CRIME, CORRUPTION AND POLICING

Criminal Procedure Act 51 of 1977

What does the law do?

As its name indicates, this law governs procedure in criminal cases.

What is the purpose of the law?

This law regulates every aspect of the criminal justice process, from arrest and bail to trial and sentencing. It is a long law that covers many issues. To understand the law well, it is important to consider some of the many court cases that have applied and interpreted it. This short summary will describe only a few aspects of the law that are of broad public interest.

When did the law come into force?

22 July 1977. This is a South African law that was made applicable to Namibia before Namibian independence. South Africa continues to have a law with the same name and number, but the Namibian version is different from the South African version because different amendments to the statute have been made in the two different countries.

In 2004, the Namibian Parliament passed the *Criminal Procedure Act 25 of 2004*. This 2004 law was intended to replace the 1977 law, but stakeholders realised that there were some problems with the 2004 replacement version. The 2004 law was repealed by the *Criminal Procedure Act Repeal Act 14 of 2018* without ever being brought into force.

What does the Namibian Constitution say about criminal procedure?

The table on the next page contains a simple summary of some of the key points in the Namibian Constitution about criminal proceedings.

Summary of key constitutional provisions relevant to criminal cases	
Protection of Life – Article 6	The death penalty will not be imposed in Namibia.
Protection of Liberty – Article 7	Procedures set out in law must be followed when anyone is deprived of their personal liberty.
Respect for Human Dignity – Article 8	Human dignity must be respected in all court proceedings and in the enforcement of penalties. No one can be subjected to torture or to "cruel, inhuman or degrading treatment or punishment". The Namibian Supreme Court has said that this means that physical punishment for a crime (such as whipping and caning) is no longer allowed.[1] The Supreme Court has also said that long prison sentences and even life imprisonment are constitutional as long as there is some possibility of release on parole.[2]
Arrest and Detention – Article 11	No one can be arrested or detained arbitrarily. Anyone who is arrested must be promptly informed of the basis for the arrest. Anyone who is arrested must be brought to a magistrate or a judge within 48 hours of the arrest – or "if this is not reasonably possible" as soon as possible after that time period. No one can be kept in custody after that unless the magistrate or the judge has authorised it.
Fair Trial – Article 12	Everyone accused of a crime is entitled to a fair hearing by an independent, impartial court. The press and the public can be excluded from a criminal trial only for reasons of morals, public order or national security, as necessary in a democratic society. Judgments in criminal cases must be given in public, except where the interests of juveniles or morals require otherwise. The criminal trial must take place within a reasonable time. Otherwise, the accused must be released. The Namibian courts have said that what qualifies as a "reasonable time" will be different in different cases, depending on factors such as the reasons for the delay, how much the delay has negatively impacted the accused and the public interest.[3] Anyone charged with a crime is innocent until proven guilty, after they have had a chance to call their own witnesses and cross-examine the witnesses against them. Anyone charged with a crime has a right to be defended by a legal practitioner of their choice. They must be given adequate time and facilities to prepare and present their defence. The Namibian Supreme Court has said that this means that the State must provide legal representation to a person who cannot afford their own lawyer, if failing to do so would prevent the accused person from having a fair trial.[4] No one can be forced to give evidence against themselves or their spouses (including spouses in a civil or a customary marriage). Confessions obtained by torturing suspects cannot be used as evidence against them. No one can be tried, convicted or punished more than once for the same crime. No one can be tried or convicted for a crime that did not exist at the time. The law cannot make something into a crime retroactively.
Presidential pardons – Article 32(3)(d)	The President has the power to pardon or reprieve a convicted offender, with or without conditions. In practice, this power has been used to grant blanket pardons to certain categories of prisoners.

1 *Ex Parte Attorney-General, Namibia: Re: Corporal Punishment by Organs of the State*, Supreme Court, 1991.

2 *S v Tcoeib*, Supreme Court, 1999; *S v Gaingob*, Supreme Court, 2018.

3 These are some of the cases that have discussed this questions: *S v Nunes*, High Court, 2001; *S v Strowitzki*, High Court, 1995; *S v Heidenreich*, High Court 1995; *Malama-Kean v Magistrate, District of Oshakati*, Supreme Court, 2002; *S v Myburgh*, Supreme Court, 2008; *Mahupelo v Minister of Safety and Security*, High Court, 2020.

4 *Government of the Republic of Namibia v Mwilima*, Supreme Court, 2002 (Caprivi treason trial).

Search and seizure

The law gives the police certain powers to search persons and places, and to seize items that reasonably appear to relate to a crime.

Normally, police must approach a magistrate or a judge to get a search warrant. The police must say why they need to do the search, and the warrant will say what persons and places can be searched. Searches that take place in terms of a search warrant must take place in the daytime, unless searches at night have been specifically authorised.

Police may search persons and places without a search warrant in several circumstances:

- if the relevant persons give consent
- if the police reasonably believe that a warrant would be issued, but the delay involved would probably defeat its purpose (because it would give the suspects time to hide or destroy the evidence).

Police may search a person who has been arrested on a reasonable suspicion of committing a crime without a search warrant. Police may seize anything in that person's possession or control as evidence of the crime.

Police who are carrying out a lawful search may use "such force as may be reasonably necessary" to overcome resistance to the search, including breaking into the relevant place by force – but they must first demand entrance and explain the purpose of the search. Police can enter a place without announcing themselves if they have a reasonable belief that the evidence they are seeking would be hidden or destroyed if they requested entry first.

It is a crime for police to carry out an unlawful search – which includes a search that does not comply with the relevant search warrant, or a search that does not follow the procedures set out in the law. It is also a crime for anyone to give false information that leads to the issue of a search warrant.

> Women may be physically searched only by a female.

The law contains rules and procedures about the treatment of items that are seized as evidence. Items that were used to commit a crime may be kept permanently by the State.

Arrest

A person reasonably suspected of committing a crime may be arrested. An arrest is not supposed to be a form of punishment, but a way of making sure that a person accused of a crime will appear in court for the criminal trial.

An arrest can take place with or without a warrant. A warrant can be issued by a magistrate or a judge if a police officer or a prosecutor provides information showing a reasonable suspicion that a particular crime has been committed.

> Arrest is not the only way to make sure that someone appears in court. The law also provides for various types of notices calling on a person to come to court to face criminal charges. Anyone who fails to obey such a notice can be arrested. For example, this procedure is common in some traffic violations where police give the driver a notice to either pay a fine or come to court on a specific date.

There is also a long list of circumstances that justify arrest without a warrant. They all involve situations where the arresting officer has some personal knowledge or basis for suspicion that the arrested person has committed certain crimes – or where there is some other law that authorises arrest without a warrant in certain circumstances. In such situations, the delay involved in getting the warrant would probably allow persons who are strongly suspected of being criminals to escape.

If the person being arrested does not submit voluntarily, then the person making the arrest must physically touch the accused person or, if necessary, forcibly confine them.

A person making an arrest can forcibly enter a place to make an arrest, after first demanding entry and explaining the reason.

The law allows for the use of force in connection with an arrest, in certain circumstances. But force should be used only as a last resort. Police should consider other methods first, such as oral warnings or warning shots fired into the air. The person attempting the arrest must also consider whether a fleeing suspect can be arrested at a later stage. For example, if the suspect can be identified and traced, then the use of force to make an immediate arrest is probably not justifiable. Any use of force must also be proportional to the seriousness of the crime. Police are justified in using force in their own self-defence, or to protect the life, safety or property of someone else.[5]

A person making an arrest must explain the reason for the arrest. If there is an arrest warrant, the accused person has a right to a copy of it.

The person who has been arrested can be confined at a police station, or at some other place named in a warrant of arrest, until they are lawfully released. A release might take place, for example, because bail is paid, because the charges have been withdrawn or because the person has been tried and found not guilty.

> Police have a right to demand that a suspect or a witness to a crime must provide their correct name and address. Anyone who refuses to do this can be arrested on the spot, without a warrant, and detained for up to 12 hours, until their name and address have been confirmed. Failure to supply a name and address is also a crime in itself.

What happens after an arrest?

Police may take the fingerprints, palmprints or footprints of anyone who has been arrested. They can also take photographs, blood samples and DNA samples.[6]

The *Criminal Procedure Act* echoes the **"48-hour rule"** in the Namibian Constitution. It says that an arrested person must be brought before a lower court within 48 hours of the arrest – but it also contains some rules that make allowances for the time of day that the court closes and for days when courts are not operating, and for situations when an accused person is being transported from one area to another or is too ill to appear.

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5 See "Use of force by law enforcement officials in Namibia", Legal Assistance Centre, 2019, which discusses court rulings about the use of force during arrests.

6 In the case of *S v Eigowab*, High Court, 1994, the Court said that refusing to provide a blood sample after being arrested on a charge of driving under the influence of alcohol makes a person guilty of the crime of obstructing justice. The Court also said that police can use force to get the sample if the suspect refuses or resists. In the case of *S v Gemeng*, High Court, 2018, the Court said that an accused person can similarly be ordered to provide DNA samples as evidence.

Courts have also considered when the 48-hour rule in the Constitution can validly be exceeded. The Namibian Supreme Court has said that relevant factors might include the availability of a magistrate, police manpower, transport and the distances involved – but convenience is *not* a relevant factor. Police are expected to plan around the 48-hour rule, such as by making sure in advance that a magistrate will be on hand.[7] The Namibian Supreme Court has also said that the 48-hour rule is a very important human right because it helps protects people from being held in detention without a proper reason, and from being tortured or killed without anyone knowing.[8]

Another very important constitutional right is the **right to legal assistance**. Again, this is echoed in the *Criminal Procedure Act* which says that an accused person is entitled to legal assistance from the time of arrest and during any criminal proceedings. This means that police have a duty to tell an accused person about this right as soon as there is an arrest. Failure to do so could mean that statements made to the police by the accused might not be allowed into court as evidence.[9] This also means that the magistrate or judge in a criminal matter has a duty to inform an accused person of the right to legal representation.[10]

The *Legal Aid Act 29 of 1990* says that any accused person can apply for State-funded legal aid which may be provided if the accused person cannot afford to pay a lawyer privately and if it is in the interests of justice. It is not possible for the State to provide free legal aid for every person accused of a crime who cannot afford a lawyer. But the Namibian Supreme Court has said that the State has a duty to provide legal representation *where the accused persons would otherwise not have a fair trial as guaranteed by the Namibian Constitution*. This means that, even if there are not enough resources to provide a lawyer through the scheme set up under the *Legal Aid Act*, the State must provide legal representation through other channels if this is necessary for a fair trial. In deciding when the State must provide legal representation for accused persons in a specific case, factors to consider include the complexity of the case, the ability of the accused persons to defend themselves and the seriousness of the criminal charges (which will determine the possible impact of a conviction on the accused).[11]

Bail

Bail is the temporary release of a person charged with a crime, after they provide a deposit of money or some other security. If the accused person does not come to court for the criminal proceedings, the money or the security they provided will be forfeited to the State.

There is no right to be released on bail, but every accused person has the right to *apply* for release on bail. Because the Namibian Constitution says that an accused person is innocent until proven guilty, accused persons cannot be kept in detention before trial as a form of advance punishment.[12]

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7 *Minister of Safety and Security v Kabotana*, Supreme Court, 2014 (agreeing with statements made by the High Court in the 1991 case of *S v Mbahapa*).

8 *Minister of Safety and Security v Kabotana*, Supreme Court, 2014 (agreeing with statements made by the High Court in the 1991 case of *Sheehama v Minister of Safety and Security*).

9 *S v Kapika*, High Court, 1997; *S v De Wee*, High Court, 1999.

10 *S v Mwambazi*, High Court, 1990.

11 *Government of the Republic of Namibia v Mwilima*, Supreme Court, 2002 (Caprivi treason trial).

12 *S v Acheson*, High Court, 1991. (The *Criminal Procedure Act* was amended after this case was decided to add additional grounds for denying bail to persons charged with certain serious crimes.)

Police officers are allowed to release accused persons on bail in the case of certain crimes that are not too serious. Decisions on bail are otherwise handled by the courts.

Bail can be denied in any criminal case if there is a risk that the accused will run away or interfere with State witnesses or evidence. Where the accused is charged with certain serious offences – including treason, murder, rape, robbery, housebreaking, theft and bribery – the court can also take into consideration the interests of the public and the administration of justice. An accused person who is denied bail can appeal this decision to a higher court.

If a court grants bail, it will often set conditions for the accused person, such as handing in their passport, reporting regularly to a police station or having no contact with witnesses or victims.

In cases involving domestic violence or rape, the victim has a right to provide information about any fears of harm or intimidation that the court should consider before making a decision on bail. The victim can also make submissions to the court on bail conditions. If a person accused of rape is released on bail, there will normally be an automatic bail condition prohibiting any contact with the victim. If the crime involved domestic violence, the court must impose certain bail conditions unless there are special circumstances that make them inappropriate:

- a prohibition on contact with the victim
- a prohibition on the possession of any firearm or other specified weapon
- an order that the accused must continue to provide maintenance to the victim and any other dependants at the same or greater level as before the arrest.

Bail in any kind of case can be cancelled if the accused fails to show up in court or fails to comply with the bail conditions, or where there is information showing that the accused is planning to run away. If bail is cancelled, then the accused will be arrested and kept in custody until the criminal trial is over.

Once the criminal case is finished, the bail will be refunded – even if the accused is found guilty.

It is also possible for an accused person who has been arrested to be released "on warning" if the crime involved is not too serious. This means that the accused person is released without having to provide bail, and warned that they must come back to court. A person who does not show up after being released on warning will be arrested.

Pleading to the charge

Before the trial starts, the accused will be asked to plead. The main pleas are "guilty" or "not guilty". There are also some other options – for example, the accused person might say that they have already been found guilty or not guilty of the same criminal charge, or that the court does not have authority to hold a trial on this criminal charge.

If an accused person pleads "guilty" to any crime other than a minor one, the presiding officer will ask questions to make sure that the accused really understands all of the elements of the crime that they are admitting. If this is not the case, then the plea will be changed to "not guilty".

Criminal trials

Where an accused person pleads "not guilty", there will be a criminal trial. The trial involves a state prosecutor on one side and the accused person on the other side. Crime victims may be witnesses in the criminal trial, but they do not otherwise take part. The State must prove the case against the accused.

