherwise trying to hide their presence in a community – which could end up frustrating efforts at police monitoring and investigation.

Registers that are open to the public tend to hamper the efforts of a released offender to reintegrate into society – and so may actually *increase* repeat offences since reintegration into the community is one of the key components of successful rehabilitation. Individuals who feel shunned by society with no hope of redemption may not care whether or not they end up in prison again, which can make them more likely to re-offend.⁹ Revealing the identity of a sex offender to the public can also have negative consequences for family members of that offender who have not done anything wrong.

Setting up and maintaining a separate sex offender register – which would be in large part a duplication of the computerised Nampol database of all convictions – would take up state funds that could be more effectively spent on expanding rehabilitation programmes for offenders and setting up a system of long-term monitoring of a smaller group of high-risk offenders.

These are some of the reasons why the South African Law Reform Commission recommended against a sex offender register,¹⁰ even though their advice was not heeded.

What might work better?

Around the world, although there are higher rates of re-offending for sex crimes than for other crimes, the fact remains that the majority of convicted sex offenders do *not* go on to commit other sex-related crimes.

<https://collections.concourt.org.za/handle/20.500.12144/3739>. The South African Criminal Law (Sexual Offences and Related Matters) Amendment Act which sets up the National Register for Sex Offenders was amended to action the Constitutional Court's ruling by Act 5 of 2015 (available at <https://www.gov.za/documents/criminal-law-sexual-offences-and-related-matters-amendment-act-8-jul-2015-1357#:~:text=to%20provide%20for%20the%20removal,records%20of%20certain%20persons%3B%20and>).

⁸ N Mollema, "The Viability and Constitutionality of the South African National Register For Sex Offenders: A Comparative Study", *PER/PELJ* 2015 (18) 7, <http://dx.doi.org/10.4314/pej.v18i7.09>.

⁹ JJ Prescott & Jonah E. Rockoff, "Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?", 2010, <https://www0.gsb.columbia.edu/faculty/jrockoff/papers/prescott%20rockoff%20meglaw%20jan%202010.pdf>; *Introductory Handbook on the Prevention of Recidivism and the Social Reintegration of Offenders*, United Nations Office on Drugs and Crime (UNODC), 2016, pages 120-ff.

For sexual offenders, a criminal record can become an almost insurmountable obstacle to their social reintegration, including employment and accommodation. They usually encounter numerous challenges related to the stigma and fears associated with sexual offending, including difficulties related to the fact that they may have been registered as sexual offenders in a publicly available registry. The numerous consequences associated with being convicted for committing a sexual offence, including restrictions in employment, housing and support by the State, are obstacles that can compromise the offenders' efforts to successfully re-enter the community and desist from offending. Research shows that re-entry planning, the acquisition of the necessary skills to control their behaviour and the availability of social support and resources are all essential to successful behavioural change and the social reintegration of this particular group.

¹⁰ *South African Law Commission, Project 107, Sexual Offences: Report*, 2002, pages 265-278, www.justice.gov.za/salrc/reports/r_prj107_2002dec.pdf; *South African Law Commission, Project 107, Sexual Offences: Process and Procedure: Executive Summary*, 2002, pages 72-79, www.justice.gov.za/salrc/dpapers/dp102-execsum.pdf.

One important factor is whether sex offenders have received sex offender treatment as part of their rehabilitation programmes. Studies in several countries have shown that such treatment lowers rates of re-offending.¹¹

Namibia is already starting on this path. The Namibian Correctional Service has an Offender Risk Management Correctional Strategy (ORMCS), which manages offenders on the basis of specific risk factors and paves the way for individualised treatment plans and appropriate post-release supervision of offenders released on parole and remission. It reported in 2021 that the introduction of the ORMCS has significantly reduced rates of re-offending since its inception in 2017.¹²

More specifically, a sex offender treatment programme aimed at reducing the likelihood of re-offending was piloted at the Elizabeth Nepemba correctional facility in Rundu for six months with 40 sex offenders, and a 2016 report on this initiative indicated positive results across all risk groups.¹³

Recommendations

Instead of setting up a sex offender register, Namibia could expand on the existing system of police certificates and roll out rehabilitation programmes that are likely to have the biggest impact on re-offending, without unleashing the possibility of mob “justice”.

We recommend taking the following steps to accomplish the objectives of a sex offender register, without engaging in unnecessary duplication:

(1) Require serious sex offenders, as a condition of their release from prison, to report their address and place of employment to police regularly for a specified number of years, to enhance police monitoring and investigation. Consider making ongoing supervision a condition of release of the most high-risk offenders.

(2) Refine the scheme already contained in the Child Care and Protection Act which is aimed at protecting children from sexual predators, and extend it to persons who seek to work with persons with mental disabilities, in care homes for the elderly, or in other settings where they would have access to vulnerable persons.

(3) Support the current efforts of the Namibian Correctional Service to conduct risk assessments and provide tailored rehabilitation and reintegration programmes for sex offenders, including programmes targeting specific types of sex offenders (such as those who have abused children).

Namibia should note the observation of a South African commentator that “a sex offender register does not prevent the commission of sexual offences. Sex offender policy issues may be implemented because they are popular, but that does not mean that they are efficient, effective or equitable. The state would do better to protect the public through legislation based on empirical evidence, while ensuring that citizens’ constitutional rights are not infringed”.¹⁴

*This article was made possible by support from
the European Union and the Hanns Seidel Foundation.*

¹¹ Roger Przybylski, *Sex Offender Management Assessment and Planning Initiative*, US Department of Justice, Office of Justice Programs, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking, updated 2017, https://smart.ojp.gov/sites/g/files/xyckuh231/files/media/document/somapi_full_report.pdf.

¹² Commissioner Sam Shaalulange, Head of Directorate Central Staff, Namibian Correctional Service, “Opinion - Namibian Correctional Service’s rehabilitation framework”, *New Era*, 8 November 2021, <https://neweralive.na/index.php/in/posts/opinion-namibian-correctional-services-rehabilitation-framework>.

¹³ Anna Wasserfall, *Reintegration of Sex Offenders*, Konrad-Adenauer-Stiftung / Regain Trust, 2016, available at www.kas.de/en/web/namibia/veranstaltungsberichte/detail/-/content/reintegration-of-sex-offenders.

¹⁴ N Mollema, “The Viability and Constitutionality of the South African National Register For Sex Offenders: A Comparative Study”, *PER/PELJ* 2015 (18) 7, <http://dx.doi.org/10.4314/pej.v18i7.09>, at page 2729.