



# GOVERNMENT GAZETTE

## OF THE

# REPUBLIC OF NAMIBIA

---

N\$9.60

WINDHOEK - 21 July 2023

No. 8140

---

### CONTENTS

*Page*

#### GOVERNMENT NOTICE

No. 212 Promulgation of Criminal Procedure Amendment Act, 2023 (Act No. 7 of 2023) of the Parliament ..... 1

---

## Government Notice

---

### OFFICE OF THE PRIME MINISTER

No. 212

2023

#### PROMULGATION OF ACT OF PARLIAMENT

The following Act which has been passed by the Parliament and signed by the President in terms of the Namibian Constitution is hereby published in terms of Article 56 of that Constitution.

No. 7 of 2023: Criminal Procedure Amendment Act, 2023.

---

Act No. 7, 2023

CRIMINAL PROCEDURE AMENDMENT ACT, 2023

**EXPLANATORY NOTE:**

_____	Words underlined with a solid line indicate insertions in existing provisions.
[            ]	Words in bold type in square brackets indicate omissions from existing provisions.

**ACT**

To amend the Criminal Procedure Act, 1977 so as to provide for police powers to obtain information, documents or data held by certain institutions; to provide for access to, search and seizure of any information, documents or electronic records; to provide for arrangements for giving of evidence through audio-visual link or similar electronic transmission; to provide for the postponement of criminal proceedings through audio-visual links; to include the requirements for audio-visual appearance by accused persons and to provide for the protection of communication between the accused person and the legal representative; to include requirements for the technical requirements for audio-visual links in courtrooms; to provide for the furnishing of evidence to a magistrate without the need for appearance; to provide for the application to criminal proceedings of certain provisions of the Electronic Transactions Act, 2019 relating to data messages and computer evidence; to provide for police powers to use traps or undercover operations and for the admissibility of evidence obtained from such traps or undercover operations; and to provide for incidental matters.

*(Signed by the President on 19 July 2023)*

**BE IT ENACTED** as passed by the Parliament, and assented to by the President, of the Republic of Namibia as follows:

**Insertion of sections 26A and 26B in Act No. 51 of 1977**

1. The Criminal Procedure Act, 1977 (Act No. 51 of 1977) (hereinafter referred to as the principal Act) is amended by the insertion after section 26 of the following sections:

**“Powers to obtain information during investigations**

**26A.** (1) A police official may, by written notice, require a person or a public or private institution to disclose or provide any information, document or article including digital data relating to an investigation that may be in his or her possession or in the possession of the public or private institution.

(2) Despite the provisions of any other law, a person who is in possession of, or who has control or custody of, or within whose power it is to furnish, any information, document or article including digital data referred to in subsection (1) shall furnish an affidavit and comply with the written notice referred to in subsection (1).

## Act No. 7, 2023

## CRIMINAL PROCEDURE AMENDMENT ACT, 2023

**Power to request for information from financial or banking institution and other juristic person**

**26B.** The Inspector-General or a police official of or above the rank of chief inspector may, in writing, request a person in charge or an authorised person -

- (a) of a financial institution as defined in section 1 of the Namibia Financial Institutions Supervisory Authority Act, 2001 (Act No. 3 of 2001);
- (b) of a banking institution as defined in section 1 of the Banking Institutions Act, 1998 (Act No. 2 of 1998); or
- (c) of any other juristic person,

to disclose or provide any record, book, register, correspondence or other document, information or material relating to the affairs or the account of a customer of the financial institution, banking institution or any other juristic person, including data stored in electronic form, which may assist the Namibian police in investigating an alleged offence.”.

**Insertion of section 27A in Act No. 51 of 1977**

2. The principal Act is amended by the insertion after section 27 of the following section:

**“Failure to comply with request or grant access**

**27A.** A person who, without reasonable cause -

- (a) fails to comply with a request in terms of section 26A; or
- (b) obstructs or fails to grant access -
  - (i) to a police official conducting a search in terms of section 21, 22, 23, 25, 26 or 27; or
  - (ii) to a person conducting a search in terms of section 24; or
- (c) fails to comply with a written notice provided for under section 26B,

commits an offence and on conviction is liable to a fine not exceeding N\$100 000 or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment.”.