Criminal trials may take place in a magistrate's court, a regional magistrate's court or the High Court, depending on the nature of the criminal charge and how severe the possible sentence might be.

> In some countries criminal cases are decided by juries made up of people from the community. Namibia does not use jury trials. Criminal cases are decided by the magistrate or the judge.

Criminal trials are open to the public except in certain very limited situations – such as where the accused or a witness is a child, or the case involves a sexual crime or domestic violence, or the court must be closed to protect national security, public morals or the safety of a witness. If all or part of a case takes place behind closed doors, the court can direct that certain information about that part of the proceedings may not be published by anyone.

> Only the prosecutor can **withdraw a charge** or **stop a prosecution**. In practice, a victim who no longer wishes to proceed with a criminal case can fill out a withdrawal statement. A prosecutor could continue with the case without the victim's cooperation if there was sufficient evidence of the crime.

The prosecutor acting for the State has the responsibility to prove that the accused person is guilty. The prosecutor and the accused person can both present evidence to support their side of the case. Accused persons can be assisted by legal practitioners, or they can present their cases in court on their own. The accused (or the lawyer representing the accused) has a right to question any witnesses who testify for the State.

There are many rules in the *Criminal Procedure Act* about how the trial will take place and what kinds of evidence can be considered. For example, one rule is that a confession made by an accused person can be considered only if it was made freely and voluntarily, without undue influence.

Another rule that has been developed in court cases is that a fair trial means that accused persons must have access to information about the evidence against them so that they can prepare their defence, unless disclosure of the information might endanger justice or the public interest. Examples would be where certain information might endanger an informer or a witness, or where it might disclose police investigation techniques that need to be kept confidential.[13]

> There is a procedure for converting a criminal trial to a proceeding under the *Abuse of Dependence-Producing Substances and Rehabilitation Centres Act 41 of 1971* for placing a person who is addicted to drugs or alcohol in a rehabilitation centre, if the prosecutor agrees to this.

Vulnerable witnesses

Some categories of witnesses at a criminal trial are considered to be "vulnerable witnesses": children (persons under age 18), victims of sexual offences, victims of domestic violence at the hands of a close family member or an intimate partner, or anyone else who is likely to suffer undue stress or trauma while testifying. There are various special arrangements that can be made to make vulnerable witnesses more comfortable in court:

[13] *S v Nassar*, High Court, 1994; *S v Angula*; *S v Lucas*, High Court, 1996; *S v Scholtz*, Supreme Court, 1998.

- **alternative venues for trials**, so that they can held in places less intimidating than courtrooms
- **testifying behind one-way screens** or by means of closed-circuit television, so that the witness does not have to see the accused
- **allowing support persons to accompany witnesses while they are testifying**, so that (for example) a young child could speak to the court while sitting on the lap of a family member
- **strict limitations on the use of irrelevant questioning that may intimidate or confuse witnesses**
- **requiring that questions be asked through the presiding officer or another impartial person**, to make sure that lawyers or accused persons do not try to intimidate or confuse a witness.

The idea is that witnesses who are not frightened or traumatized are likely to give more reliable evidence that will lead to more just outcomes.

Conviction and sentencing

If there is a reasonable doubt about an accused person's guilt, the court must make a finding of "not guilty". If the State has proved its case, the count will find the accused person "guilty".

It is possible in some cases for a person who was charged with one crime to be convicted of another similar crime. For example, a person who was charged with rape might be convicted of attempted rape or indecent assault instead. The law sets out the rules about this, to make sure that the accused person had a fair chance to put forward a defence to the crime in question.

After an accused person is found guilty, there will be a separate consideration of the appropriate sentence. Both the prosecution and the convicted offender may address the court on the issue of sentencing. The court will consider the crime (including its impact on the victim), the personal circumstances of the offender and the interests of society.

Possible sentences: The Namibian Constitution forbids the death penalty and any sentence that involves physical punishment. Many statutes provide maximum sentences that may be imposed for a specific crime, and a few provide minimum sentences.

In general, a sentence for a crime can be imprisonment, periodical imprisonment, a fine, declaration of the offender as an "habitual criminal" or confinement to any institution established by law (such as an alcohol rehabilitation centre). *Periodical imprisonment* must include imprisonment for a minimum of 100 hours and a maximum of 2000 hours, but it does not have to be over a continuous time period. This option has been used in practice as a punishment for failure to pay child maintenance, since it can allow the offender to continue working to provide the maintenance that is owed while still being penalised.

Postponed or suspended sentences: A court may postpone or suspend a sentence for up to five years, either with or without certain conditions. Possible conditions might include:
- compensation or some other form of benefit or service to the victim
- community service
- submitting to some kind of instruction or treatment
- submitting to supervision by a probation officer
- attendance at a specified centre for a specified purpose
- good conduct during the period of postponement or suspension.

If the offender does not comply with the conditions, the court can order the arrest and detention of the offender. It can then impose a sentence where sentencing was postponed, or put into operation a sentence that was suspended.

One of the conditions that can be imposed when a sentence is postponed or suspended is *community service*. The Namibian High Court has suggested that a court should consider whether the accused is a suitable candidate for community service and willing to carry it out, who will supervise and control the community service, what days and times the community service should cover, and how long it should continue.[14] In another case, the High Court said that the offender must be given an opportunity to give input before community service is required.[15]

Caution or reprimand: If no law sets a minimum sentence for the crime in question, a court may decide to release a convicted offender with only a caution or a reprimand.

Appeals, reviews and pardons

A finding of guilt or innocence, or a sentence, can be appealed to a higher court. In other words, an accused person can appeal a finding of guilt or ask for a lighter sentence, and the Prosecutor-General can appeal a finding of innocence or ask for a heavier sentence. If one side appeals, the other side can "cross-appeal" at the same time.

If the accused person did not have a lawyer, the sentence imposed by a magistrate's court may be automatically reviewed by a judge of the High Court, depending on a combination of the length of the sentence (or the amount of the fine) and the magistrate's years of experience. The High Court can also review a decision of a lower court in any case where it appears that there may have been some form of corruption or a fundamental legal mistake in the trial. "Review" means that the judge examines the record of the case to be sure that there was no error or unfairness. This is an extra safeguard to make sure that no one is unfairly deprived of their liberty.

Victim compensation

The court that tried the criminal case can award compensation to the victim, upon application by the victim or prosecutor. This compensation is designed to make up for property damage or loss.[16] The court can also impose compensation as a condition of a postponed or suspended sentence.[17]

Juvenile offenders

The law has a few special procedures that apply to juveniles, who are persons under 18.

Juveniles accused of a crime may be released into the custody of their parent or guardian while awaiting trial. Alternatively, they may be allowed to stay in a place of safety, such as a children's home, until the trial is over. Keeping juveniles in prison or a police cell while they are awaiting trial should be a last resort, but appropriate alternatives are not always available.

The court will notify a juvenile's parent or guardian that they must attend the trial, if they can be located without a long delay. It is a crime for the parent or guardian to ignore a notice to come to court in these circumstances, unless the court has exempted them from attending for some reason. The parent or guardian is allowed to assist the juvenile in court.

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14 *S v Fillemon*, High Court, 2013.
15 *S v Linus*, High Court, 2013.
16 *S v Tjisuta*, High Court, 1991; *S v Hendriks*, High Court, 2004.
17 See *S v Petrus*, High Court, 2006.

The court is always closed to the public during a criminal trial when the accused is under age 18. (A court may also decide to close a trial to the public when a witness under age 18 is giving evidence, or prohibit anyone under age 18 from attending a criminal trial if they are not giving evidence.)

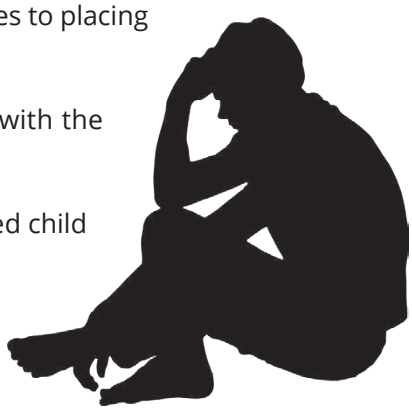
No one is allowed to publish information that may reveal the identity of an accused or a witness who is under age 18 unless the judge or magistrate presiding over the trial has given permission for this.

A court that is conducting a criminal trial may convert the proceedings into a child protection enquiry if it appears that the juvenile accused may be a child in need of protective services. For example, the child may have been forced into criminal activity by an adult, or driven into crime by neglect, poverty or substance addiction. This could mean that the child needs assistance rather than criminal punishment.

If juveniles are convicted of crimes, the law provides some alternatives to placing them in correctional facilities:

- placing them under the supervision of a probation officer
- placing them in the custody of a suitable person (possibly also with the supervision of a probation officer)
- placing them in a child detention centre.

One problem is that Namibia does not currently have any specialised child detention centres in place.



If juveniles are confined in police cells or correctional facilities at any stage of the criminal process, the *Child Care and Protection Act 3 of 2015* contains certain rules that apply unless there is a court order that says otherwise:

- They must be kept separately from adults, except that they may be in the same room as adults for meals and exercise, under proper supervision.
- They must be allowed visits by their parent or guardian, as well as by other persons where the contact is in the best interests of the child.
- They must be kept in conditions that reduce any risk of harm, keeping in mind the special vulnerability of children.
- They must be kept only with children who are at the same stage of the criminal process, so that children awaiting trial are detained separately from children who have been convicted.

This law also set up a complaints system that is designed to lead to social worker investigations in the case of injury or other problems with children in detention.

Some criticisms and possible law reforms

Juvenile offenders: Additional rules and procedures for young offenders are expected to be added by a forthcoming law on child justice. This law is expected to include procedures for taking children out of the criminal justice system and putting them into programmes that hold them accountable for their wrongdoing while also helping them change their ways without having to undergo a criminal trial and conviction. Diversion programmes are already operating in practice in Namibia, but there is no legal framework for this approach as yet.

Plea bargaining: Amendments to the *Criminal Procedure Act* are under consideration in order to provide for plea and sentence agreements, more commonly known as "plea bargaining". This refers to the situation where the accused person agrees to plead guilty to a crime while knowing in advance what sentence will be imposed. Such negotiations typically allow the accused to plead guilty to a less serious crime than the one in the original charge. The advantage to the State

is that such agreements help to reduce court backlogs, and can sometimes be used to motivate accused persons to give evidence against crime ringleaders. A bill to add a formal procedure for plea bargaining was introduced into Parliament in 2021, but withdrawn before it was passed. This proposal suggested that accused persons should only be allowed to enter into plea bargains if they have legal representation, to be sure that their rights are protected. It also suggested that the Prosecutor-General should have the power to issue directives limiting plea bargains to certain categories of crimes, to make sure that they are not used to allow people who commit serious crimes to avoid appropriately harsh sentences. The pros and cons of introducing this approach to Namibia's criminal justice system are still under discussion.[18]

Use of force: The rules in the *Criminal Procedure Act* about the permissible use of force need attention. These rules have been qualified by court cases, but this means that the limits on the use of force are not entirely clear. The police follow an *Operations Manual* that has better and clearer directives about use of force, but this is not the same as having clear rules in a binding law. The permissible use of deadly force requires particular attention, keeping in mind the constitutional right to life alongside awareness of the practical challenges of policing, including the need for police to make split-second decisions under pressure. The rules on the use of force in the law should be improved to set clear standards that are consistent with the Namibian Constitution and the relevant international guidelines, while retaining enough flexibility to allow police to carry out their duties.[19]

"Schedule 1 crimes": There is a list of crimes at the end of the *Criminal Procedure Act* called "Schedule 1". Anyone suspected of committing one of these crimes can be arrested without a warrant. The law also authorises police to use deadly force to arrest persons suspected of committing these crimes, if this is necessary to make the arrest. This seems reasonable for some of the crimes on the list – such as murder, rape, robbery and assault that has caused a dangerous wound. But it seems very unreasonable for other non-violent crimes on the same list – such as fraud, forgery or knowingly receiving stolen property. Most problematic of all, the list includes the crime of sodomy, which once included certain forms of rape but now covers only sexual acts between consenting adults. So treating consensual sodomy in this way is a serious form of discrimination against gay men. Another problem with the list is that it is too broad. It includes any crime

Schedule 1

Treason.	Culpable homicide.	Sodomy.
Sedition.	Rape.	Bestiality.
Murder.	Indecent assault.	Robbery.

Assault, when a dangerous wound is inflicted.
Arson.
Breaking or entering any premises, whether under the common law or a statutory provision, with intent to commit an offence.
Theft, whether under the common law or a statutory provision.
Receiving stolen property knowing it to have been stolen.
Fraud.
Forgery or uttering a forged document knowing it to have been forged.
Offences relating to the coinage.
Any offence, except the offence of escaping from lawful custody in circumstances other than the circumstances referred to immediately here-under, the punishment wherefor may be a period of imprisonment exceeding six months without the option of a fine.
Escaping from lawful custody, where the person concerned is in such custody in respect of any offence referred to in this Schedule or is in such custody in respect of the offence of escaping from lawful custody.
Any conspiracy, incitement or attempt to commit any offence referred to in this Schedule.

[18] Sakeus Iikela, "Opposition blasts 'Fishrot bill'", *The Namibian*, 25 February 2021.

[19] See "Use of force by law enforcement officials in Namibia", Legal Assistance Centre, 2019.

that can be punished by imprisonment for more than six months without the option of a fine. In South Africa, the Constitutional Court found that a similar "Schedule 1" list of crimes was unconstitutional because it was a "rag-bag" that mixed serious violent crimes together with relatively petty crimes that do not involve any kind of physical threat. It was an illogical list of crimes for its purpose. The similar law in South Africa has been amended since that case was decided. In Namibia, it appears that the police do not actually apply the "Schedule 1" list as it stands in practice, but this aspect of the *Criminal Procedure Act* should be amended.[20]

Victim compensation: It has been suggested that arrangements for victim compensation should be expanded and improved. The desire for compensation sometimes motivates victims to withdraw criminal charges and settle the case privately by taking money from the offender, or to resolve cases in customary tribunals instead of criminal courts. These alternative approaches could leave the general public at risk from the offender. Victim compensation could be more well-integrated into the criminal justice system.[21]

Other relevant laws

Once a person is convicted of a crime, the ***Correctional Service Act 9 of 2012*** contains rules and procedures about their confinement in prisons (now officially called "correctional facilities").

