

POLICE CLEARANCE CERTIFICATES

1. What is a police clearance certificate? 2
2. Who is required to get police clearance certificates? 3
3. Relevant crimes 7
4. Prohibitions and relevant time periods 7
5. Register of convictions for listed offences 16

NOTE

In this publication, “Ministry” and “Minister” refer to the Ministry and Minister responsible for child protection, and “Guide” means this *Guide to the Child Care and Protection Act* (which is published in separate chapters).

EDITION
2019

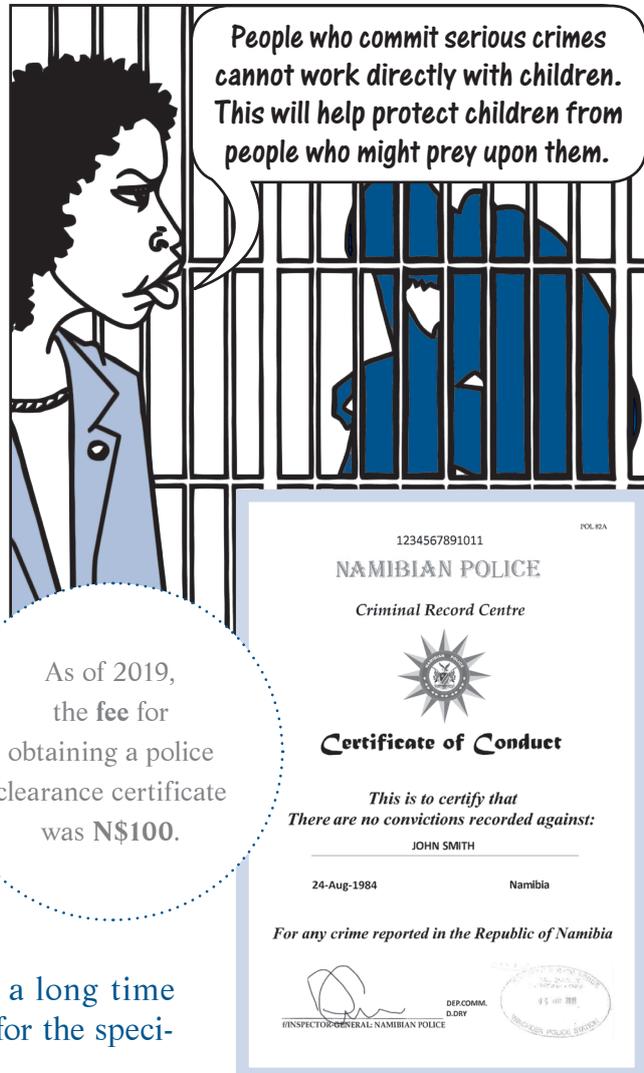
The Act requires persons who work directly with children in certain capacities to obtain police clearance certificates showing that they have not been convicted of specified crimes relating to violence or child abuse.

1. What is a police clearance certificate?

A police clearance certificate is a certificate issued by the police which lists all past convictions for any crimes, no matter how long ago they occurred. The police clearance certificate will list all crimes for which the person in question has been convicted and the date of the convictions.

The police clearance certificate will indicate the date when it was issued. It obviously lists only convictions *prior to the date that it was issued*.

The Act and the regulations do not specify how recent the police clearance certificate must be. But if it was issued a long time previously, it may omit recent convictions for the specified offences.



“ A valuable element of child protection legislation is the adoption of measures to ensure that persons who have been found previously to have harmed children are not employed (whether as paid workers or as volunteers) in positions where they can have access to children. In particular, a legislatively based screening process must be developed to ensure that wholly unsuitable persons wishing to work in schools and in institutions linked to the care system (for instance children’s homes, orphanages, reform schools) are not employed there. ”

◆ African Committee of Experts on the Rights and Welfare of the Child, *General Comment No. 5, 2018, section 5.3.1 (footnote omitted)*

2. Who is required to get police clearance certificates?

The Child Care and Protection Act requires the following people to provide police clearance certificates:

- (1) a person involved in **managing or operating** an institution that provides welfare services to children
- (2) a person who **works with or has direct access to children** at an institution that provides welfare services to children

Institutions that provide welfare services to children include –

- a child protection organisation
- a residential child care facility (a place of safety, a children’s home or a child detention centre)
- a place of care (creches, day care centres, etc)
- an early childhood development centre
- a shelter
- a school
- any other “association providing welfare services to children”.

This would include, for example, school principals, teachers and people who work in children’s homes. It would also include a cleaner who works at a school or a children’s home, for example, if that cleaner had access to the children. People who prey on children are known to sometimes seek out work in places where children are vulnerable. Anyone who has contact with children at a facility which provides welfare services to children is covered, including volunteers.

See Chapter 7 of this *Guide* for descriptions of the facilities in this list which are required to register under the Child Care and Protection Act. However, the police clearance requirement is not limited to those facilities.