**Insertion of section 158B in Act No. 51 of 1977 as amended by**

3. The principal Act is amended by the insertion after section 158A of the following section:

**“Arrangements for witness to testify through audio-visual link**

**158B.** (1) For purposes of this section, “audio-visual link” means a live television link between the court point and the point at which a witness is located, which points are both equipped with facilities that enable the persons referred to in subsection (4)(b) and all persons present at the court point to see and hear the witness.

(2) A court may, on its own motion or on the application of a party to criminal proceedings or the concerned witness, order that the witness, in or outside Namibia, gives evidence through an audio-visual link or similar electronic transmission.

(3) A court may make an order referred to in subsection (2) only when the relevant facilities are available or obtainable and only when the court considers that the use of an audio-visual link or similar electronic transmission will -

- (a) prevent unreasonable delay;
- (b) save costs;
- (c) be in the interest, wellbeing and safety of the witness concerned;
- (d) be in the interest of the security of the State, of public safety or interest, or of administration of justice; or
- (e) prevent the likelihood that prejudice or harm might result to any person if the witness testifies or is present at such criminal proceedings.

(4) In order to ensure a fair and just trial the court -

- (a) may make the giving of evidence in terms of subsection (2) subject to conditions as the court may consider necessary; and
- (b) shall ensure that the accused, his or her legal representative, the prosecutor in the case and the presiding officer are able to hear and see the witness while the witness gives evidence.

(5) A court order made in terms of subsection (2) shall direct the witness to attend at a time and place fixed by the court to give his or her testimony through an audio-visual link, and the court order shall direct the witness to remain in attendance at such place until the witness is excused by the court.

(6) The Minister may make regulations necessary to give effect to the provisions of this section.”.

**Insertion of sections 159A, 159B, 159C and 159D in Act No. 51 of 1977**

4. The principal Act is amended by the insertion after section 159 of the following sections:

**“Postponement of certain criminal proceedings through audio-visual link**

**159A.** (1) For purposes of this section and sections 159B, 159C and 159D, unless the context indicates otherwise -

“appropriate person” means a court official or a person at the court point or remote point who is present or may be required to be present at the proceedings, including the presiding officer, the prosecutor, the legal representative for the accused person, any technical assistant, the clerk of the court, witnesses and members of the public who are entitled to be present;

“audio link” means a live telephone link between the court point and the remote point which points are both equipped with facilities that enable audio communication between an accused person and the legal practitioner for such accused person;

“audio-visual link” means a live television link between the court point and the remote point which points are both equipped with facilities that enable all the appropriate persons at the court point and the remote point to follow the proceedings by seeing and hearing all the appropriate persons;

“court point” means the courtroom or a place where the court that has jurisdiction is sitting;

“correctional facility” means a correctional facility as defined in section 1 of the Correctional Service Act, 2012 (Act No. 9 of 2012); and

“remote point” means the room or place at the designated correctional facility or police station where the accused person appearing through audio-visual link is located.

- (2) An accused person -
- (a) who is over the age of 18 years;
  - (b) who is in custody in a correctional facility in respect of an offence;
  - (c) who has already appeared before a court;
  - (d) whose case has been postponed and who is in custody pending his or her trial; and
  - (e) who is required to appear or to be brought before a court in any subsequent proceedings, whether before, during or after the trial, or at conviction and sentence, and subject to the provisions of this section and sections 159B, 159C and 159D -
    - (i) for a further postponement of the case;
    - (ii) for consideration of release on warning in terms of section 72(1)(a), where the release on warning is not opposed by the prosecutor or where the release on warning does not require the leading of evidence; or

## Act No. 7, 2023

## CRIMINAL PROCEDURE AMENDMENT ACT, 2023

- (iii) for consideration of release on bail in terms of section 60, 63, 307 or 321 -
  - (aa) where the granting of bail is not opposed by the prosecutor;
  - (bb) where the granting of bail does not require the leading of evidence; or
  - (cc) where the accused person is not required to appear or to be brought physically before the court,

may appear before court by audio-visual link and such appearance shall be considered to be a physical appearance before court, unless the court directs, in the interests of justice, that the accused appears or be brought physically before the court.