There are several general statutes that focus on procedures relating to crimes that cross national borders in some way:

- The ***Extradition Act 11 of 1996*** sets out rules and procedures for transferring persons accused of certain crimes from one country to another, as well as procedures for dealing with persons convicted of certain crimes who are still unlawfully at large in other countries.
- The ***International Co-operation in Criminal Matters Act 9 of 2000*** deals with cooperation between Namibia and certain other countries on issues such as providing evidence, carrying out sentences and confiscating the proceeds of crime.
- The ***Transfer of Convicted Offenders Act 9 of 2005*** covers the transfer of sentenced offenders between Namibia and other countries.

[20] See "Use of force by law enforcement officials in Namibia", Legal Assistance Centre, 2019.

[21] The *Criminal Procedure Act 24 of 2004*, which was repealed without ever coming into force, broadened the possibilities for victim compensation and provided more detailed procedures for this.

Police Act 19 of 1990

What does the law do?

This law sets up the Namibian Police Force (Nampol) and describes the general powers and duties of police.

What is the purpose of the law?

The law establishes Nampol as the national police force of Namibia, provides for its organisation and administration, and sets out the general functions, powers and duties of the police. It also provides procedures for complaints and disciplinary proceedings.

The Namibian Constitution says that there must be a statute establishing a Namibian police force "to secure the internal security of Namibia and to maintain law and order". The Constitution says that the President must appoint an Inspector-General of Police on the recommendation of the Security Commission. The President also has the power to remove the Inspector-General of Police from office for good cause, if this is in the public interest.

The Constitution also says that the Inspector-General of Police has the following duties:

- to make provision for balanced structuring of the police force (to make sure that the police force reflects the diversity of the Namibian population)
- to make suitable appointments to the police force
- to arrange for the investigation and prosecution of charges of indiscipline against members of the police force
- to ensure the efficient administration of the police force.

Other details about the operation of Nampol are covered by the *Police Act*.

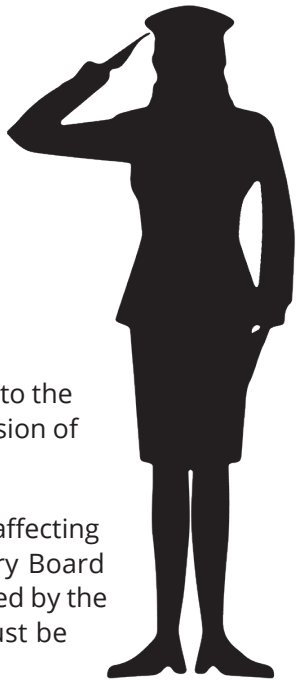
Security Commission

The Constitution and the *Security Commission Act 18 of 2001* set up the Security Commission. It is made up of the Chairperson of the Public Service Commission, the Chief of the Defence Force, the Inspector-General of Police, the Head of the Intelligence Service, the Commissioner-General of the Correctional Service and two members of the National Assembly. These two members are appointed by the President on the recommendation of the National Assembly, and they can hold office for as long as they remain members of the National Assembly. The Security Commission advises the President on appointments and other issues relating to security.

When did the law come into force?

3 December 1990, shortly after independence.

How is Nampol organised?



The **Inspector-General** is in command of Nampol, which includes other officers and non-officers appointed by the Inspector-General. The Inspector-General has the authority –

- to organise Nampol into units and other groupings
- to decide on the number and grading of Nampol members
- to decide on the training that Nampol members must undergo
- to make decisions on how to deploy Nampol members
- to make rules on discipline and other issues.

The law says that the **Minister** responsible for policing may issue instructions to the Inspector-General, and that the Minister can also set aside or amend any decision of the Inspector-General.

There is a **Police Advisory Board** to advise the Minister on general questions affecting the police. The regulations issued under the *Police Act* say that this Advisory Board must be made up of five to seven persons with appropriate expertise appointed by the Minister for three-year terms. The majority of the persons on the Board must be people who do not work in the public service.

All **members of Nampol** must undergo medical examinations to ensure they are mentally and physically fit to serve. People who have been convicted of certain crimes are not allowed to join the police. Members of Nampol may be discharged on account of ill-health, extended absence without leave, incapacity to perform their duties efficiently or as a penalty for misconduct. They can also be reduced in rank because of inefficiency. Members of Nampol must obey all lawful orders from their seniors.

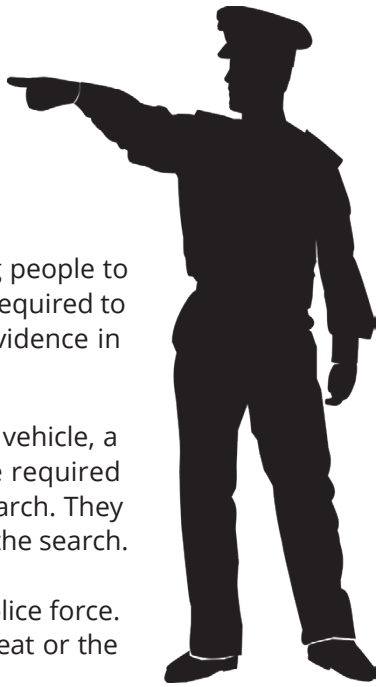
The *Labour Act 11 of 2007* does not apply to the police force – although the constitutional right to fair and reasonable administrative action does apply. In terms of the regulations issued under the *Police Act*, police are not allowed to establish or join a trade union without the written permission of the Inspector-General.

What are the functions of the police force?

The functions of Nampol are:

- to preserve internal security
- to maintain law and order
- to investigate crime
- to prevent crime
- to protect life and property.

What are the main powers and duties of the police force?



The *Police Act* describes only a few general police powers and duties. Police functions in specific contexts are described in other laws, such as the *Criminal Procedure Act 51 of 1977.*

- Police are authorised to deliver warrants of arrest, summons telling people to appear in court, and other official court documents. Police may be required to take part in court cases on behalf of the State, such as by giving evidence in criminal proceedings.

- Police may search a person, a place or a vehicle (including a motor vehicle, a boat, a train or an aeroplane) without a search warrant if the time required to get a warrant from the court would defeat the purpose of the search. They can also seize anything that they find that relates to the purpose of the search. There are some safeguards:
  - The search must be reasonably related to the functions of the police force.
  - The search must not be "excessively intrusive" in light of the threat or the crime involved.
  - The police must inform the person concerned of the purpose of the search if that person is present.
  - A woman can be physically searched only by another woman.

- For the purpose of carrying out their functions, police may stop and search any vehicle that is on a public road. They can set up a roadblock for this purpose, or simply direct drivers to stop. It is a crime to ignore a direction to stop, punishable by a fine of up to N$2000 or prison for up to 12 months, or both.

- The Inspector-General may publish a photograph or sketch of a person in connection with the functions of the police force.

- Police may use "reasonable" force to prevent crime or to arrest an offender, a suspect or a person who is "unlawfully at large".

- Police may enter without consent or break into any place that appears to be on fire, or into a place next door, to protect persons or property.

- Police may set up traffic barriers or block off public or private property without consent when this is necessary to maintain law and order or to prevent or detect crime. Police may also take reasonable steps to stop any person from crossing such barriers, on foot or in a vehicle. It is a crime for the driver of a vehicle to ignore a reasonable signal to stop at such a barrier. The penalty is a fine of up to N$2 000 or prison for up to six months, or both.

How are police held accountable?

It is a crime for any member of Nampol to violate the *Police Act*, or an order issued in terms of the *Police Act*. The penalty is a fine of up to N$2 000 or prison for up to six months, or both.

The Inspector-General can bring disciplinary proceedings against any member of Nampol for misconduct. Regulations issued under the *Police Act* contain a long list of acts that are misconduct.

Here are some examples of police misconduct that are particularly relevant to members of the public:

- sleeping on duty
- being "grossly discourteous" to anyone while on duty
- being negligent or lazy in carrying out police duties
- using unnecessary force or violence against a person in custody, or otherwise ill-treating someone in custody
- fighting or otherwise behaving in a violent or unseemly way
- spreading false information
- acting in any way that is disgraceful or doing something that could cause embarrassment to the police force
- acting in a way that undermines the impartial discharge of police duties (or doing something that creates such an impression of bias amongst members of the public)
- refusing to carry out police duties
- withholding or unreasonably delaying a complaint against another member of the police force
- sharing information gained through official duties without the permission of the Inspector-General
- demanding or accepting any kind of bribe or reward for carrying out police duties, or for failing to carry out police duties
- being under the influence of alcohol or drugs (without a medical prescription), on or off duty

- taking an active part in party-political matters or associating with any particular political party or movement (including through party colours, symbols, badges or gestures), on or off duty
- using a position in the police force to promote or prejudice the interest of any political party, or trying to get political intervention to affect anyone's position or conditions of employment in the police force
- hiding, altering or destroying any document relating to police functions or duties
- discriminating against anyone on the grounds of colour, race, nationality or ethnic or national origin while on duty
- using a position in the police force to promote or prejudice the interest of any business or private agency outside of official duties
- being convicted of any crime.

There are many additional forms of misconduct that relate to internal rules and discipline.

How does a member of the public make a complaint about police conduct?

The regulations provide a procedure for complaints. Any member of the public can make a complaint about police misconduct to any member of Nampol. The person who receives the complaint must record it and give it to the Inspector-General.

The Inspector-General will then appoint a police officer to investigate the complaint. This officer must be higher in rank than the person being investigated, and from a different police station or office. If the complaint was made anonymously, the Inspector-General does not have a duty to start an investigation. There is also no duty to start an investigation if the complaint does not actually point to any misconduct.

Once the investigation is complete, the investigating officer will give a report to the Inspector-General. The Inspector-General will refer the matter to the Prosecutor-General if it appears that a crime may have been committed, or start a disciplinary proceeding if there appears to be misconduct.

Disciplinary proceedings

The procedure for disciplinary proceedings is set out in the law. The Inspector-General may choose a presiding officer who is a member of the police higher in rank than the person who is facing possible discipline. Alternatively, the Minister can appoint any legally qualified member of the public service to preside over the proceedings, after consulting the Attorney-General.

There are slightly different procedures for charges of misconduct that are not triggered by a complaint from a member of the public.

The disciplinary proceedings must take place within 12 months of the date when the misconduct took place or came to light. Persons facing possible discipline must be given a chance to present their side of the story, with the assistance of a legal practitioner if they wish (at their own cost).

The Inspector-General may suspend members while a criminal trial or disciplinary proceedings are pending, after giving them a chance to explain why they should not be suspended. During a suspension, members are stripped of all powers, functions and authority, and they are not entitled to receive any salary unless the Minister directs otherwise. They are also not allowed to wear a police uniform while suspended.

If a member of the police is found guilty of misconduct the possible penalties are:

- a caution or reprimand
- a reduction in salary or rank (or both)
- a fine of up to N$2000 (which could be suspended or paid in instalments)
- a recommendation to the Inspector-General that the member should be discharged or called upon to resign.

After the disciplinary proceedings are concluded, the Inspector-General may confirm, alter or set aside the conviction or the penalty. No conviction or penalty can be put into effect unless it is confirmed by the Inspector-General. A convicted member of the police force can also appeal the conviction and penalty to the Minister.

Complaining to the Ombudsman about police conduct

In terms of Article 91 of the Namibian Constitution, the functions of the Ombudsman include the duty to investigate complaints concerning violations of fundamental rights and freedoms, abuse of power or unfair, harsh, insensitive or discourteous treatment by any official in the employ of any organ of Government – as well as any unlawful, oppressive or unfair conduct by a public official. The Ombudsman also has a duty to investigate complaints concerning the administration of the police force, including any complaints about the failure to achieve a balanced structuring of the police force.

The Ombudsman must investigate any complaint about these matters that is brought to his or her attention. The Ombudsman can take various steps to remedy any problem that the investigation reveals. If the problem is not resolved, the Ombudsman must compile a report on the issue and submit it to the Speaker of the National Assembly, Cabinet and the relevant government authority with recommendations on the way forward.

Holding police accountable in court

If someone wants to sue the State for damages resulting from police action or inaction, the case must be brought within 12 months of the event. The Namibian Supreme Court has said that the shorter time limit is constitutional because it promotes the speedy resolution of claims against the State, while having sufficient flexibility to be fair to the public since the Minister can waive it at any time.[1]

Are police allowed to engage in outside work or business?

The general rule is that members of Nampol are required to place all of their time at the disposal of the State. But, with the approval of the Minister, they are permitted to earn money in pursuits outside the police force. If they earn money outside the police force without permission, they must pay the amount earned over to Nampol. Similarly, if members of the police force receive any payment or reward in connection with performance of their duties (other than their normal salaries and allowances), they must pay this amount over to Nampol. In either case, failure to pay over these amounts is a crime. The Minister has the power to make partial or total exceptions to the rule about paying over such proceeds.

How are police recognised for good work?

With the approval of the Minister, the Inspector-General may provide a monetary reward or any other kind of reward for extraordinary diligence or devotion in the performance of police duties.

The President may decide on medals or decorations that may be awarded for exceptional police service. But it is a crime for persons to wear such medals or decorations if they are not genuine or not actually awarded to them.

[1] *Minister of Home Affairs v Majiedt*, Supreme Court, 2007.

Crimes relating to police

There are some crimes relating to the police that can be committed by members of the public.

It is a crime –
- to falsely pretend to be associated with the police force
- to wear a uniform, badge or button similar to that of the police in order to deceive others.

The penalty is a fine up of up to N$4 000 or prison for up to 12 months, or both.

There are also some crimes that can lead to even more serious penalties:
- to falsely pretend to be a member of the police force
- to try to get a member of the police force to violate his or her duties
- to do anything "calculated to cause disaffection amongst members" of the police force
- to assault a member of the police force or anyone who is assisting the police
- to obstruct police in the execution of their duties or functions
- to threaten to harm members of the police force or their families, or property belonging to them or their families, with a view to influencing the exercise of their duties.

The penalty is a fine up of up to N$20 000 or prison for up to 5 years, or both.

City police

Local authorities are allowed to establish municipal police services, although the Minister can limit this to certain categories of local authorities. The Minister can issue regulations on which parts of the *Police Act* apply to municipal police services, and the Inspector-General will determine the minimum standards of training required for their members.

Crime statistics

The Inspector-General is required to give the Minister information and statistics on crime from time to time, and the Minister must table a summary of this information in the National Assembly once a year. Any information tabled in the National Assembly is available to the general public.