Designated social workers and probation officers designated to work with children must have police clearance certificates. The same requirement applies to **designated child protection organisations**, which must provide police clearance certificates for all of its social workers and all other employees who work directly with children.

The Act also makes the requirements explicitly applicable to a person employed at or involved in an **organisation managing a cluster foster care scheme**.

It is specifically mentioned that an **organisation which provides prevention and early intervention services to children** must submit police clearance certificates for all staff members who have direct contact with children if it wants to be eligible for State funding. However such an organisation would seem to qualify as an institution providing welfare services to children whether or not it was seeking State funding, meaning that police clearance certificates would be required for staff who work with children or have direct access to children at *all* such organisations.

(3) an **alternative care giver or adoptive parent**

This includes –

- a **foster parent**
- an **adult supervisor of a child-headed household.**

In the case of an **adoptive parent**, the social worker conducting the assessment of a person applying to be a prospective adoptive parent may require that other members of the household where the child is to live must also have police clearance certificates.

Where a person has applied to have a **private home approved as a place of safety**, the applicant must show that no person residing in the home has been convicted of an offence contemplated in the provisions on police clearance certificates.

(4) a person who works in **any other form of employment or activity which is identified in regulations** issued in terms of the Act

The Child Care and Protection Regulations list two additional categories of persons”:

- (a) a person employed or involved in a post where he or she is **in a position of authority or supervision over a child or has responsibility for the care of a child** –
- whether in the public or private sector
 - whether or not the person receives remuneration.

This category might include, for example, person in charge of Scout troops or Girl Guides, Sunday school teachers, sports coaches and swimming teachers, any person that provides tuition to a child (such as a piano teacher or a maths tutor) and a nanny or a babysitter.

- (b) a person who **owns or has any economic or business interest in any entity, business concern or trade relating to the supervision or care of a child** IF this interest would –
- cause him or her to have direct access to a child
 - place him or her in a position of authority or supervision over a child
 - give him or her responsibility for the care of a child.

Depending on the circumstances, this category might include, for example, the owner of a bowling alley or a commercial swimming pool, or the owners of rides and entertainments set up at fairs or agricultural shows.

(5) **TRANSITIONAL PROVISION:** Any person acting in the specified capacities “who is providing welfare services to children before the commencement of these regulations”, must obtain a police clearance certificate within six months of the commencement of the regulations.

The relevant date for providing the required police clearance certificates for persons already providing welfare services to children would have been **30 June 2019**. Even though this date has already passed, there may be some lag in enforcement of the restrictions on employment based on past convictions, due to the slow spread of awareness of the new rules.

The Labour Act does not deal explicitly with a situation where someone who is already employed is disqualified from continuing to work in that position by virtue of a new legal requirement. If a person who is already employed is found to have a conviction which disqualifies them from working in a specific position, the employer should attempt to redeploy that person in a position that does not involve access to children. If the rules in the Child Care and Protection Act prevent the person from being employed at all by the institution in question, or if transfer to an acceptable position is not feasible, then the employer should follow the procedures for termination of employment in the Labour Act.

Where an employer is prohibited by the Child Care and Protection Act from employing a person because of his or her past convictions, a dismissal of that person on this basis could presumably not be considered unfair.

- ◇ Child Care and Protection Act, 238(1); see also references cited in the table on pages 10-12
- ◇ Child Care and Protection Regulations, regulations 1 (definition of “police clearance certificate”); 119(1) (transitional provision); 119(2) (further categories of persons required to have police clearance certificates); see also references cited in the table on pages 10-12

The functions on this list which require a police clearance certificate will be referred to in this chapter as “**the specified capacities**”, to serve as a useful shorthand. The Act uses the phrase “act in a capacity referred to in subsection (3)” when it refers to all of these functions.



“Institutions providing welfare services to children”

The “institutions providing welfare services to children” are not exhaustively listed in the Act. The Act does not provide a definition of “welfare services”, and there does not seem to be an agreed meaning of this term at the international level. So one question that arises is: **Who else might be covered by the rule?**

Few recent statements about the possible parameters of the term “child welfare” could be located. A few possible sources of guidance on the scope of this concept are listed below:

- ④ In Namibia, one guideline would be the institutions which are the concern of the Ministry responsible for child welfare. Its mandate refers broadly to “the wellbeing of children”, and its vision refers to “the care and protection of children”.
 - ◇ “About MGECW”, Ministry of Gender Equality and Child Welfare website, undated
- ④ Another guideline would be the definition of “welfare organization” in the National Welfare Act, which was in force when the Child Care and Protection Act was passed (and remains in force as of 2019). It defines a “welfare organisation” as:
 - “any association of persons, corporate or unincorporate, or institution the objects of which include one or more of the following, namely -
 - (a) the carrying on of social work by individual treatment, group work or community organization;
 - (b) the provision wholly or in part of any of the material, spiritual or social requirements of persons or families in distress and in need of assistance;
 - (c) the carrying on of charitable activities in relation to persons or families who are in need and require assistance;
 - (d) the prevention of social distress and indigency of persons or families;

(e) the rendering of legal assistance and advice as a form of social assistance;
(f) the collection of contributions towards any war fund;
(g) the prevention of cruelty to animals and the promotion of animal welfare;
(h) the collection of funds for any of the objects specified in the preceding paragraphs, but does not include any institution maintained and controlled by the State or a local authority or any hospital board or any trade union registered or deemed to be registered in accordance with the provisions of the Labour Act, 1992 (Act 6 of 1992), or any religious body in respect of activities confined to religious work”.