(3) Any proceedings in terms of subsection (2) shall be regarded as having been held in the presence of the accused person if, during the proceedings, that person -

- (a) is held in custody in a correctional facility; and
  - (b) is able to follow the criminal proceedings and the court is able to see and hear the accused person by means of audio-visual link.
- (4) The remote point shall be regarded as being a part of the court.

**Requirements for audio-visual appearance by accused person**

**159B.** (1) An accused person appearing before a court by audio-visual link shall do so from a place at which the requirements referred to in subsections (2) and (3), and section 159D, are complied with.

(2) The Minister may, subject to the provisions of this section and after consultation with the Minister responsible for correctional facilities, designate by notice in the *Gazette*, a correctional facility which has been suitably equipped as a place where proceedings in terms of section 159A can be held.

(3) Both the court point and the remote point in the correctional facility designated in terms of subsection (2) shall be equipped with facilities that, in accordance with any requirements prescribed by regulations and any directions of the court referred to in section 159D(5), allow -

- (a) private communication to take place between the accused person and a legal representative of such accused person in the proceedings at the court point; and
- (b) documents to be transmitted between both points by a legal representative of an accused person and such accused person -

## Act No. 7, 2023

## CRIMINAL PROCEDURE AMENDMENT ACT, 2023

- (i) at any time during the proceedings;
- (ii) during any adjournment of the hearing in the proceedings referred to in paragraph (a); or
- (iii) at any time on the day of a hearing, shortly before or after the hearing.

(4) The court shall, at every appearance of an accused person in terms of section 159A, inquire into the physical and mental well-being of the accused person and for that purpose may, where necessary, direct that the facilities referred to in section 159D be used in such a manner that enables the presiding officer to satisfy himself or herself as to the well-being of the accused person and make such order as may be appropriate in relation to the well-being of the accused person.

**Protection of communication between accused person and legal representative**

**159C.** Without limiting any other protection applying to the communication between an accused person and the legal representative for the accused person -

- (a) a communication by audio link or audio-visual link between an accused person and his or her legal representative as provided for in section 159B(3); or
- (b) a document transmitted between an accused person and his or her legal representative as provided for in section 159B(3),

is confidential and is inadmissible as evidence in any proceedings as if the communication took place or the document was produced while they were in the presence of each other.

**Technical requirements for use of audio-visual link**

**159D.** (1) For the purposes of proceedings in terms of section 159A, the court point and the remote point shall be equipped with facilities that enable all appropriate persons -

- (a) at the court point to see and hear a person appearing before the court or making a submission, or any other appropriate person at the remote point, and to follow the proceedings; and
  - (b) at the remote point to see and hear all appropriate persons at the court point and to follow the proceedings.
- (2) Subject to subsection (3), if the court is satisfied that -
- (i) there is an interruption of an audio-visual link;
  - (ii) an audio-visual link is of a poor quality; or
  - (iii) any of the facilities referred to in subsection (1) is malfunctioning,

## Act No. 7, 2023

## CRIMINAL PROCEDURE AMENDMENT ACT, 2023

the court may direct that the matter stands down and cause the accused person to be brought physically before the court on the same date if the court considers that it is no longer in the interests of justice to continue proceedings by way of audio-visual link.

(3) If it is not reasonably practicable to bring the accused person to court on the same day as referred to in subsection (2), the court shall, prior to the expiry of the existing court order for the detention of the accused person, postpone the proceedings in the absence of the accused person to the next court day.