Criticism

It has been suggested that complaints about police conduct should be handled by an independent authority to make sure that all complaints are thoroughly investigated. One analysis stated, "International experience shows that independent civilian oversight of the police is of the utmost importance for ensuring effective performance."[2] There have been reports that police at charge offices sometimes refuse to accept public complaints about misconduct by their colleagues.[3] The Office of the Ombudsman has also reported that it experiences problems in getting progress reports on complaints against police once they are referred to the investigative division within Nampol, even though the Ombudsman's duty of oversight over police conduct is laid down in the Namibian Constitution.[4]

It has also been suggested that the law should match powers with functions. Many police functions are preventative in nature, such as preventing crime and maintaining law and order, in contrast to the duty to investigate crimes that have already been committed. It might be helpful if the police powers set out in the law were connected to specific police functions, to make sure that the powers are appropriate and proportional to the functions being served. For instance, it might make sense to apply a different standard for searching someone's home for evidence of a crime that has already been committed than for searching someone's home as part of a general crime prevention exercise.[5]

Also, it is somewhat confusing that there are overlapping rules in the *Criminal Procedure Act 51 of 1977* and the *Police Act 19 of 1990* for searching persons and places in the case of suspected crimes, as well as for protecting internal security, maintaining law and order and preventing crime. This means that it may not always be clear which law applies – and police should not able to choose between the two laws on the basis of which one gives them the most authority.[6]

2 John Nakuta & Vincia Cloete, *The Justice Sector & the Rule of Law in Namibia: The Criminal Justice System*, Namibia Institute for Democracy / Human Rights and Documentation Centre, [2010], pages 16-18.

3 "Policing and Human Rights – Assessing Southern African Countries' Compliance with the SARPCCO Code of Conduct for Police Officials", African Policing Oversight Forum, 2012, page 104.

4 John Walters, "The protection and promotion of human rights in Namibia: The constitutional mandate of the Ombudsman" in N Horn & A Bösl (eds), *Human Rights and the Rule of Law in Namibia,* Macmillan Namibia, 2008, page 125.

5 Clemens Artz, "Constitutionalism, Rule of Law and Preventive Powers of Police in Namibia", *Namibian Law Journal*, Volume 11, Issue 1, 2019, page 16; Clemens Artz, "Preventive Powers of Police in Namibia – A Rights-Based Approach", *Verfassung und Recht in Uebersee*, 2019, pages 516-517.

6 Clemens Artz, "Constitutionalism, Rule of Law and Preventive Powers of Police in Namibia", *Namibian Law Journal*, Volume 11, Issue 1, 2019, page 18; Clemens Artz, "Preventive Powers of Police in Namibia – A Rights-Based Approach", *Verfassung und Recht in Uebersee*, 2019, page 519.

Anti-Corruption Act 8 of 2003

What does the law do?

This law establishes an Anti-Corruption Commission and provides measures for the prevention and punishment of corruption.

What is the purpose of the law?

Broadly speaking, the mandate of the Anti-Corruption Commission is to prevent corruption, to educate the public on the impact of corruption, and to investigate allegations of corrupt practices. Because corruption can often involve government officials, the Commission is designed to be an independent and impartial body. The law sets up the Commission and says how it will operate. The law also creates a number of new crimes aimed at various corrupt practices. This law helps Namibia to carry out its duties under the United Nations Convention against Corruption, the African Union Convention on Preventing and Combating Corruption and the SADC Protocol Against Corruption.

When did the law come into force?

15 April 2005. The Namibian Constitution was amended in 2010 to add a new provision on "Anti-Corruption Measures" which was further amended in 2014. The Constitution as amended requires Parliament to pass a law setting up an independent and impartial Anti-Corruption Commission with a Director-General and a Deputy Director-General nominated by the President and appointed for five-year terms by the National Assembly. The constitutional amendments move the task of investigating complaints of corruption from the Ombudsman to the Anti-Corruption Commission. Even though Parliament had already taken these steps, adding a provision to the Constitution on the Anti-Corruption Commission signals its importance.

What is corruption?

The law does not include a definition of corruption. The Anti-Corruption Commission has described it as "the abuse of a position of trust for personal gain".[1]

These are some typical forms of corruption:

- public servants demanding or taking money or favours in exchange for services
- politicians misusing public money or granting public jobs or contracts to their friends and family members
- companies bribing public officials to get valuable deals.

[1] Anti-Corruption Commission, "Your role to ensure a corrupt-free society", undated.

Corruption undermines democracy and economic development. It increases poverty, inequality and damage to the environment. It also destroys public trust in government.[2]

What are the powers and functions of the Anti-Corruption Commission?

The law gives the Commission these key duties:

- to consider complaints about corruption reported to it, and also to act on its own to uncover corrupt practices
- to decide when an investigation is needed, and whether the investigation should be conducted by the Commission or another authority
- to investigate possible corruption, and to report on its investigations to the public or private bodies that are affected
- to work together with other authorities that investigate corrupt practices in Namibia and in other countries
- to gather evidence of corrupt practices and give this evidence to the Prosecutor-General of Namibia or to prosecuting authorities in other countries
- to take measures to prevent corrupt practices in both public and private bodies, such as helping them improve their internal practices and procedures, and advising them on steps that can prevent corruption
- to educate the public about the dangers of corruption and to provide information to the public on the Commission's functions.

Who heads the Anti-Corruption Commission?

The Anti-Corruption Commission is an independent and impartial body. It is headed by a Director-General and a Deputy Director-General nominated by the President and appointed by the National Assembly for five-year terms. The law says that these officials must have "good character" and "high integrity" as well as relevant knowledge or experience. The Director-General is the head of the Commission and responsible for its direction and control.

Who staffs the Anti-Corruption Commission?

The staff members are public servants appointed in the same way as the staff of other government institutions. The Director-General has the power to issue administrative orders to the staff of the Commission on matters such as their training, duties and responsibilities. The Director-General will select some staff members to act as investigating officers who look into specific cases. The Director-General also has the power to appoint external experts as "Special Investigators" for specific incidents of suspected corruption, if the Prime Minister agrees to this.

How is the independence of the Anti-Corruption Commission protected?

The Director-General and the Deputy Director-General must not be involved in the day-to-day management of any business or occupation, or the management of any political party. They must not be salaried employees of any other person or organisation. These rules are intended to prevent conflicts of interest.

Another safeguard is that the Director-General and the Deputy Director-General can be dismissed from office before the end of their terms only after their removal has been considered by a three-person board appointed by the Chief Justice of the Supreme Court of Namibia. This board must be chaired by

[2] You can find out more about corruption on the website of Transparency International, an organisation that works in countries around the world to end corruption.

someone who has been a judge or would be qualified to serve as a judge. The board gives its report to the President for consideration. If the President thinks that an official should be removed from office after receiving the board's report, the President must refer the matter to the National Assembly. If the National Assembly adopts a resolution calling for removal, the President must then remove the official from office.

Corrupt practices

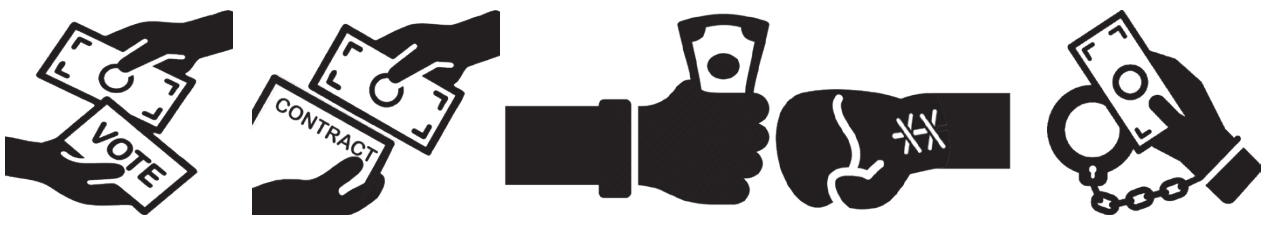
The table below lists some of the crimes created by the law. The maximum penalty for any of these crimes is a fine of N$500 000, prison for 25 years, or both.

Note that bribery and similar crimes generally apply on both sides of the transaction: both giving and receiving bribes is a crime. Note also that it is a crime to offer or to request a bribe, even if the person on the other side of the proposed transaction does not cooperate. So almost all of the crimes that involve bribery include corruptly offering, giving, requesting, accepting or agreeing to accept some inducement or reward. The corrupt element means that the aim was to get someone to act to the advantage of a particular person or business, instead of doing their duties in a proper and impartial way.

Most of the crimes involving bribery talk about requesting or providing "gratification". This term is broadly defined to cover many forms of benefits. For instance, it includes money, gifts, loans, being released from loans already owing, appointments to some job or position, discounts, rebates, services and favours. The definition has to be wide because corruption can take many different forms.

CORRUPT PRACTICES	
Crime	**Description**
Bribery	Bribery, directly or indirectly, for doing or not doing something. It is also an offence to arrange this with an employee or an agent of the business or the institution in question. ***Example:*** *offering a shop employee a bribe to "look the other way" while you steal goods from the shop*
Bribery of a public officer	Bribing a public officer for: • voting for or against something (or abstaining from a vote) • doing or not doing any official act • delaying an official act, or giving it priority • hindering or preventing an official act • acting to influence the granting of an contract or advantage in favour of any person • showing undue favour or disfavour to anyone. A "public officer" includes a staff member of the public service (including the police force, the correctional service, the defence force, and regional and local authority councils), a member of Parliament, a regional or local authority councillor, a judge or anyone who is being paid from public funds. ***Examples:*** *paying a police officer to "lose" a police docket; paying a government official to put your ID application at the front of the queue*

Bribery of foreign public officials	Bribing a foreign public official directly or indirectly to get or retain business or some advantage in the course of business – but in this case the crime covers only the person who offers or gives the bribe and not the person who requests or receives it (who will often be based outside Namibia). A "foreign public officer" includes anyone holding a legislative, administrative or judicial office in another country, anyone who carries out public functions on behalf of a foreign country, and an official or agent of a public international organisation. ***Examples:*** *paying a government official in Angola to recommend your company for a fishing quota; paying someone in the SADC office to give your business an advance look at forthcoming tender documents*
Bribery in relation to tenders	Bribing someone in connection with a tender for a public or private body. ***Example:*** *offering a bribe to an employee of a company or a member of a government tender board to recommend you as a supplier*
Bribery of witnesses	Bribing a witness (or someone else) to influence the witness's testimony or to try and get them not to testify at all. ***Example:*** *offering to pay for your daughter's university fees if you will agree to lie to the court about the traffic accident that you saw*
Bribery in connection with auctions	Bribing someone to influence the bidding at an auction. ***Example:*** *paying someone not to bid against you at an auction of municipal properties to try and keep the price low*
Bribery in connection with contracts	Bribing someone to influence a contract with a public or private body, or to influence the price provided in a contract. ***Example:*** *"If you pay me a cut, I will tell my boss that the company competing against you for the catering contact provides bad food."*
Bribery in connection with sporting events	Bribing someone to influencing the run of play or the outcome of a sporting event. ***Example:*** *"Everyone thinks that Namibia is going to win the next soccer match. If you can make sure that we lose the game, we can make a lot of money betting against Namibia."*
Conflicts of interest	Where public officers have personal interests in contracts, agreements or investments made by the public body they work for. ***Example:*** *pushing for a government contract to be given to a company that you have a stake in, without disclosing your involvement*
Abuse of a public office or position	Corruptly using a public position for the benefit of yourself or some other person. ***Example:*** *You work at NATIS and print out some fake driver's licences for your cousin to sell in the parking lot.*



There are also many related crimes – such as hiding money or property that was used as a bribe, attempting to commit a corrupt practice, assisting someone to commit a corrupt practice, or changing computer systems or account books to conceal corrupt practices.

Duty to report

A public officer has a duty to report any offers of bribes to the Anti-Corruption Commission, and every member of the public has a duty to report a request for a bribe as well as any knowledge of a corrupt practice. Failure to report knowledge of a corrupt practice is a crime in itself, and the maximum penalty is the same as for the underlying crime.

Complaints about possible corrupt practices

Anyone can give the Commission information about a suspicion of a corrupt practice. You can make a complaint orally or in writing. If you make the complaint orally, a staff member of the Commission will write it down and ask you to sign it.

The Commission has a duty to examine every complaint made to it and decide whether or not an investigation is needed. The Commission will consider:

- the seriousness of the conduct that has been reported
- whether the complaint is trivial, and whether it was made in good faith
- whether or not an investigation into the conduct by some other authority is underway, or has already been completed
- whether an investigation of the complaint would be in the public interest.

If an investigation is warranted, the Commission will also decide if it should carry out the investigation, or refer it to some other authority. The final decision on whether the Commission will undertake an investigation lies with the Director-General. If the Director-General decides that the Commission will investigate, the investigation must be done as quickly as possible.

The Commission must inform the person who made the complaint of its decision on the way forward.

The identity of informants who assisted in a corruption investigation can be protected, unless the informer has given false information on purpose, or where justice cannot be done without revealing the informer's identity. Even if a court decides that it is necessary to reveal an informer's identity, the informer can be protected by closing the court to the public and prohibiting the publication of any information that could reveal the informer's identity. The law protects informers who act in good faith against disciplinary proceedings, and against civil or criminal lawsuits related to their reporting.

Note that the Commission does not have to wait for a complaint. It can also initiate an investigation on its own.

Investigations

The Commission has a range of investigative powers. It can summon people for questioning, examine documents and get warrants from a magistrate or a judge for the search and seizure of relevant items. It can even search places (other than private dwellings) without a warrant if it is likely that a warrant would be issued but the delay involved would probably defeat its purpose (because it would give the wrongdoers time to hide or destroy the evidence).

The Commission can require individuals to provide details about their financial transactions and their assets – including information on when and how they got money or property. It can also order banks and other financial institutions to provide information about persons suspected of corrupt practices, and it can get access to account information and safe deposit boxes.

The Director-General, the Deputy Director-General and persons authorised to carry out investigations for the Commission have the power to make arrests without a warrant when there is a reasonable suspicion that someone has carried out a corrupt practice, or is about to do so.

It is a crime to interfere with an investigation by the Commission, to refuse to appear for questioning, to refuse to provide relevant documents, to provide false information or to try to improperly influence an investigation. The penalty for any of these crimes is a fine of up to N$100 000, prison for up to five years, or both.