◇ National Welfare Act 79 of 1965, section 1

⑨ Under the Children’s Act, which has been replaced by the Child Care and Protection Act, “children’s commissioners” were known as “commissioners of child welfare”, suggesting that all of the topics covered by that law concerned “child welfare”.

◇ Children’s Act 33 of 1960, sections 2-3 (now repealed)

⑨ In South Africa, the National Welfare Act 100 of 1978 defines “social welfare services” as: “organized activities, measures or programmes in connection with -
(a) social work as defined in section 1 of the Social Work Act, 1978 (Act 110 of 1978);
(b) the prevention and treatment of social pathological conditions in the community or in groups of persons or in families or individuals;
(c) the promotion, protection or stability of family or marital life;
(d) the welfare of the aged or physically or mentally handicapped persons;
(e) the welfare of children;
(f) the prevention of alcoholism or dependence upon dependence-producing substances or the treatment of persons who are dependent upon alcohol or any other dependence-producing substance;
(g) the provision of housing to indigent persons or persons in need;
(h) any corrective service;
(i) social relief”.

◇ National Welfare Act 100 of 1978 (South Africa), section 1

⑨ In South Africa, the Financial and Fiscal Commission (an independent constitutional advisory body) has made this statement: “Broadly speaking, child welfare services refer to those services that aim to provide children with the necessary protection from socio-economic, physical and developmental hardship, abuse and neglect.”

◇ *The Provision and Funding of Child Welfare Services in South Africa*,
Financial and Fiscal Commission, 2013, page 17

⑨ In the US, child welfare has been described as “a continuum of services designed to ensure that children are safe and that families have the necessary support to care for their children successfully”.

◇ Factsheet: “What Is Child Welfare? A Guide for Educators”,
US Department of Health and Human Services, June 2018

⑨ A 2010 edition of the *International Encyclopedia of Education* contrasts the concepts of “child protection” and “child welfare”. It describes “child protection” as a term which emphasises the legal grounds upon which social workers and police can intervene to identify children who have been harmed or are likely to be harmed, and for the purpose of preventing future harm. It describes “child welfare” as a broader term which refers to assisting children and their families in cases of abuse and neglect, or when they are found to be in need, through general prevention services including health, education, recreation, family support, and treatment services.

◇ E Khoo, “Early Childhood Risk, Protection and Abuse Prevention”,
in Penelope Peterson et al (eds), *International Encyclopedia
of Education (Third Edition)*, 2010, pages 17-24

3. Relevant crimes

Convictions for the following crimes will disqualify a person from acting in any of the specified capacities:

- Ⓞ murder
- Ⓞ rape
- Ⓞ indecent assault
- Ⓞ incest
- Ⓞ kidnapping
- Ⓞ any statutory sexual offence (This would include violations of the Combating of Rape Act or violations of some provisions of the Combating of Immoral Practices Act.)
- Ⓞ any offence relating to pornography
- Ⓞ any offence relating to trafficking (This would include violations of the Combating of Trafficking in Persons Act.)
- Ⓞ abduction (excluding the wrongful removal or retention of a child by a parent with parental responsibilities)
- Ⓞ assault with intent to cause grievous bodily harm.

◇ Child Care and Protection Act, section 238(8)

These crimes disqualify a person from being fit to work with children regardless of whether the victim was a child or an adult. A person who uses violence against a person of any age should not be working closely with children.

4. Prohibitions and relevant time periods

This issue is covered confusingly in the Act. The courts might apply the rules of statutory interpretation to make the various provisions of the Act logically consistent. The summary and the table on pages 10-12 are based on a straightforward reading of the plain meaning of the terms used.

Persons acting in specified capacities: Subsection 238(2) says that a person may not act in any of the specified capacities if he is she has been convicted for any of the listed offences.

Subsection 238(2) does not specify a time period, indicating that a conviction **at any time in the past** disqualifies the person in question from acting in the specific capacities.

(2) A person may not act in a capacity referred to in subsection (3) if convicted of an offence listed in subsection (8).

Note that the list of specific capacities goes beyond employment at an institution providing welfare services to children; it also includes persons acting in any of the specified capacities.

As the table on pages 10-12 indicates, the Act and the regulations are not always in agreement about the relevant time period, with individual regulations sometimes simply mentioning “police clearance certificates”, defined by the regulations as being the certificates referred to in subsection 238(5) – which contains a 10-year time limit. (The Act takes priority over the regulations, which are required to be consistent with the Act.)