(4) The Minister may make regulations necessary to give effect to the technical requirements for the facilities referred to in subsection (1).

(5) In order to ensure a fair trial, a court may give directions in a case as the court considers necessary, but such directions may not be inconsistent with any provision of this Act or any regulation made under this Act.”.

**Amendment of section 205 of Act No. 51 of 1977**

5. Section 205 of the principal Act is amended by the substitution for subsection (1) of the following subsection:

“(1) A magistrate may, upon the request of a public prosecutor, require the attendance before him or any other magistrate, for examination by the public prosecutor, of any person who is likely to give material or relevant information as to any alleged offence, whether or not it is known by whom the offence was committed[.], except that if such person furnishes that information to the satisfaction of the public prosecutor concerned prior to the date on which he or she is required to appear before a magistrate, he or she shall be under no further obligation to physically appear before such magistrate.”.

**Insertion of section 222A in Act No. 51 of 1977**

6. The principal Act is amended by the insertion after section 222 of the following section:

**“Application to criminal proceedings of certain provisions of Electronic Transactions Act, 2019, relating to data messages and computer evidence**

**222A.** The provisions of section 1 and sections 25 to 33 inclusive, of the Electronic Transactions Act, 2019 (Act No. 4 of 2019) shall *mutatis mutandis* apply with reference to criminal proceedings.”.

**Insertion of section 250A in Act No. 51 of 1977**

7. The principal Act is amended by the insertion after section 250 of the following section:



**“Use of traps or undercover operations and admissibility of evidence obtained from such traps or undercover operations**

**250A.** (1) A police official may -

- (a) make use of a trap or engage in an undercover operation to detect, investigate or uncover the commission of an offence or to prevent the commission of an offence; and
- (b) use agents, prescribed in the rules referred to under subsection (7)(a), to participate or assist in a trap or engage in an undercover operation.

(2) The evidence obtained by a police official through the use of a trap or an undercover operation is admissible if the conduct of the police official during the trap or undercover operation does not go beyond providing an opportunity, as referred to in subsection (4), to an accused person to commit an offence.

(3) Where the conduct of the police official during the trap or undercover operation goes beyond providing an opportunity to commit an offence a court may, subject to subsection (5), admit the evidence obtained through such trap or undercover operation.

(4) The court shall, in considering whether certain conduct of a police official goes beyond providing an opportunity to commit an offence, have regard to the following factors:

- (a) whether the required approval referred to in subsection (7)(b) was obtained prior to the setting of a trap or the use of an undercover operation, and whether any rules referred to in subsection (7)(a), if applicable, were adhered to or to what extent the rules were adhered to;
- (b) the nature of the offence under investigation, including -
  - (i) whether the security of the State, the safety of the public, the maintenance of public order or the national economy is seriously threatened by the offence;
  - (ii) the prevalence of the offence in the area in question; and
  - (iii) the seriousness of the offence;
- (c) the availability of other techniques for the detection, investigation, uncovering or prevention of the commission of the offence in the particular circumstances of the case and in the area in question;
- (d) whether a reasonable person who was in the position of the accused would have been induced into committing an offence by the kind of conduct used by the police official;

**Act No. 7, 2023****CRIMINAL PROCEDURE AMENDMENT ACT, 2023**

- (e) the degree of persistence and number of attempts made by the police official before the accused succumbed and committed the offence;
- (f) the type of inducement used, including the degree of deceit, trickery, misrepresentation or reward;
- (g) the timing of the conduct, in particular whether the police official instigated the commission of the offence or whether the police official became involved in an existing unlawful activity;
- (h) whether the conduct involved an exploitation of human characteristics such as emotions, sympathy or friendship or an exploitation of the personal, professional or economic circumstances of the accused person to increase the probability of the commission of the offence;
- (i) whether the police official has exploited a particular vulnerability of the accused person such as a mental handicap or a substance addiction;
- (j) the proportionality between the involvement of the police official as compared to that of the accused, including an assessment of the extent of the harm caused or risked by such police official as compared to that of the accused, and the commission of any illegal acts by such police official;
- (k) any threats, implied or expressed, by the police official against the accused;
- (l) whether, before the trap was set or the undercover operation was used, there existed any suspicion, on reasonable grounds, that the accused had committed an offence similar to which the charge relates;
- (m) whether the police official acted in good or bad faith; or
- (n) any other factor that the court may consider as having a bearing on the matter.