If an investigation indicates that a crime relating to corruption has been committed, the Director-General may refer the case to the Prosecutor-General for possible criminal prosecution. The Prosecutor-General has the power to delegate the duty for prosecution of the suspected crime to a staff member of the Commission who has the necessary legal qualifications.

Annual reports

Every year, the Director-General must give a report to the Prime Minister about the activities of the Commission. This report must be tabled in the National Assembly, which makes it a public document.

Why is fighting corruption important?

Corruption is very damaging to society. It enriches a few people at the expense of the majority. It destroys trust in government and between citizens. It reduces productivity, by making profiting from corruption seem easier than working for a living. It discourages local and international investment, which undermines economic growth. It wastes taxpayers money, which interferes with effective delivery of public services and goods. It ultimately undermines democratic institutions by affecting electoral processes, distorting the rule of law and destroying equality.

Criticism

The **independence of the Anti-Corruption Commission** could be strengthened. In the Parliamentary debate on the law, a concern was raised about the requirement that a Special Investigator can be appointed only with the agreement of the Prime Minister. The fear was that this could undermine the investigation of corruption in the Office of the Prime Minister.[3]

[3] Debates of the National Assembly, 1 April 2003.

Another concern is the requirement that the Director-General and the Deputy Director-General must be nominated by the President and appointed by the National Assembly. This approach will normally put the decision on these appointments entirely in the control of the ruling party. The law could require the agreement of the main opposition party on the appointment, or require some form of multi-party consultation.[4]

A related criticism is that the Director-General of the **Anti-Corruption Commission has too much discretion about what corrupt practices to investigate and prosecute**. The Director-General decides if an investigation by the Commission is warranted. Also, once an investigation is concluded, the Director-General decides if the matter should be referred for possible prosecution. Giving these key decisions to one person alone seems unwise.[5]

The Anti-Corruption Commission itself has recommended that the law should be amended to include **embezzlement by a person in the private sector** as a "corrupt practice" that it can investigate. Embezzlement means misusing a position of trust to misappropriate money. Examples are where accountants for private companies issue false invoices as a way of diverting funds to themselves or their friends, or where cashiers pocket money that was paid by customers to the company.

The Commission has also recommended that **the crime of bribery of foreign public officials should be extended to cover both sides of the transaction, like other forms of bribery**. It has also been suggested that bribery of foreign public officials should include instances where the bribe benefits a third party.[6]

The Anti-Corruption Commission and Namibia's Institute for Public Policy Research have both recommended that the law should be amended to create the crime of "**illicit enrichment**" which exists in many other countries. Because corruption is secretive and often hard to prove, this crime applies when the wealth of public officials exceeds their legitimate income. If public officials cannot show where the money held in their bank accounts or used for their purchases came from, then it is assumed that they must be corrupt. This helps to combat corrupt acts that might otherwise stay hidden.[7]

[4] Job Shipululo Amupanda, "The Fight against Corruption in Namibia: An Appraisal of Institutional Environment and a Consideration of a Model for Civil Society Participation", *Namibia Law Journal*, Volume 11, Issue 1, 2019.

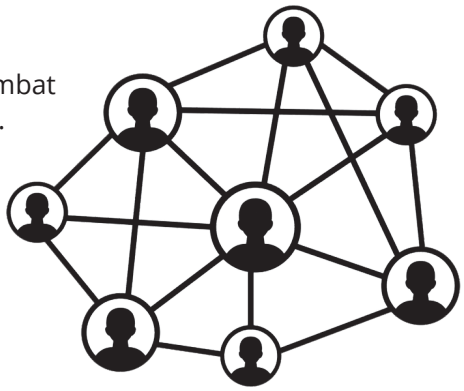
[5] Job Shipululo Amupanda, "The Fight against Corruption in Namibia: An Appraisal of Institutional Environment and a Consideration of a Model for Civil Society Participation", *Namibia Law Journal*, Volume 11, Issue 1, 2019.

[6] Anti-Corruption Commission, Namibia National Anti-Corruption Strategy and Action Plan 2016-2019; Anti-Corruption Commission, Final Draft National Anti-Corruption Strategy and Action Plan 2021-2025; United Nations Office of Drugs and Crime, Country Review Report of the Republic of Namibia (under the United Nations Convention against Corruption, based on Namibia's report for 2010-2015).

[7] Anti-Corruption Commission, Namibia National Anti-Corruption Strategy and Action Plan 2016-2019; Anti-Corruption Commission, Final Draft National Anti-Corruption Strategy and Action Plan 2021-2025; Max Weylandt, "The Crime of Illicit Enrichment in Namibia: New Opportunities for Enforcement?", Institute for Public Policy Research, June 2017. See also United Nations Office of Drugs and Crime, Country Review Report of the Republic of Namibia (under the United Nations Convention against Corruption, based on Namibia's report for 2010-2015).

Prevention of Organised Crime Act 29 of 2004

What does the law do?



This law (often abbreviated as "POCA") provides measures to combat organised crime, money laundering and criminal gang activities. It also provides procedures to take away money or property used to commit a wide range of serious crimes (such as a vehicle used to transport stolen goods or a house where illegal drugs are stored), as well as the proceeds of unlawful activities (the benefits gained from committing the crime).

What is the purpose of the law?

The law helps Namibia fulfil its duties under the United Nations Convention against Transnational Crime. It is also an important tool in combating serious criminal activity in Namibia by making sure that "crime does not pay".

When did the law come into force?

5 May 2009. This law originally included provisions on trafficking in persons, but these were repealed and replaced in 2019 by the *Combating of Trafficking in Persons Act 1 of 2018*.

What is organised crime?

In general, organised crime refers to groups of individuals who engage in criminal activities on an ongoing basis. It has also been described as networks of individuals who collaborate over time to commit crime. Organised crime groups often use corruption, violence and threats of harm to protect their illegal activities. They may seek to obtain power and influence as well as money.

Organised crime often involves serious crimes and large sums of money, and often operates across national borders. Some of the kinds of crimes committed are money laundering, illegal gambling, wildlife poaching, the sale of counterfeit goods, smuggling of goods such as cigarettes and alcohol to evade customs duties, cybercrime and trafficking in drugs, firearms or people. Organised crime is a threat to national and international security and economic stability.

What are criminal gangs?

Organised crime groups are referred to by different names, such as crime "syndicates", "enterprises", "mafias", "firms" or "gangs".

The Namibian statute refers to "criminal gangs". It defines a criminal gang as any formal or informal organisation, association or group of two or more persons that come together on an ongoing basis to commit crimes.

It is a crime to be a member of a criminal gang. Even if you do not admit to membership in a gang, your membership can be proved by:

- being identified as a member of a criminal gang by a parent, guardian or relative
- living or spending time in a gang's area of operation, adopting their style (in terms of clothing, hand signs, language or tattoos) and associating with other members
- having been arrested more than once in the company of other gang members for crimes that are consistent with criminal gang activities
- being identified as a member by physical evidence such as photographs or other documentation.

Whether or not you are a gang member, it is a crime to provide direct or indirect assistance to a criminal gang or its activities. For instance, it is a crime to do any of these things:

- promote or contribute towards a pattern of criminal gang activity
- aid, advise or encourage anyone to take part in a pattern of criminal gang activity
- encourage, recruit or advise another person to join a criminal gang.

What is racketeering?

Racketeering means engaging in an illegal scheme. (A "racket" is a slang term for a dishonest scheme where someone seeks to profit by misleading people or by doing something illegal.) Organised crime groups are often involved in racketeering.

Racketeering typically involves illegal acts such as prostitution, human trafficking, drug trafficking, illegal weapons trade, wildlife crime, counterfeiting or dealing in child pornography. It might also involve schemes such as these:

- *Cyber extortion:* blocking information on computers and demanding money to restore access
- *Protection rackets:* threatening to harm individuals or businesses unless they pay a protection fee
- *Kidnapping for ransom:* holding an individual captive and demanding money to set them free
- *Fencing:* buying stolen goods from thieves at low rates and then reselling them at a profit to unsuspecting buyers.

These are just a few examples. There are many variations.

The law makes it a crime to be involved in racketeering or to knowingly deal in the proceeds of racketeering.

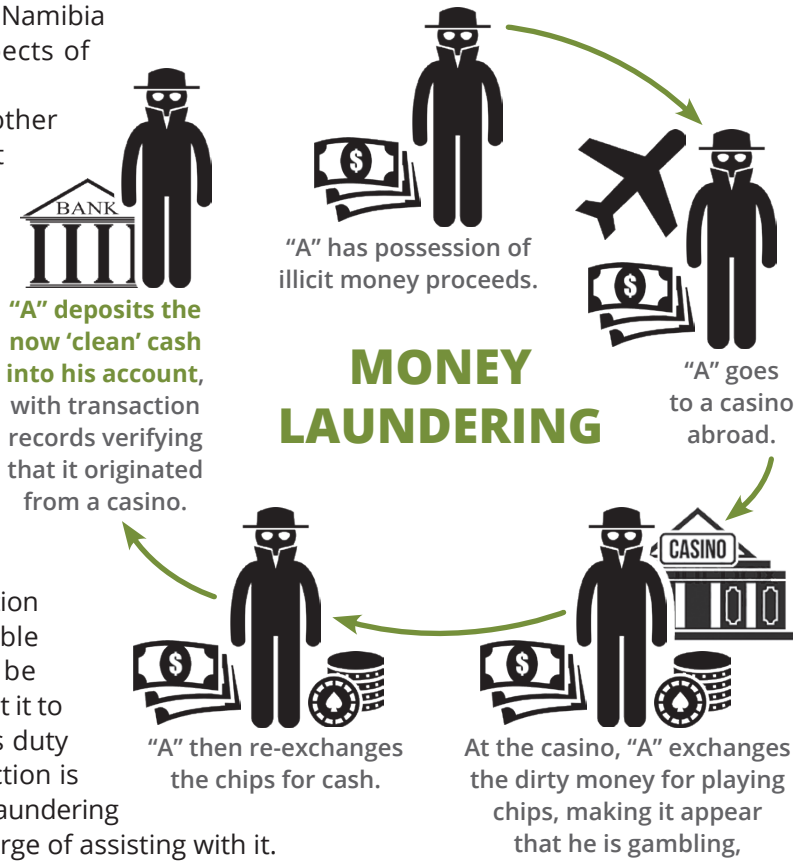
What is money laundering?

Money laundering is the process of dealing with the proceeds of a criminal activity to disguise their illegal source. Organised crime groups do this to keep government authorities from discovering the crime that produced the profit. Money laundering is common in crimes that produce large profits, such as illegal trading in weapons and drug trafficking. It often involves moving funds to a different country or taking steps to make them appear to be the profits of a legitimate business. The goal of the process is to make "dirty" money resulting from crimes look like "clean" money from an honest enterprise – which is why it is called "money laundering".

Money laundering may involve a long chain of transactions in different places, to make the money harder to track. Every step of the process is money laundering if the persons involved knew or had reason to believe that the transactions involved the proceeds of an unlawful activity ("dirty money"), or failed to take reasonable action to find out if this was the case. The steps involved in the money laundering might include:

- taking part, directly or indirectly, in a transaction that involves dirty money
- receiving, possessing or using dirty money
- moving dirty money into or out of Namibia
- concealing or disguising any aspects of dirty money
- entering into agreement with another person to help that person benefit from dirty money.

The law makes it a crime to be involved in various ways with money laundering. If a company or any other group of persons assists with money laundering, anyone who acted in an official capacity for that company or group can be found guilty of the crime as an individual.



Anyone who is approached in connection with a transaction that any reasonable person would know or suspect to be money laundering has a duty to report it to the Financial Intelligence Centre. This duty applies even if the suspicious transaction is not completed. Reporting the money laundering transaction can be a defence to a charge of assisting with it.

> The Financial Intelligence Centre is an information-gathering body set up by the *Financial Intelligence Act 13 of 2012*. There is a separate summary of that law if you want to know more.

Severe penalties

The kinds of crimes covered by this law are usually serious crimes that can produce large profits. So the possible penalties for criminal gang activities, racketeering and money laundering can be very high fines (up to N$1 billion in some cases) or very long prison sentences.

Assets associated with criminal activity

The law sets out several different procedures for taking away money or property that was used to commit a serious crime, as well as the proceeds of unlawful activities. Courts can also make various temporary orders to prevent money or property from disappearing while proceedings are pending. Some of these orders can be made only against someone who has been convicted of a crime, but others apply even if there is no prosecution or even where the accused was not convicted – as long as the property can be connected to unlawful activities. The idea is that taking away the profits from crime will remove incentives for committing crime.

To prevent unfairness, there are procedures for releasing sufficient assets to provide for reasonable living expenses for the affected person and anyone they are legally liable to support, as well as for reasonable legal expenses to allow for a fair defence in court.

There are also safeguards for innocent third parties who have good faith interests in the property, where they had no reason to suspect that it was tied to crime.

The assets that are handed over to the State go into a Criminal Assets Recovery Fund that is used to finance law enforcement agencies, witness protection programmes and assistance to crime victims. People who have suffered loss or injury from criminal activity can apply for compensation from the funds that are turned over to the State.

Criminal Assets Recovery Committee

The law also sets up a Criminal Assets Recovery Committee with the task of advising Cabinet on confiscation and forfeiture of property associated with criminal activity, and on how these assets should be used after they are handed over. The members of the Committee are:

- the Minister responsible for justice
- the Minister responsible for policing
- the Minister responsible for finance
- the Attorney-General
- up to seven persons designated by the Minister to help consider a specific matter.

Why is it important to combat organised crime?

As stated in Parliament, organised crime has become a corrupting power because it taints normal economic activities with the investment of illegal profits.[1] In addition, criminal gangs that become very powerful can control communities with fear. It is important to make sure that the law remains supreme in Namibia, and that criminal groups are not able to act in violation of the law without consequences.

[1] Debates of the National Assembly, 30 September 2004.

Financial Intelligence Act 13 of 2012

What does the law do?

This law addresses suspicious financial activities that may relate to money laundering or terrorism, by giving certain persons and businesses a duty to report on certain transactions.

What is the purpose of the law?