Employers: Subsection 238(1) says a person may not employ anyone who has been convicted for any of the listed offences in an institution providing welfare services to children.

This prohibition is worded generally, so it could apply to *any positions of employment* in such an institution, or it may have been intended to refer only to *employment in the specified capacities* in such an institution (involvement in **managing or operating** such an institution, or **working with or having direct access to children** at such an institution).

Another ambiguity relates to the word “employ”. It could mean (a) the **initial appointment** of someone to a position or (b) the **continuing act of employing someone**. Since there is another provision that clearly covers new positions of employment (section 238(5)), it would be logical to interpret this provision (section 239(1)) as applying to the continuing act of employment.

The prohibition applies to **employment on a part-time, full-time or volunteer basis**.

Subsection 238(1) does not specify a time period, indicating that a conviction **at any time in the past** disqualifies the person in question from working in the specific capacities.

This is reinforced by subsection 238(6), which requires an employer or any other person who has reason to believe that a person convicted of one of the listed offences (a) is employed, (b) has applied for employment or (c) is acting in one of the specified capacities, must inform the registrar at the Ministry. Again, no time period is specified, indicating that this duty applies in respect of a conviction **at any time in the past**.

◆ Child Care and Protection Act, section 238(1), (4) and (6)

In contrast, subsection 238(5) says that an employer must, *before* employing a person in any of the specified capacities, require that person to provide a police clearance certificate showing that he or she has not been convicted of any of the listed offences **within 10 years before the date of assumption of duty**.

The 10-year time period will render the provision meaningless in some cases, because some of the crimes in question, such as murder, rape and trafficking in persons, would be likely to attract heavy prison sentences – meaning that by the

(1) A person may not employ a person convicted of an offence listed in subsection (8) in an institution referred to in subsection (3).

(5) Before employing a person as contemplated in subsection (1) the employer must ensure that the person submits a valid police clearance certificate stating that the person has not been convicted of an offence listed in subsection (8), within 10 years before the date of assumption of duty.

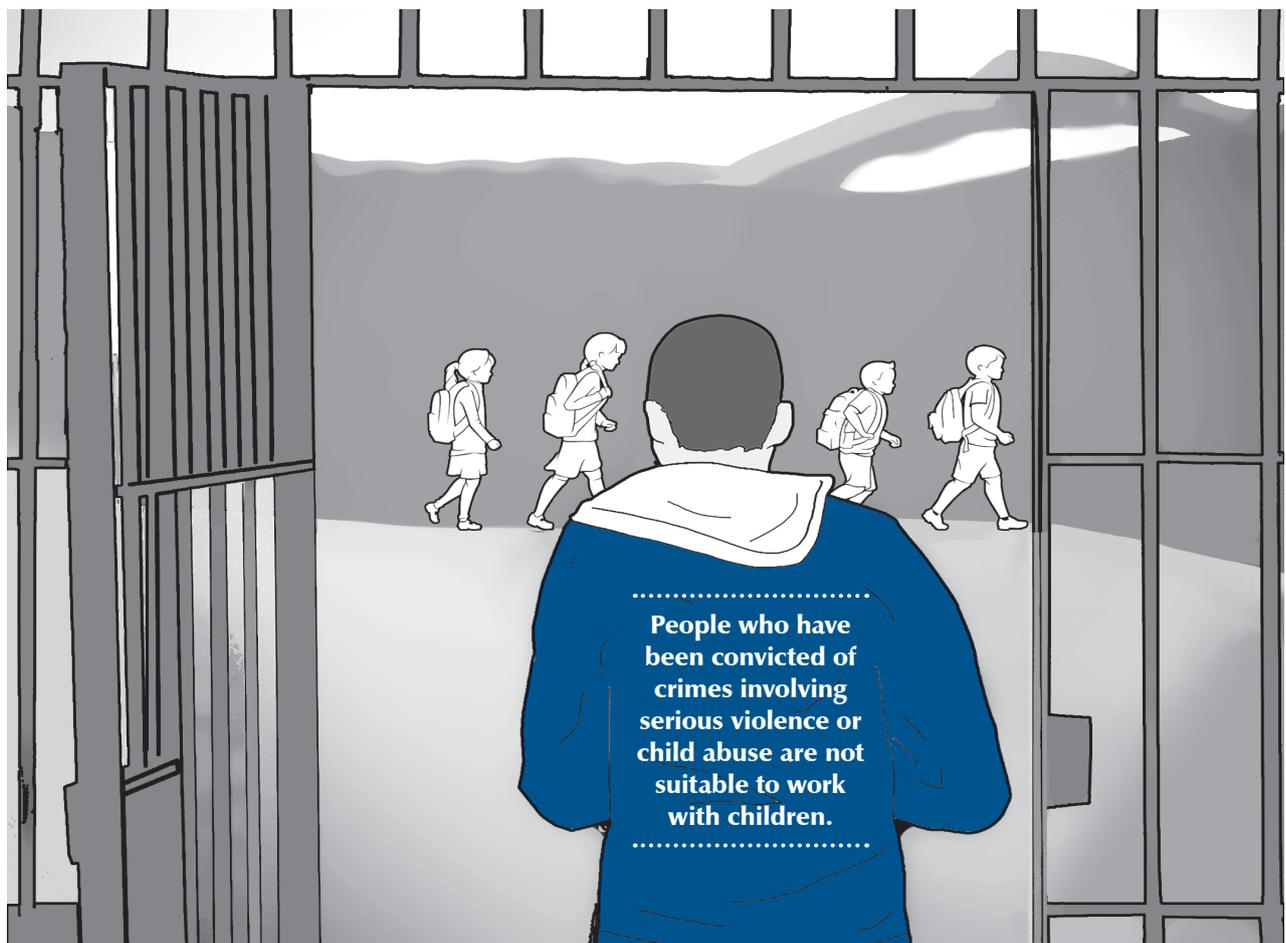
time that a person convicted of any of those crimes gets out of prison, 10 years since the conviction may already have elapsed. This would mean, for example, that it is possible that a convicted child trafficker would be eligible for employment in a position which gave him or her authority over children *immediately upon leaving prison*.