(5) If a court in criminal proceedings finds that in the setting of, or during, a trap or an undercover operation the conduct of the police official went beyond providing an opportunity to commit an offence the court may -

- (a) refuse to allow such evidence to be tendered; or
- (b) refuse to allow such evidence already tendered to stand,

if the evidence was obtained in an improper or unfair manner and the admission of such evidence would render the trial unfair or would otherwise be detrimental to the administration of justice.

## Act No. 7, 2023

## CRIMINAL PROCEDURE AMENDMENT ACT, 2023

(6) When considering the admissibility of the evidence referred to in subsection (5), the court shall weigh up the public interest against the personal interest of the accused, having regard to the following factors:

- (a) the nature and seriousness of the offence, including -
  - (i) whether the security of the State, the safety of the public, the maintenance of public order or the national economy is seriously threatened by the offence;
  - (ii) whether, in the absence of the use of a trap or an undercover operation, it would be difficult to detect, investigate, uncover or prevent the commission of the offence;
  - (iii) whether the offence is frequently committed that special measures are required to detect, investigate or uncover or prevent the commission the offence; and
  - (iv) whether the decency or seriousness of the setting of a trap or undercover operation was justified;
- (b) the extent of the effect of the trap or undercover operation on the interests of the accused person in reference to -
  - (i) the ease with which the interests of the accused person may have been disregarded, having regard to the circumstances under which the offence was committed; and
  - (ii) the prejudice to the accused person resulting from any improper or unfair conduct;
- (c) the nature and seriousness of any infringement of any fundamental right contained in the Namibian Constitution;
- (d) whether in the setting of, or during, the trap or the undercover operation the means used were proportional to the seriousness of the offence; and
- (e) any other factor that in the court considers as having a bearing on the matter.

(7) The Inspector-General in accordance with section 3(2)(k) of the Police Act, 1990 (Act No. 19 of 1990) -

- (a) with the concurrence of the Attorney-General, shall issue general or specific rules regarding the supervision and control of traps and undercover operations; and
- (b) shall require any police official to obtain written approval from a senior police official prescribed in the rules referred to in paragraph (a), which approval may be granted with conditions, whether written or not, in order to set a trap or to engage in an undercover operation.

## Act No. 7, 2023

## CRIMINAL PROCEDURE AMENDMENT ACT, 2023

(8) A police official or the agent referred to in subsection (1) (b), who sets or participates in a trap or an undercover operation to detect, investigate or uncover, or to obtain evidence of, or to prevent the commission of an offence -

- (a) is not criminally liable in respect of any act that constitutes an offence and that relates to the trap or undercover operation if the trap or undercover operation was performed in good faith; and
- (b) may not be prosecuted without the written consent of the Prosecutor-General.

(9) If at any stage of the proceedings the question arises whether evidence may be excluded under subsection (5), the burden of proof to show on a balance of probabilities that the evidence is admissible lies with the prosecution, however -

- (a) the accused may furnish the grounds on which the admissibility of the evidence is challenged; or
- (b) if the accused is not represented, the court shall on its own motion raise the question of the admissibility of the evidence.

(10) The issue of whether evidence may be excluded under subsection (5) may, on application by the prosecutor or the accused or by order of the court of its own motion, be adjudicated as a separate issue in dispute.”

**Short title and commencement**

8. (1) This Act is called the Criminal Procedure Amendment Act, 2023 and comes into operation on a date determined by the Minister by notice in the *Gazette*.

(2) Different dates may be determined under subsection (1) in respect of different provisions of this Act.

---