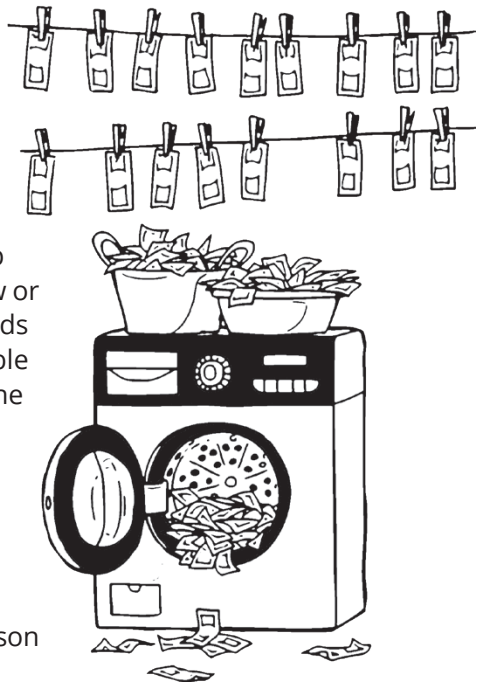
The law is intended to fight money laundering and the financing of terrorism, which are often intertwined with corruption. This helps to protect the integrity and stability of the Namibian financial system. The law also helps Namibia fulfil its duties under the United Nations Convention against Transnational Organised Crime.

When did the law come into force?

21 December 2012. It replaced a similar law, the *Financial Intelligence Act 3 of 2007*.

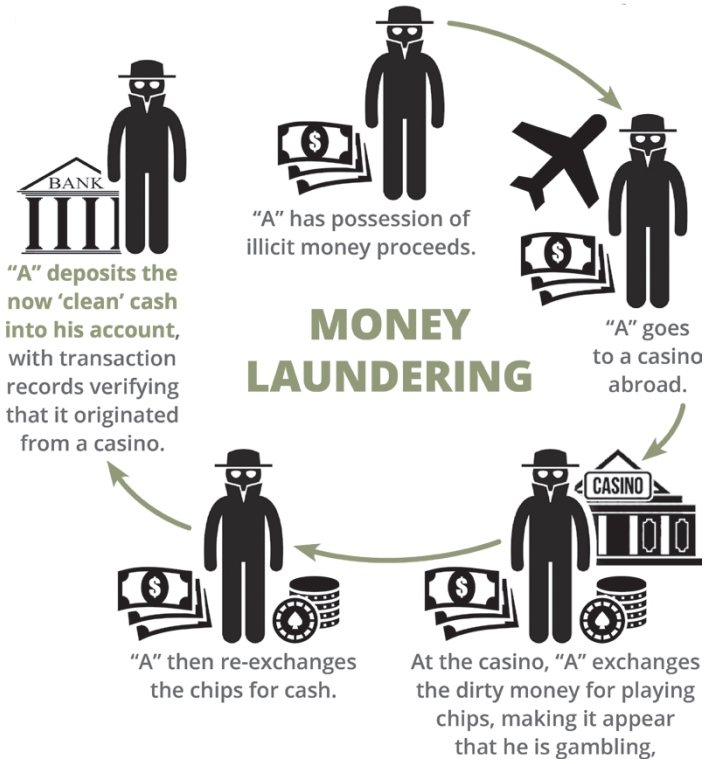
What is money laundering?

Money laundering is the process of dealing with the proceeds of a criminal activity to disguise their illegal source. Criminals do this to keep government authorities from discovering the crime that produced the profit. Money laundering is common in crimes that produce large profits, such as illegal trading in weapons and drug trafficking. It often involves moving funds to a different country or taking steps to make them appear to be the profits of a legitimate business. The goal of the process is to make "dirty" money resulting from crimes look like "clean" money from an honest enterprise – which is why it is called "money laundering".



Money laundering may involve a long chain of transactions in different places, to make the money harder to track. Every step of the process is money laundering if the persons involved knew or had reason to believe that the transactions involved the proceeds of an unlawful activity ("dirty money"), or failed to take reasonable action to find out if this was the case. The steps involved in the money laundering might include:

- taking part, directly or indirectly, in a transaction that involves dirty money
- receiving, possessing or using dirty money
- moving dirty money into or out of Namibia
- concealing or disguising any aspects of dirty money
- entering into agreement with another person to help that person benefit from dirty money.



This is an example of a simple method of money laundering. The process often involves much more complex transactions with many steps.

How are money laundering and corruption connected?

These two kinds of wrongs are linked on a two-way street. On the one hand, corruption offences such as bribery or theft of public goods generate large amounts of proceeds. These proceeds need to be "cleaned" so that this money can enter the financial system without detection of the corruption. On the other hand, corruption makes money laundering easier because corrupt officials can help money launderers bypass controls and sanctions. This toxic relationship means that money laundering must be fought as an essential part of fighting corruption.

> ***"Proliferation"*** means making or dealing in weapons that can cause mass destruction, such as nuclear weapons, biological weapons or related materials.

What new bodies are created by the law?

The law establishes the **Financial Intelligence Centre** to collect and assess information about suspicious financial transactions, and to coordinate with law enforcement officials, other Namibian institutions and international bodies involved in similar work. The Centre does not have investigative powers of its own, but it provides and analyses information for criminal investigations by law enforcement agencies such as the Namibian Police and the Anti-Corruption Commission. It also researches international trends and developments with a view to improving Namibia's approaches to the detection and prevention of money laundering and terrorism financing.

The Minister of Finance appoints the **Director** of the Financial Intelligence Centre for a term of five years. The Director appoints the staff of the Centre, with the agreement of the Governor of the Bank of Namibia.

The law also establishes the **Anti-Money Laundering and Combating of the Financing of Terrorism and Proliferation Council**, which gives policy advice to the Minister and the Director of the Financial Intelligence Centre. The members of the Council are:

- the Governor of the Bank of Namibia
- the Executive Directors of the ministries responsible for finance, trade, justice, and safety and security
- the Inspector-General of the Namibian Police Force
- the Director of the Namibian Central Intelligence Service
- the Chief Executive Officer of the Namibia Financial Institutions Supervisory Authority
- the Director of the Anti-Corruption Commission
- the President of the Bankers Association
- two persons appointed by the Minister to represent the different categories of institutions that have reporting duties under the law.

Who must collect information and make reports to the Financial Intelligence Centre?

The law imposes duties on certain persons and institutions to collect and maintain accurate information related to financial matters that are covered by the law.

Certain transactions must be reported by legal practitioners, estate agents, accountants, auditors, banks, casinos, persons who trade in minerals or petroleum, person who deal in foreign exchange or securities, investment advisers and brokers, auctioneers, long-term insurers, various people involved with imports and exports, non-profit organisations and many others. These are called *"accountable institutions"*. Another category of persons and bodies that must collect and report information includes motor vehicle dealers, second-hand goods dealers, people who run gambling houses or other betting businesses, persons or businesses that trade in jewellery, antiques or art, and short-term insurers. These are called *"reporting institutions"*.

Certain supervisory and regulatory bodies also have duties under the law. These include the Namibia Financial Institutions Supervisory Authority, the Bank of Namibia, the Law Society of Namibia, the Namibia Estate Agents Board, the Public Accountants' and Auditors' Board, the Namibia Stock Exchange and the Casino Board. Duties to collect and report information also apply to the Registrar of Companies and Close Corporations and the Master of the High Court. These bodies help the Financial Intelligence Centre make sure that the accountable institutions and the reporting institutions carry out their duties.

What kind of information must be reported?

One duty on accountable and reporting institutions is to know their clients. They must record information about their customers and business relationships. Accountable and reporting institutions may not allow anonymous accounts or allow people to open accounts with false identification. They must monitor transactions for unusual activity or suspiciously large transactions that do not seem to have a lawful purpose, and report any suspicious activity to the Centre without alerting the people involved. There are also special duties in respect of cross-border financial transactions.

Accountable and reporting institutions must set up monitoring systems to identify situations that pose a special risk of money laundering or terrorism financing. Once a client has been identified as posing a risk, the institution must not establish or continue to have a relationship with that client unless this is approved by the institution's senior management. In addition, the institution must take steps to identify the source of that client's funds and property.

Failure to comply with the information collection and reporting duties under the law is a crime. However, there are other less drastic remedies that must be attempted before resorting to criminal charges – such as issuing a directive about compliance, accepting a written undertaking with details about future implementation of the duties under the law or making the institution pay an administrative fine (a fine that can be imposed without a criminal trial).

It is also a crime for anyone to destroy or tamper with the records that must be kept by institutions for reporting to the Centre, or to make false entries in those records.

The Centre can undertake inspections of places, documents and computer systems to make sure that the information-collecting and reporting duties are being followed.

The reporting duties under this law take priority over confidentiality rules in any other laws or agreements, with the exception of some aspects of attorney-client privilege. Any person or institution that makes a report under this law in good faith is protected against civil or criminal lawsuits in respect of that reporting.

Monitoring specific persons

Where there is a reasonable suspicion of wrongdoing connected to money laundering and terrorism financing, the Financial Intelligence Centre can apply to a judge in private for an order to monitor all transactions with a specific person or all transactions involving a specific account.

How do these duties combat money laundering and terrorism financing?

The first step in combating money laundering and terrorism financing is to find them. These activities are intended to be hidden. That is why the law focuses on documenting and auditing business relationships and financial transactions, to uncover inconsistencies that could signal wrongdoing. The duty to identify all clients and customers makes it harder for people to engage in hidden financial transactions.

What happens if the Financial Intelligence Centre receives information that points to illegal activity?

The Financial Intelligence Centre collects and analyses data, but it does not have investigative powers. If it receives information that may point to illegal activities, it refers the matter to law enforcement agencies such as the Namibian Police or the Anti-Corruption Commission for investigation and action.

Tipping off the criminals

It is a serious crime to warn someone about an investigation into the issues covered by the law, or to share information about a disclosure that was made in connection with such an investigation. The penalty is fine of up to N$100 million or prison for up to 30 years.

Other interference with the work of the Centre

It is a crime to obstruct the work of the Financial Intelligence Centre or any other institution that is carrying out duties under this law. It is also a crime to try to unduly influence or interfere with the Centre's work. The penalty for these crimes is a fine of up to N$100 million or prison for up to 30 years.

Protection for informers

People who provide information to the Financial Intelligence Centre are provided with some protection under this law, but more comprehensive protection is provided by the *Whistleblower Protection Act 10 of 2017* and the *Witness Protection Act 11 of 2017*. See the separate summaries on these laws for more details.

Links with crimes under other laws

This law focuses mainly on information-gathering about financial transactions. The underlying wrongs of corruption, money laundering, terrorism and proliferation and the financing of terrorism and proliferation are criminalised under other laws: *Anti-Corruption Act 8 of 2003*, *Prevention of Organised Crime Act 29 of 2004*, and *Prevention and Combating of Terrorist and Proliferation Activities Act 4 of 2014*. There are separate summaries of each of these laws.

Future directions

The Financial Intelligence Centre is considering legal changes to add unexplained wealth orders to its toolkit for detecting money laundering. This would make it possible to investigate situations where a person's lifestyle does not seem to fit their legal income. In such cases, the idea is to make it possible to issue an order requiring persons who appear to be living beyond their means to prove to a court that their wealth was acquired through legal channels.

Prevention and Combating of Terrorist and Proliferation Activities Act 4 of 2014

What does the law do?

This law provides measures to combat terrorist activities and the spread of weapons of mass destruction, as well as the funding of these activities.

What is the purpose of the law?

In the wake of the terrorist attacks in the United States on 11 September 2001 and additional terrorist attacks around the world, the United Nations Security Council adopted a resolution that gives all countries in the UN a duty to create legal frameworks to combat terrorism and the financing of terrorism.[1] Namibia is also a party to the International Convention for the Suppression of Terrorism, which includes a duty to make it a crime to finance terrorism. The idea behind the Namibian law is to provide security agencies with improved tools to combat terrorism and its financing, including the power to freeze and take away assets that might be linked to terrorism.

The **United Nations (UN)** is an organisation that brings together almost every country in the world for international cooperation. When nations become members of the UN, they agree to the UN Charter, an agreement that sets out basic principles of international relations. The **UN Security Council** is a smaller body that takes primary responsibility for maintaining international peace and security. It is made up of 15 members of the UN. There are five permanent members (China, France, the Russian Federation, the United Kingdom and the United States). Ten other nations are elected by all of the UN members to be on the Security Council for two-year terms. Namibia was a member of the Security Council during 1999-2000.

When did the law come into force?

1 July 2014. There was an earlier version of this law, the *Prevention and Combating of Terrorist Activities Act 12 of 2012*. The 2012 law was enacted in a rush because of international pressure on Namibia to get a law on terrorism in place. The government later discovered that the 2012 law did meet all of the relevant international standards, so a revised version was passed by Parliament in 2014.

What is "terrorist activity"?

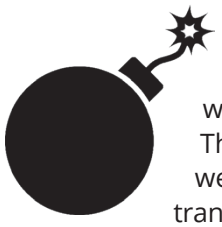
The law contains a long definition of *"terrorist activity"*. It includes any criminal act that might endanger persons, property, natural resources, the environment or cultural heritage, where the activity is intended to cause terror. *"Causing terror"* means –

- trying to force government or any institution or person to act in a certain way
- disrupting public services
- causing general revolt in a country.

Terrorist activity also includes any act aimed at killing or seriously injuring civilians in a time of armed conflict, with the aim of intimidating the population, or forcing a government or an international organisation to act in a particular way. It also includes crimes that are defined in a long list of international treaties relating to terrorism.

[1] United Nations Security Council Resolution 1373 (2001).

In addition, terrorist activity includes promoting, aiding or encouraging terrorism, and paying ransoms to specified groups (with the exception of ransoms paid by a government to protect its citizens).



What is "proliferation activity"?

The law defines *"proliferation activity"* to include a wide variety of actions involving any weapon that can cause mass destruction, along with materials related to such weapons. This category of weapons includes nuclear weapons, chemical weapons and biological weapons along with others. The activities that are covered include making, possessing, transporting, selling and using such weapons.

New crimes

The law creates many new crimes aimed at common forms of terrorism in the world today. Some of the crimes are described here. The law is aimed at covering involvement in every aspect of terrorism – including funding, training, planning and carrying out terrorist acts.

- It is a crime to engage in a terrorist or proliferation activity, directly or indirectly.
- It is a crime to use, or threaten to use, any weapon that could cause mass destruction.
- It is a crime to plant poisonous or dangerous substances or explosive devices for purposes of terrorism.