It is not clear how section 238 should be interpreted given the contradictions between 238(1) and (2), which both simply refer to “convictions”, and 238(5) which refers to convictions “within 10 years before the date of assumption of duty”.

To complicate matters further, some other provisions in the Act and regulations refer to proof that the person in question has no convictions for any of the listed crimes, without specifying a time period. On the other hand, other provisions directly cross-reference section 238(5), with its 10-year time period OR refer to the definition of police clearance certificates in the regulations, which references section 238(5). The table on pages 10-12 lists the various references to police clearance certificates and the apparent time periods involved.

Penalties: The same penalty applies to (a) a person who acts in a specified capacity despite having a conviction for any of the listed offences, and (b) a person who employs someone who has been convicted of any of the listed offences in an institution providing welfare services to children. The penalty is a fine of up to N\$20 000 or imprisonment for up to five years, or both.

◆ Child Care and Protection Act, section 238(9)



POLICE CLEARANCE CERTIFICATES		
CAPACITY	TIME PERIOD	REFERENCE
Child Care and Protection Act <i>"Police clearance certificate" is not defined.</i>		
employment in "an institution providing welfare services to children"	conviction at any time in the past disqualifies	s. 238(1)
"acting" in any of the specified capacities	conviction at any time in the past disqualifies	s. 238(2)
"employment" in any of the specified capacities	conviction within 10 years before the date of assumption of duty disqualifies	s. 238(5)
approval of a private home as a place of safety	proof that no person residing in the home has been convicted of any of the listed offences; any conviction	s. 64(4)(b): "convicted of an offence contemplated in section 238"
prospective foster parent	"in possession of a valid police clearance certificate"; conviction at any time in the past disqualifies	s. 156(1)(d): "as contemplated in section 238" s. 156(2): "A person who has been convicted of an offence contemplated in section 238 is not a fit and proper person to be entrusted with the foster care of a child."
person employed at or involved in an organisation managing a cluster foster care scheme	"in possession of a valid police clearance certificate"; conviction at any time in the past disqualifies	s. 156(4): applies s. 156(1)-(2) with the necessary changes, so same as for prospective foster parents
prospective adoptive parent	"in possession of a valid police clearance certificate"; conviction at any time in the past disqualifies	s. 170(2)(f): "as contemplated in section 238" s. 170(8): "A person who has been convicted of an offence contemplated in section 238 is not a fit and proper person...to be an adoptive parent."
members of household of prospective adoptive parent	social worker <i>may</i> require that other members of the household where the child will live "must be in possession of a valid police clearance certificate"; time period unclear	s. 170(3): "contemplated in section 238"
adult supervisor of child-headed household	"in possession of a police clearance certificate"; time period unclear	s. 225(3)(b): "contemplated in section 238"
Child Care and Protection Regulations <i>The Act takes priority over the regulations, which are required to be consistent with the Act.</i> <i>"Police clearance certificate" is defined in regulation 1 as</i> <i>"the police clearance certificate referred to in section 238(5) of the Act".</i>		
designated social worker	has no previous conviction relating to child neglect or abuse, drug trafficking or any of listed offences; conviction at any time in the past disqualifies	reg 3(1)(d): "section 238(8)"

