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# *Pro* Bono

## INFORMATION ABOUT NAMIBIA'S LAW

### **EXPUNGEMENT OF CRIMINAL RECORDS: Should criminal convictions follow you forever?**

When applying for a job or a visa to work or study abroad, a person may have to submit a Certificate of Conduct (also known as a police clearance certificate) to show that they have no criminal history. This certificate is issued by the Namibian Police after checking the individual's criminal record, using fingerprints as a means of identification. It will disclose any past criminal convictions contained in records going back to shortly before the date of independence.

While it is usually in the public interest to know whether a person has been convicted of a crime, a blemished Certificate of Conduct could harm an individual's chance of reintegration into society and disproportionately impact their future if they are denied employment or a visa – especially if the crime was a relatively minor one or a youthful transgression.

For instance, consider violation of the curfew under past Covid regulations, possession of a very small amount of dagga, or minor traffic violations. Even if you paid an admission of guilt fine, in most cases this will still result in a criminal record since such fines are equated with conviction and sentence by a court. The only current exceptions are admission of guilt fines for violations of local authority by-laws and a handful of specific traffic offences.

Expungement means sealing or destroying a criminal record, or removing it from the database of previous convictions used for police clearance certificates. Expungement is usually coupled with a provision excusing the individual in question from having a legal duty to disclose the conviction (such as on an application for study or employment). It may also mean that the conviction in question is no longer counted as a “previous conviction” when considering sentencing in any future criminal cases. Alternatively, the record may be re-activated if another crime is committed.

Laws allowing for expungement must balance society's right to protection from criminals against the offender's right to dignity through rehabilitation and reintegration. This is particularly important for juvenile offenders, to make sure that youthful mistakes do not unreasonably hamper future prospects.

Expungement works differently in different countries. It may happen automatically for specified offences, or it may require application to an administrative official or a court. In some countries, the court imposing the sentence decides at that stage if the case is eligible for future expungement, while other countries wait to gauge the success of rehabilitation. There is often a waiting period before expungement is possible, with expungement being contingent on having a clean record during that time. Most countries have a list of serious crimes – such as murder and rape – which are never eligible for expungement.

### **Namibian law**

Namibia currently makes no provision for expungement, other than the possibility of a Presidential pardon in terms of the Namibian Constitution – which does not necessarily lead to expungement.

The President may “pardon” or “reprieve” offenders, either unconditionally or subject to conditions. In practice, the President has issued pardons to certain categories of offenders, freeing them from their remaining sentences, as well as reprieves, which have typically shortened the sentences of certain categories of offenders by three or six months. It is not clear that these steps have any effect on the criminal records of these persons.

The Correctional Service Act 9 of 2012 empowers the relevant Minister to put forward individual prisoners or categories of prisoners for possible Presidential pardon or reprieve, based on recommendations from the National Release Board and the Commissioner-General of the Correctional Service. The criteria are that the offenders have displayed commendable conduct, self-discipline, responsibility and industry during their term of imprisonment so far, that they are unlikely to present an undue risk to society by re-offending after their release, and that their release will contribute to the reintegration of the offenders into society as law-abiding citizens.

The draft Child Justice Bill, which is still under consideration, recognises the importance of rehabilitation of juvenile offenders. This bill (as it stood in 2020) includes a provision that would allow the presiding officer to indicate at the time of sentencing whether or not a child offender’s record is eligible for expungement, after considering the nature of the offence and the child’s personal circumstances. If future expungement is approved, the presiding officer must set a date for expungement one to five years after the sentence is imposed and may require that the child is not convicted of a similar or more serious offence during that time as a condition. The directions on expungement would be submitted to the Namibian Police Criminal Record Centre, and the expungement would happen automatically once the time frame has passed, if the conditions are satisfied.

### **What do other countries do?**

Germany provides several approaches to this issue. Firstly, certain minor offences (identified on the basis of the sentences imposed) are not included in a first time offender’s “basic” Certificate of Conduct which might be required for work or visa applications. But all offences are included in the “extended” Certificate of Conduct required to qualify for working with minors or for appointment to official bodies such as courts, law enforcement units or financial authorities. Secondly, all convictions are automatically excluded from any Certificate of Conduct after the expiry of a time limit of 3-10 years, depending on the gravity of the crime.

Thirdly, convictions automatically qualify for “deletion” from the individual’s criminal record if the sentence has been satisfied or remitted, after 5-20 years have lapsed, with the time frame again depending on the seriousness of the crime. Records of convictions of juvenile offenders generally persist for shorter time period than those of adult offenders. But certain convictions, including those resulting in life imprisonment as well as offences concerning national security, will always be reflected in the Certificate. Germany also provides for expungement of all criminal records after a person reaches age 90 or dies.

In Canada, “expungement” applies only to historically unjust convictions for acts that should never have been criminalised and would now be considered inconsistent with the *Canadian Charter of Rights and Freedoms*. This type of expungement is available to both living and deceased persons.

Other convictions may qualify for “record suspension” where the criminal record is not erased but simply kept private. To qualify, the applicant must prove good conduct in the community after a waiting period of 5-10 years has elapsed (depending on the type of offence committed). Record suspension can be revoked in the case of repeat offenders, misconduct by the offender or false

statements in the application for record suspension. Certain serious offences are ineligible for record suspension.

In South Africa, certain convictions automatically fall away as “previous convictions” once 10 years have elapsed. Expungement of some other categories of criminal records is possible on application after the 10-year period has passed.

As in Canada, there is a separate expungement procedure for convictions that contradict the current Constitution, such as race-based offences that were committed during the apartheid era.

### **Thoughts on the way forward**

Expungement raises some thorny questions about how best to balance the protection of society and the dignity of the offender. In general, we suggest that expungement should never be available for extremely serious crimes such as treason, murder, rape and other serious sexual offences – particularly those committed against children.

At the other end of the spectrum, first offences for very minor crimes should fall away automatically after a set time period if there is no repeat offence.

The middle ground raises the more difficult questions about what offences should be eligible for expungement and what criteria and procedures should apply.

We suggest that this might be a fruitful issue for examination by Namibia’s Law Reform and Development Commission.

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*For more information on expungement, see the South African Law Reform Commission’s 2016 “Review of the Expungement of Certain Criminal Records” at [www.justice.gov.za/salrc/dpapers/dp135.pdf](http://www.justice.gov.za/salrc/dpapers/dp135.pdf).*