The penalty for these crimes is life in prison.

- It is a crime to knowingly give a false alarm about the planting of dangerous devices or explosive items, where the false information could lead to terror, disruption of services or damage to property.
- It is a crime to be involved in funding a terrorist or proliferation activity, inside or outside Namibia, whether or not the funds were actually used for these purposes.

The penalty for these crimes is a fine of up to N$100 million or prison for up to 30 years, or both.

The financing of terrorism often involves complex chains of transactions, so it is necessary for the law to cover as many points of involvement as possible. It is a crime to be involved with funds or business interests connected to any terrorist or proliferation activity. This includes providing many kinds of financial services. It is also a crime to be involved with funds or business interests that help persons or organisations identified by Namibia's Security Commission as being involved with terrorism. The same is true where the funds or business interests violate international sanctions, or benefit countries, persons or organisations identified by the UN Security Council as being subject to international sanctions. The crimes relating to funding and business interests apply to anyone who reasonably should have known or suspected that they were related to terrorism. The penalty for any of these crimes is a fine of up to N$100 million or prison for up to 30 years, or both.

Other crimes are aimed at various actions that facilitate terrorism or proliferation activities. It is a crime –

- to be a member of an organisation involved in these activities
- to direct the activities of an organisation involved in these activities
- to take part in training connected to these activities
- to possess anything connected to these activities
- to collect information in aid of these activities
- to recruit persons into these activities
- to hide persons involved in these activities or give them a safe place to stay.

It is also a crime to give military assistance to a foreign government or organisation without permission from Namibia's Ministry of Defence – although there is an exception for humanitarian or civilian assistance aimed at helping civilians in an area of armed conflict.

Namibia's **Security Commission** is set up by Article 114 of the Namibian Constitution. The members are:

- the Chairperson of the Public Service Commission
- the Chief of the Defence Force
- the Inspector-General of Police
- the Head of the Intelligence Service
- the Commissioner-General of Correctional Service
- two members of the National Assembly, appointed by the President on the National Assembly's recommendation.

In addition, there are some specific crimes aimed at stopping terrorist activities that involve airports, ships, fixed platforms at sea (such as oil or gas drilling rigs), radioactive materials, the taking of hostages or the safety of diplomats, their families and (in some cases) their staff.

Supporting United Nations sanctions relating to terrorism

Because Namibia is a member state of the UN, it has a duty to comply with the decisions of the UN Security Council. The Security Council uses a range of peaceful measures to combat threats to international peace, in the hope of avoiding armed force. One of its tools is to impose sanctions against specific countries, companies, groups or individuals. These can include limitations on economic activity and trade in items such as weapons, the freezing of funds and travel bans. Some of its sanctions are aimed specifically at preventing terrorism and proliferation. The UN publishes a list of the sanctions that are in force, so that all of its member countries can apply them. It also has procedures for removing a person, organisation or country from the sanctions list.

This law gives the Namibian government tools to ensure that persons and institutions in Namibia do not violate UN sanctions aimed at preventing terrorism. All organisations and individuals that are subject to these sanctions are published in the *Government Gazette*. Then any funds or assets belonging to them are frozen, and it becomes a crime to provide them with economic resources or financial services, or to supply them with arms of any kind. Travel bans are enforced against persons on this list and their immediate family members, where they are not Namibian citizens.

The *Government Gazette* is a regular government publication that anyone can subscribe to. You can find all of Namibia's *Government Gazettes* on the LAC website.

Identifying additional people and organisations for sanctions

Namibia can also act on its own to identify organisations and individuals that could be linked to terrorism. If the Minister responsible for safety and security believes that a person or organisation is involved in terrorist or proliferation activities, the Minister must request Namibia's Security Commission to *"proscribe"* them. This has an effect similar to being placed on the UN sanctions list. As at the international level, there is also a procedure for seeking to be removed from the Namibian list. A list of the persons and organisations proscribed by Namibia must be circulated in Namibia, and published in the *Government Gazette*. The Namibian government may propose to the UN Security Council that these persons or organisations should also be added to the UN sanctions list.

Investigative powers

The police have certain specific powers for dealing with suspected terrorist and proliferation activities. They can close roads, stop vehicles and search them without a warrant if the search is related to the objectives of this law and the delay involved in getting a warrant would defeat the purpose of the search. The person in question must be told the reason for the search, and the search must not be "excessively intrusive" in the light of the crime involved. Police can also arrest anyone driving or controlling the vehicle without a warrant. They can search persons, places and containers without a warrant, for articles that could be used in connection with terrorist or proliferation activities. The Inspector-General can apply to a judge for a warrant to intercept communications to gather information about terrorist or proliferation activities. The warrant can give police permission to enter a place and install a monitoring device.

Certain persons and institutions have a duty to provide information to Namibia's Financial Intelligence Centre about funds being used by a person or organisation involved in terrorist or proliferation activities, or in violation of UN sanctions.

The law also provides channels for different countries to share information about terrorism with each other.

The **Financial Intelligence Centre** is an information-gathering body set up by the *Financial Intelligence Act 13 of 2012*. See the separate summary of that law for more information.

Criticism

The Institute for Public Policy Research in Namibia has pointed to the difficulty of defining terrorist activities and associated crimes. The definition used in this statute is very broad and so fails to give clear guidance on what acts are actually covered. In fact, some of the wording is so broad that it could be applied to a media report, a public protest or a labour action intended to influence government

or some other body. Given the special powers of investigation for terrorist activity, the many counter-measures that are authorised and the very high penalties that could be imposed, it would be better if the definitions were tighter and more specific, to rule out "the possibility of loose or even malicious interpretation". The Institute for Public Policy Research also recommends that the law should include a system for monitoring its implementation, in order to prevent potential abuses of power. They suggest giving this role to an independent monitor or to the Ombudsman.[2]

Related laws

- ***Financial Intelligence Act 13 of 2012:*** This law is an additional tool in Namibia's fight against terrorism. It gives certain persons and institutions a duty to report financial activities that may relate to terrorism, to help law enforcement officials combat this problem. There is a separate summary of this law.
- ***Protection of Information Act 84 of 1982:*** This law contains rules about the disclosure of information that could endanger State security to a foreign state or a hostile organisation. This includes official codes or passwords, or information about military matters, security matters or steps to prevent or combat terrorism. It is also forbidden to approach, enter or inspect certain *"prohibited places"* for the purpose of harming State security or the interests of Namibia, or to assist someone to do this. *"Prohibited places"* include places used for the defence of Namibia, such as military bases, ships or aircraft, communications facilities, and arms manufacturing or storage facilities. It is also illegal to hide or give safe shelter to someone who is violating the rules in this law. The purpose of these rules is to prevent the collection of information that might aid terrorism or attacks on Namibia. The law is essentially aimed at preventing people from spying on Namibia in ways that might cause the nation harm.

  But national security and the interests of the nation can be interpreted so broadly that they can be the basis for trying to prevent the disclosure of important information on political issues or the exposure of corruption. For example, in 2019, the Namibian Supreme Court was asked to decide whether the *Protection of Information Act* would prevent publication of a news story about farms that had been bought with public funds for private use by members of an association with links to the Namibian Central Intelligence Service. The constitutional right to freedom of speech can be limited by law to protect national security. But in this case, the government did not show that the newspaper had violated any laws in getting the information, or that publishing the information would harm national security. So the Court said that the news article could be published. Significantly, the Court also said that matters considered national security must be decided by the courts, noting that sensitive issues can be discussed behind closed doors. But, in an open and democratic society, it is not permitted to prevent courts from examining legal issues by labelling them as matters of national security.

- ***Defence Act 1 of 2002:*** This law has rules against publishing information that is likely to endanger national security or the safety of members of the Defence Force, or taking photographs or making sketches, plans or models of military premises or installations.
- ***Namibia Central Intelligence Service Act 10 of 1997:*** This law makes it illegal to expose the identity of informers or intelligence personnel who are engaged in secret operations, and provides for the restriction of public access to intelligence facilities.
- ***Correctional Service Act 9 of 2012:*** This law makes it illegal to make or publish photographs, films or drawings of a correctional facility.
- ***Civil Aviation Act 6 of 2016:*** This law makes it illegal to share confidential information about aviation security measures, or to act in any way that could endanger a member of the public at an airport.

[2] Graham Hopwood, "Rushed and Ill-considered: Namibia's Anti-Terrorism Law", Institute for Public Policy Research, 2015, pages 6-10.

Whistleblower Protection Act 10 of 2017

What does the law do?

This law protects persons who report information on improper conduct, referred to as *"whistleblowers"*.

What is the purpose of the law?

Whistleblowers play a crucial role in exposing mismanagement, corruption and other wrongdoings – but they may be in danger of victimisation for speaking out. They may find themselves at risk of losing their jobs or experiencing other kinds of retaliation. So people might be afraid to report wrongdoing without legal protection against victimisation. The aim of the law is to protect these courageous individuals from any kind of retaliation.

When did the law come into force?

The law is not yet in force. The Minister of Justice will announce the date that it will come into force.

Where does the term *"whistleblower"* come from?

In some countries in the past, police would blow a whistle to alert others to a crime or a problem. The term also relates to referees at sport events, who blow a whistle to signal a foul or some other violation of the rules of the sport. Today this word is used to refer to a person who exposes wrongdoing in a government, a company or an organisation.

What kinds of reporting are covered by the law?

Anyone who reports *"improper conduct"* can be protected by the law. *"Improper conduct"* includes:

- criminal activities
- violation of the fundamental rights and freedoms protected by the Namibian Constitution
- a miscarriage of justice
- any action that could be the subject of a disciplinary proceeding in an organisation
- failure to comply with any law
- waste, misappropriation or mismanagement of resources that affects the public interest
- damage to the environment
- endangering the health and safety of an individual or a community
- deliberate concealment of any of these kinds of wrongdoing.

Who is the improper conduct reported to?

Some workplaces will be required to name an ethics and integrity officer as an *"authorised person"* to receive disclosures of improper conduct. At other workplaces, employees can speak to their supervisors or some other person authorised by the employer to receive disclosures. Disclosures can also be made to a person or institution designated by the Minister of Justice as an *"authorised person"*, or made directly to the Whistleblower Protection Office.

In rare cases, disclosure of improper conduct is protected if it is made to the public (such as by giving information to the media) – but ONLY if there is no time to follow the usual routes AND the misconduct involves a serious crime or creates a risk of immediate and serious harm to the life, health or safety of persons or the environment.

It is a serious crime for anyone to use force or other coercion to try to stop a person from disclosing information about improper conduct. The penalty is a fine of up to N$50 000 or prison for up to 10 years, or both.

Do all disclosures lead to protection for the whistleblower?

No. A whistleblower is protected against victimisation ONLY IF disclosure was made to a proper authority in good faith, and ONLY IF the whistleblower had reasonable grounds for believing that the information was true.

Also, there is NO protection for whistleblowers if –

- they are continuing to participate in the improper conduct themselves
- they knowingly made a false statement in their disclosure
- their disclosure was not serious or was made just to annoy
- their main motive for the disclosure was to avoid being disciplined or dismissed
- making the disclosure constitutes a crime on the part of the whistleblower.

Protection that was initially provided to a whistleblower can be taken away if any of these issues come to light later on.

False reports

Parliament included penalties for false reports because of fears that people may maliciously make false reports about prominent individuals just to damage their reputations. A whistleblower who intentionally gives a false report will not receive any protection under the law. It is also a crime for a whistleblower to knowingly make a false report. The penalty is a fine of up to N$30 000 or prison for up to 10 years, or both.

Anonymous disclosures will be assessed and considered, but whistleblowers can be protected only after they have identified themselves.

What is the procedure for reporting improper conduct?

A disclosure can be made orally or in writing. The person who receives the disclosure must record the information along with the time and place that it was made, and give the whistleblower a written acknowledgement that the disclosure has been received.

In the case of a disclosure by an employee about a fellow employee or the employer, the authorised person will normally investigate and compile a report for the employer's chief executive officer (CEO), with either a recommendation for corrective action or a finding that the disclosure did not actually expose improper conduct. The CEO will then –

- take the recommended action
- provide reasons for disagreeing with the conclusions and recommendations of the authorised officer or
- dismiss the matter.

The CEO must notify the whistleblower in writing of his or her decision and make a report to the Commissioner of Whistleblower Protection.

The **Commissioner of Whistleblower Protection** must have a legal qualification. The President appoints the Commissioner for a term of five years from nominations made by the Magistrates Commission and approved by the National Assembly.

In the case of a disclosure that does not involve an employment situation, the process works in much the same way – but the communication about the initial investigation will go straight from the authorised person to the Commissioner of Whistleblower Protection, who will assign a staff member to look into the matter and report back on it.

Whenever the Commissioner receives a report about a disclosure through any of these routes, the Commissioner must decide whether the person who made the disclosure is actually a whistleblower who is entitled to protection under the law. The Commissioner must notify the whistleblower of the decision on protection. Whistleblowers who are not satisfied with the Commissioner's decision on their entitlement to protection can appeal to the Whistleblower Protection Review Tribunal.

The **Whistleblower Protection Review Tribunal** consists of a magistrate or a judge assisted by two other persons with appropriate expertise. They are appointed by the President on the recommendation of the Minister of Justice for five-year terms. The Tribunal convenes only when it is needed.

Depending on the issue involved, the matter might be referred to an investigation agency, such as the Ombudsman, the Anti-Corruption Commission, the Namibian Police, the Namibian Central Intelligence Service or the Namibian Correctional Service.

What kind of protection does the law give to whistleblowers?

The law protects whistleblowers (and persons related to them or associated with them) from *"detrimental action"* such as intimidation, harassment, harm to persons or property, or negative employment consequences. Retaliation in the employment context might take many forms, including dismissal, suspension, demotion, transfer, changed working conditions or other negative treatment.

A whistleblower who experiences any detrimental action can make a complaint to the Commissioner. The Commissioner will get a staff member to investigate if necessary, and then either dismiss the complaint or refer it to the Whistleblower Protection Review Tribunal to decide on a remedy. The Tribunal might award damages or compensation, or get a court order against the person taking the detrimental action. It also has the power to correct any negative employment consequences, by ordering reinstatement or back pay, reversing or ordering a transfer, or taking other appropriate measures. In addition, it can order an employer to take disciplinary action against the person responsible for the retaliation against the whistleblower.