POLICE CLEARANCE CERTIFICATES

CAPACITY	TIME PERIOD	REFERENCE
social workers and other persons employed by designated child protection organisation , who work directly with children	“police clearance certificates issued not more than one year before the date of submission for renewal”; conviction within 10 years before the date of assumption of duty disqualifies	reg 1 : “‘police clearance certificate’ means the police clearance certificate referred to in section 238(5) of the Act” reg 4(7)(c) : no cross-reference to s. 238
probation officers	has no previous conviction relating to child neglect or abuse, drug trafficking or any of the listed offences; conviction at any time in the past disqualifies	reg 5(1)(c)(ii) : “section 238(8)”
every member of the board of a children’s home or child detention centre	must be in possession of a police clearance certificate; conviction within 10 years before the date of assumption of duty disqualifies	reg 1 : “‘police clearance certificate’ means the police clearance certificate referred to in section 238(5) of the Act” reg 14(7) : no cross-reference to s. 238
persons working with children at children’s homes, child detention centres, places of care, early childhood development centres and shelters	must provide police clearance certificate; conviction within 10 years before the date of assumption of duty disqualifies	reg 1 : “‘police clearance certificate’ means the police clearance certificate referred to in section 238(5) of the Act” reg 17(3)(iii) : no cross-reference to s. 238
every member of the board, staff member of the children’s home or child detention centre and any other person who will have direct access to the children at the home or centre	police clearance certificates must be provided with application for registration; conviction within 10 years before the date of assumption of duty disqualifies	reg 1 : “‘police clearance certificate’ means the police clearance certificate referred to in section 238(5) of the Act” reg 23(5)(m) : no cross-reference to s. 238
the manager and every staff member and any other person who will have direct access to the children at a place of care, early childhood development centre or shelter	police clearance certificates must be provided with application for registration; conviction within 10 years before the date of assumption of duty disqualifies	reg 1 : “‘police clearance certificate’ means the police clearance certificate referred to in section 238(5) of the Act” reg 24(2)(j) : no cross-reference to s. 238
all staff members who work in direct contact with children at an organisation which provides prevention and early intervention services to children	must comply with section 238(5); conviction within 10 years before the date of assumption of duty disqualifies	reg 43(d) : “section 238(5)”
prospective adoptive parent	police clearance certificates must be provided from Namibia, the country of citizenship or any other country where the applicant has resided during the last 10 years; conviction within previous 10 years	reg 1 : “‘police clearance certificate’ means the police clearance certificate referred to in section 238(5) of the Act” reg 59(2)(g) : no cross-reference to s. 238

POLICE CLEARANCE CERTIFICATES

CAPACITY	TIME PERIOD	REFERENCE
<p>prospective adoptive parent habitually resident outside Namibia applying for intercountry adoption</p>	<p>a police clearance certificate indicating that the applicant has no previous criminal record relating to child neglect or abuse, drug trafficking or any of the offences listed in section 238(8) of the Act or any conviction under any law relating to the protection of children; reference to “police clearance certificate” suggests that the relevant time period is the previous 10 years, but text also refer to “no previous criminal record”, which suggests no time limit</p>	<p>reg 1: “police clearance certificate’ means the police clearance certificate referred to in section 238(5) of the Act” reg 82(1)(d): no cross-reference to s. 238</p>
<p>adult supervisor of child-headed household</p>	<p>must provide “a police clearance certificate issued not more than one year prior to designation”; reference to “police clearance certificate” suggests that the relevant time period is the previous 10 years</p>	<p>reg 1: “police clearance certificate’ means the police clearance certificate referred to in section 238(5) of the Act” reg 86(6)9d): no cross-reference to s. 238</p>
<p>person employed or involved in any position where he or she will -</p> <ul style="list-style-type: none"> ⦿ be in a position of authority or supervision over a child ⦿ have responsibility for the care of a child 	<p>“a person may not employ a person in the following categories of employment or activity without the latter having obtained a police clearance certificate”; time period could be (1) conviction within 10 years before the date of assumption of duty disqualifies (definition of police clearance certificate) or (2) at any time (reference to s. 238(3), which applies subsection 238(1)-(2))</p>	<p>reg 1: “police clearance certificate’ means the police clearance certificate referred to in section 238(5) of the Act” reg 119(2)(a): “further to the provisions of section 238(3)”</p>
<p>a person who owns or has any economic or business interest in any entity, business concern or trade relating to the supervision or care of a child, if this would cause the person to –</p> <ul style="list-style-type: none"> ⦿ have direct access to a child ⦿ be in a position of authority or supervision over a child ⦿ have responsibility for the care of a child 	<p>“a person may not employ a person in the following categories of employment or activity without the latter having obtained a police clearance certificate”; time period could be (1) conviction within 10 years before the date of assumption of duty disqualifies (definition of police clearance certificate) or (2) at any time (reference to s. 238(3), which applies subsection 238(1)-(2))</p>	<p>reg 1: “police clearance certificate’ means the police clearance certificate referred to in section 238(5) of the Act” reg 119(2)(a): “further to the provisions of section 238(3)”</p>
<p>TRANSITIONAL PROVISION: person in a specified capacity “who is providing welfare services to children before the commencement of these regulations”</p>	<p>“must within six months of the commencement of these regulations obtain a police clearance certificate”; time period could be (1) conviction within 10 years before the date of assumption of duty disqualifies (definition of police clearance certificate) or (2) at any time (pursuant to s. 238(1)-(2))</p>	<p>reg 1: “police clearance certificate’ means the police clearance certificate referred to in section 238(5) of the Act” reg 119(1): “section 238”</p>



Amendments to section 238 in Parliament

The Bill which was tabled in Parliament in 2014 [B. 8 - 2014] contained the following provision on police clearance certificates, which contained no time limit:

PROVISION IN ORIGINAL BILL

Police clearance certificates required in respect of certain persons

- 238.** (1) A person who -
- (a) manages or operates, or participates or assists in managing or operating, an institution providing welfare services to children, including a child protection organisation, residential child care facility, place of care, early childhood development centre, shelter, school, club or association providing welfare services to children;
 - (b) works with or has direct access to children at an institution providing welfare services to children, including a child protection organisation, residential child care facility, place of care, shelter, early childhood development centre, school, club or association providing welfare services to children, either as an employee, volunteer or in any other capacity;
 - (c) is permitted to become the alternative care-giver or adoptive parent of a child; or
 - (d) works in any other form of employment or activity as may be prescribed,
- must apply for a police clearance certificate stating that such person does not have a criminal conviction in respect of any of the offences contemplated in subsection (2) -
- (i) in the case of a person referred to in this paragraph or paragraph (a) or (b) within six months after the commencement of this section;
 - (ii) in the case of a person who intends to be employed in any capacity or at any institution contemplated in this paragraph or paragraph (a) or (b) or who intends to manage or operate such an institution, before taking up such employment, management or operation; or
 - (iii) in the case of a person referred to in paragraph (c), before becoming an alternative care-giver or adoptive parent.
- (2) The offences committed for purposes of subsection (1) are -
- (a) murder;
 - (b) rape;
 - (c) culpable homicide involving gross negligence;
 - (d) indecent assault;
 - (e) incest;
 - (f) kidnapping;
 - (g) any statutory sexual offence;
 - (h) any offence relating to the manufacture, distribution or possession of pornography;
 - (i) any offence relating to the trafficking of either an adult or a child;
 - (j) abduction, excluding the wrongful removal or retention of a child by a parent with parental responsibilities, whether domestic or as contemplated in the Hague Convention on International Child Abduction;
 - (k) assault with intent to cause grievous bodily harm;
 - (l) common assault;
 - (m) any offence in terms of this Act; or
 - (n) any attempt to commit any of the offences listed in paragraphs (a) to (m).
- (3) A police clearance certificate contemplated in subsection (1) is valid for a period of one year from the date of issue and must be renewed by the holder of the certificate after every two years until such time as the holder ceases to be one of the persons contemplated in subsection (1).
- (4) A person contemplated in subsection (1) commits an offence if that person -
- (a) fails or refuses to produce a valid police clearance certificate as referred to in that subsection on the request of any person who can demonstrate that he or she has a direct interest in being provided with such a certificate; or

(b) fails to renew a police clearance certificate as contemplated in subsection (3) within 30 days after a written request to do so, and is liable on conviction to a fine not exceeding N\$20 000 or to imprisonment for a period not exceeding five years or to both the fine and imprisonment.

(5) An employer who allows a person to work in any capacity contemplated in subsection (1)(a), (b) or (d) without a valid police clearance certificate commits an offence and is liable on conviction to a fine not exceeding N\$20 000 or to imprisonment for a period not exceeding five years or to both the fine and imprisonment, but prosecution may not be instituted under this subsection if an application for a police clearance certificate or for the renewal of the certificate has been made but is pending.

The National Council proposed an amendment to correct an obvious error in subsection (3), which originally referred inconsistently to “one year” and “two years”. The amended provision read as follows:

(3) A police clearance certificate contemplated in subsection (1) is valid for a period of two years from the date of issue and must be renewed by the holder of the certificate after every two years until such time as the holder ceases to be one of the persons contemplated in subsection (1). (Amendment moved by Hon Kankoshi, National Council, 17 December 2014)

However, before the Bill came back to the National Assembly, an entirely new section 238 was drafted by the Ministry of Justice with a view to addressing the following concerns:

- The original requirement that police clearance certificates would have to be renewed every two years would have meant that the police department handling the clearance certificates would be flooded with applications every two years. The renewal requirement was eliminated in favour of supplementing the police clearance certificate requirement with a register of convictions.
- The listed offences need not have been committed against a child. Thus, the Ministry thought that the inclusion of common assault in the list was too general and lacked a sufficient rational connection to the objective of protecting children. Assault was eliminated from the list, while assault with intent to cause grievous bodily harm was retained.
- The clause is unclear as to the effect of a conviction made 5 or 10 years before the date of commencement of the clause; concerns were expressed about what would happen to employees who were convicted of such offences in the past but were currently employed in one of the specified capacities. This concern appears to have been the impetus behind the confusing introduction of the 10-year timer period in section 238(5), but that provision applies to new employees rather than existing employees.
- The Ministry was concerned that the cited concerns made the clause “too wide and overbroad”, which could result in a challenge to its constitutionality.

During reconsideration of the bill by the National Assembly on 4 March 2015, an amendment was moved by the Hon Minister of Gender Equality and Child Welfare, to substitute section 238 in its entirety. The substitution was moved and approved, without any further discussion (Proceedings of the National Assembly, 4 March 2014). The substituted provision quoted below is the one which appears in the final law.

SUBSTITUTED PROVISION

Requirements in respect of certain persons who work with children

238. (1) A person may not employ a person convicted of an offence listed in subsection (8) in an institution referred to in subsection (3).

(2) A person may not act in a capacity referred to in subsection (3) if convicted of an offence listed in subsection (8).

(3) Subsections (1) and (2) apply to -

- (a) a person who manages, operates, participates or assists in managing or operating an institution providing welfare services to children, including a child protection organisation, residential child care facility, place of care, early childhood development centre, shelter, school or association providing welfare services to children;
- (b) a person who works with or have direct access to children at an institution providing welfare services to children, including a child protection organisation, residential child care facility, place of care, shelter, early childhood development centre, school or association providing welfare services to children;
- (c) an alternative care giver or adoptive parent; and
- (d) a person who works in any other form of employment or activity as may be prescribed.

(4) Subsection (1) applies to employment on a part-time, full-time or volunteer basis.

(5) Before employing a person as contemplated in subsection (1) the employer must ensure that the person submits a valid police clearance certificate stating that the person has not been convicted of an offence listed in subsection (8), within 10 years before the date of assumption of duty.

(6) An employer or a person who has reason to believe that a person who has been convicted of an offence listed in subsection (8) is employed has applied for employment or is acting in such capacity as contemplated in subsection (3), must prescribed manner inform the registrar referred to in subsection (11).

(7) The registrar, referred to in subsection (11), who receives information in terms of subsection (6) must deal with the information in the prescribed manner.

(8) For the purpose of this section the offences are:

- (a) murder;
- (b) rape;
- (c) indecent assault;
- (d) incest;
- (e) kidnapping;
- (f) any statutory sexual offence;
- (g) any offence relating to the manufacture, distribution or possession of pornography; or
- (h) any offence relating to human trafficking;
- (i) abduction, excluding the wrongful removal or retention of a child by a parent with parental responsibilities, whether domestic or as contemplated in the Hague Convention on International Child Abduction; or
- (j) assault with intent to cause grievous bodily harm.

(9) A person who contravenes subsection (1) or (2) commits an offence and is liable to a fine not exceeding N\$20 000.00 or imprisonment for a period not exceeding five years or to both such fine and such imprisonment.

(10) The registrar referred to in subsection (11) must keep a register in which is recorded -

- (a) the names of persons convicted of offences listed in subsection (8); and
- (b) other prescribed information.

(11) The Minister must for the purpose of subsection (12) designate a staff member as a registrar, who will have the function of keeping a register and such other function as may be prescribed.

(12) A court which has convicted a person of an offence listed in subsection (8) must ensure that the prescribed information on convictions is submitted to the registrar referred to in subsection (11).

(13) The Minister may prescribe requirements relating to police clearance certificates, duties of employers for the purpose of this section and register to be kept in terms of this section.

5. Register of convictions for listed offences

Police clearance certificate do not have to be renewed. However, the Ministry is required to keep a **register of convictions** in respect of the listed offences, so that persons who commit any of these offences *after* they have provided their police clearance certificates can be identified and prevented from working with children.

Registrar: The Minister must designate a staff member as a registrar, who will have the function of keeping a register of convictions as well as any other function that may be set out in regulations.

Register: The registrar must keep a register which records –

- ⦿ the names of persons convicted of any of the listed offences
- ⦿ any other information prescribed by regulations issued under the Act.

As of 2019, no regulations had been issued with requirements to record any additional information. However, since the Act refers to a 10-year time period in section 238(5), it would be useful for the register to contain the date of any convictions for the listed offences.

Courts' duty to share information with registrar: A court which has convicted a person for any of the listed offence has a duty to ensure that the prescribed information on convictions is submitted to the registrar.

As of 2019, the Minister had not yet issued any regulations about the submission of information to the registrar by courts.

Public duty to share information with registrar: An employer or a member of the public who has reason to believe that a person who has been convicted of a listed offence is employed, has applied for employment or is acting in a specified capacity must inform the registrar in the prescribed manner. When the registrar receives such a report, he or she must deal with it in the prescribed manner.

As of 2019, the Minister had not yet issued any regulations about how to make such reports to the registrar, or how the registrar must deal with such reports.

Other issues: The Act states that the Minister may prescribe other requirements relating to the register.

As of 2019, the regulations do not address access to the register by current or prospective employers, or members of the public. Thus, it is not yet clear how the register will function to protect children from exposure to persons with previous convictions for the crimes recorded in the register.

◇ Child Care and Protection Act, section 238(6)-(7), (10)-(13)