It is a crime to take detrimental action against whistleblowers or persons connected with them. The penalty is N$50 000 or prison for up to 15 years, or both. As another form of protection, whistleblowers cannot be subjected to civil or criminal action for making disclosures that they believed to be true. For example, the whistleblower cannot be sued for defamation for a good faith disclosure.

It is essential that the identity of whistleblowers is kept confidential, along with other personal information about them and persons connected to them. This includes their address, their occupation and any other information that could put them at risk if revealed. It is a crime for anyone to reveal confidential information about the whistleblower.

How does the law encourage whistleblowing?

The law provides for the possibility of rewards whenever a disclosure leads to arrest and prosecution, or a percentage of money or property that is recovered as a result of the whistleblower's information.

The provisions of the law on whistleblowing override any contracts or conditions of employment that require secrecy – but they do NOT override any law that restricts the disclosure of information in the interests of national security, national defence, crime prevention or detection, the administration of justice or the sovereignty and integrity of Namibia.

The law establishes a **Whistleblower Protection Advisory Committee** to advise the Minister on high-level policy matters relating to whistleblower protection. The Committee members are:

- the Executive Director of the Ministry of Justice
- the Executive Director of the Office of the Prime Minister
- the Ombudsman
- the Director-General of the Anti-Corruption Commission
- the Inspector-General of Police
- the Director of the Namibia Central Intelligence Service
- the Environmental Commissioner
- a person nominated to represent employers' organisations
- a person nominated to represent trade unions.

Criticism

The ACTION Coalition in Namibia (a group of NGOs) has criticised the provision that makes it a crime for whistleblowers to knowingly report false information. They say that fears about possible criminal sanctions might discourage genuine whistleblowers who are already placing themselves at risk by coming forward with information. False reports will not qualify whistleblowers for any protection under the law, meaning that they might face dismissal or disciplinary action at their workplace or a lawsuit for defamation. This might be sufficient to discourage false reports, without criminal penalties.[1]

Another concern cited by the ACTION Coalition is the need to strengthen the independence of the offices and bodies created by the law. For example, they recommend that candidates for the Commissioner for Whistleblower Protection should be interviewed and recommended for appointment by an

[1] Media Release, "MPs urged to refer Whistleblower Protection Bill to Standing Committee", ACTION Coalition Namibia, 7 March 2017.

independent panel. They also suggest that the law should protect the Whistleblower Protection Office against interference by anyone, including members of the Cabinet or Parliament – in the same way that the Constitution protects the Office of the Ombudsman from such interference.[2]

The law does contain some protections for the independence of investigations and decision-making in terms of the law. It is a crime for someone who is conducting an investigation into improper conduct to conceal or suppress evidence, or for anyone who has relevant information to refuse to assist in an investigation. It is also a crime for anyone to try to prejudice or influence the Whistleblower Protection Review Tribunal. But there is no general protection for the independence of investigators or the Whistleblower Protection Office.

How does this law fit together with the *Witness Protection Act*?

Whistleblowers fall under the definition of *"witness"* in the *Witness Protection Act 11 of 2017*, whether or not the whistleblower gives information in court. This means that a whistleblower is also entitled to the protections provided by the *Witness Protection Act*, which is explained in a separate summary. Whistleblower protection is about preventing retaliation, particularly detrimental action in the workplace. Witness protection involves broader protective measures such as identity change or relocation. The *Whistleblower Protection Act* and the *Witness Protection Act* complement each other.

Other laws that protect whistleblowers and witnesses

Some limited protections for whistleblowers and witnesses are also contained in other laws:

- ***Anti-Corruption Act 8 of 2003:*** This law protects the identity of informants who assisted in a corruption investigation. Other witnesses are not required to identify the informer or provide information that could reveal the informer's identity, except where the informer has given false information on purpose, or where justice cannot be done without revealing the informer's identity. Even if the court decides that the informer's identity must be revealed, the informer can be protected by closing the court to the public or prohibiting the publication of any information about the informer's identity. This law protects informers who act in good faith against disciplinary proceedings and civil or criminal lawsuits related to their reporting.[3]
- ***Financial Intelligence Act 13 of 2012:*** This law protects persons who make or contribute to reports to the Financial Intelligence Centre. Their identity will be kept secret unless they are required to give evidence in criminal proceedings.[4]
- ***Prevention of Organised Crime Act 29 of 2004:*** This law allows the court to hold proceedings behind closed doors and to limit the publication of information that might put people at risk.[5]
- ***Labour Act 11 of 2007:*** This law makes it unfair to dismiss or discipline an employee for disclosing information that the employee is legally entitled or legally required to disclose.[6] But it does not provide any protection against other kinds of victimisation for speaking out about wrongdoing.

The *Whistleblower Protection Act* and the *Witness Protection Act* supplement these other laws by providing more comprehensive protection for persons who expose wrongdoing.

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2 Media Release, "MPs urged to refer Whistleblower Protection Bill to Standing Committee", ACTION Coalition Namibia, 7 March 2017; Iheb Chalouat, Carlos Carrión-Crespo and Margherita Licata, "Law and practice on protecting whistle-blowers in the public and financial services sectors", International Labour Office (ILO), 2019, page 43. Section 89(3) of the Namibian Constitution gives this protection to the Ombudsman: "No member of the Cabinet or the Legislature or any other person shall interfere with the Ombudsman in the exercise of his or her functions and all organs of the State shall accord such assistance as may be needed for the protection of the independence, dignity and effectiveness of the Ombudsman."

3 *Anti-Corruption Act 8 of 2003*, section 52.

4 *Financial Intelligence Act 13 of 2012*, section 45.

5 *Prevention of Organised Crime Act 29 of 2004*, section 98.

6 *Labour Act 11 of 2007*, sections 33(2(a) and 48.

Witness Protection Act 11 of 2017

What does the law do?

This law sets up a Witness Protection Programme to protect the safety and wellbeing of witnesses and persons related to or associated with them.

What is the purpose of the law?

Persons who have knowledge of wrongdoing and can give information to government authorities are often put under pressure not to say what they know. Witnesses who fear for the safety of themselves or their families are unlikely to want to cooperate with authorities or testify in court. This law aims to protect and support witnesses and persons connected to them, so that no one will be afraid to speak out against wrongdoing. It also helps Namibia fulfil its duties under the United Nations Convention against Transnational Organized Crime.

When did the law come into force?

The law is not yet in force. The Minister of Justice will announce the date that it will come into force.

Who is a "witness" for the purposes of the law?

People usually think of a witness as a person who gives evidence in a court case. But there is a specific definition of witness for the purposes of this law. A *"witness"* in this law is **someone who has given or is going to give evidence** in a *"proceeding"*, or **someone who has made a statement** in connection with a *"proceeding"*. *"Proceedings"* include –

- criminal trials for any crimes covered by the law (listed on the next page)
- appearances before a commission of inquiry
- inquests (court enquiries into the cause of a person's death)
- proceedings under the *Prevention of Organised Crime Act 29 of 2004* relating to the property of someone who has benefited from a crime
- proceedings before other tribunals or bodies identified by the Minister of Justice as being covered by this law.

The term *"witness"* also includes **victims** of crimes covered by the law – whether or not they testify or make a statement. It also includes **whistleblowers** who disclose improper conduct in terms of the *Whistleblowers Protection Act 10 of 2017.* It can also cover **any other person identified by the Director of Witness Protection in the Ministry of Justice as needing witness protection**.

Who runs the Witness Protection Programme?

The Witness Protection Programme is run by the **Witness Protection Unit** that is part of the Ministry of Justice**.** This Unit is headed by a **Director** and **Deputy Director**, who are staff members of the Ministry of Justice appointed by the Minister for 10-year terms. The Director makes decisions on whether or not a person may be admitted to the Witness Protection Programme and the types of protection that will be provided. The Witness Protection Unit can set up branch offices in any part of Namibia as needed, with each branch being headed by a **witness protection officer**.

Even though the Unit is made up of Ministry staff, it is supposed to carry out its functions impartially and without interference from any person or authority. It is a crime for any person to interfere with a staff member of the Unit.

Members of the Namibian Defence Force, the Namibian Police, the Correctional Service or the Intelligence Service can be seconded to serve as **security officers** for the Unit.

The law establishes a **Witness Protection Advisory Committee** to advise the Minister on high-level policy matters relating to witness protection, and to advise the Witness Protection Unit on how to carry out its functions. The members of this Committee are:

- the Executive Director of the Ministry of Justice
- one high-level staff member from each of the ministries responsible for –
  - finance
  - international relations
  - home affairs
  - safety and security
- one high-level staff member nominated by the Head of the Intelligence Service
- one high-level staff member nominated by the Prosecutor-General
- one member of the Namibian Police ranked Commissioner or higher.

What criminal proceedings are covered by the Witness Protection Programme?

The protections for witnesses are available only in relation to certain serious crimes, and particularly in cases where the crimes involve criminal gangs or crime syndicates. The crimes covered are:

- treason (attacking a government that you owe allegiance to)
- sedition (trying to get people to rebel against a government or a government authority)
- murder
- culpable homicide (causing someone's death through negligence)
- rape
- public violence
- robbery
- kidnapping
- defeating the ends of justice
- perjury (making a false statement under oath in a judicial proceeding)
- any crimes under the *Anti-Corruption Act 8 of 2003*
- any crimes under the *Prevention of Organised Crime Act 29 of 2004*
- any crimes under the *Prevention and Combating of Terrorist and Proliferation Activities Act 4 of 2014*
- certain crimes related to drugs under the *Abuse of Dependence-Producing Substances Act 41 of 1971*
- domestic violence crimes
- crimes relating to possession or dealing in firearms and explosives
- any crimes involving criminal gangs, crime syndicates or law enforcement officers where the Director believes that the witness's safety is at risk
- crimes relating to exchange control, extortion, fraud, forgery, uttering (putting counterfeit money into circulation) or theft where substantial amounts of money are involved, and especially in cases involving criminal gangs or crime syndicates
- crimes under the *Geneva Conventions Act 15 of 2003*, which relates to the humane treatment of persons during war
- any other crime identified by the Minister for the purposes of the law
- any other crime where the Director believes that the witness's safety is at risk and that the witness should be protected.

What kinds of protection does the Witness Protection Programme provide for witnesses?

The law sets up a general framework for witness protection, but the details will be different in each case.

Witnesses may be housed in "places of safety" for temporary protection while other arrangements are being made .[1]

[1] This is covered in part by section 185 of the *Criminal Procedure Act 51 of 1977*.

Witnesses may be allowed to give evidence in a closed session. It is also possible to restrict the publication of information about the proceedings involving the witness, so that the identity of the witness is not revealed.

Witnesses may be assisted to change their identity, and provided with new identification documents so that anyone who wants to harm them will not be able to find them. In this case, the Witness Protection Unit will arrange to keep the witness's previous identity secret. But there are also rules to make sure that a person who is given a new identity cannot use the new identity to avoid legal obligations or restrictions that already applied to them.

Witnesses may be assisted to relocate with their families inside or outside Namibia. They may also be given financial assistance to cover reasonable living expenses, as well as help with finding work or accessing education until they can become self-supporting.

The law also allows the Director to take other steps to ensure the safety and wellbeing of the witness.

What is the procedure for requesting witness protection?

The Director has the sole responsibility for deciding whether to admit a witness or a related person to the Witness Protection Programme. Admission to the Programme is not intended to be a reward for giving evidence, or a way to persuade people to give evidence – it is just a way to protect the safety and well-being of witnesses who are at risk.

Witnesses (or persons connected to them) who believe that they are at risk must apply for protection to one of the officials listed in the law:

- the investigating officer
- any person in charge of a police station
- if the person at risk is in prison, the person in charge of that prison or a State social worker
- a prosecutor
- a staff member of the Witness Protection Unit
- a person authorised to receive information from whistleblowers under the *Whistleblower Protection Act 10 of 2017*
- the Prosecutor-General, or in the case of proceedings other than criminal cases, someone designated by the presiding officer
- any other person identified by the Minister of Justice for this purpose.

If the person at risk is not able to make the application personally, the investigating officer or any other interested person can help them. The person receiving the application has a duty to assist the applicant with the paperwork. The application must be forwarded right away to the Director or to a witness protection officer. In either case, a witness protection officer will evaluate the application and make a recommendation to the Director.

The witness may be placed under temporary protection while the application is being considered. The Director may collect additional information about the situation, and may even request the applicant to undergo a medical examination or a mental evaluation before making a decision.

The law sets out the factors that the Director should consider in making a decision on the application. Here are some of the key factors:

- the nature and extent of the danger to the applicant's safety
- the interests of the community
- the applicant's relationship with any other persons already admitted to the Programme
- if the witness has a criminal record, the potential risk to the public if they are accepted into the Programme
- the importance of the information that the witness can provide
- the cost of providing the protection
- whether there are other ways to protect the witness.

The applicant must be notified of the Director's decision and the reasons for it. If the application is refused the applicant can appeal to the Witness Protection Review Tribunal.

The **Witness Protection Review Tribunal** consists of a magistrate or a judge assisted by two other persons with appropriate expertise, appointed by the Minister of Justice after discussion with the Chief Justice for five-year terms. The Tribunal convenes only when it is needed.

Anyone who is admitted to the Witness Protection Programme must enter into a protection agreement with the Director. This agreement will explain why the applicant was admitted to the Programme and give details of the protection to be provided. This agreement will set out the duties of the person who is being protected, which include:

- a duty to give evidence in the proceedings that gave rise to the protection (if this applies)
- a duty to continue to meet other legal obligations, including things such as providing maintenance for children and paying taxes
- a duty not to commit crimes while under protection
- a duty not to do anything that might endanger his or her own safety, the safety of staff members of the Unit or any other person who is being given witness protection.

Suspending or ending witness protection

Witness protection can be suspended if the person being protected acts in a way that limits the Director's ability to protect them. It can be ended at the protected person's request, or if the protection is no longer needed. It can also be withdrawn if it comes to light that the witness gave false or misleading information, violated a term of the protection agreement or did something that may threaten the security of the entire Programme.

Protection from threats and victimisation

It is a serious crime to threaten anyone for applying for witness protection, or for cooperating with a court or a law enforcement agency. It is also a serious crime to take legal action or disciplinary action against someone in retaliation for cooperation with the authorities. The penalty for these crimes is a fine of up to N$100 000 or prison for up to 10 years, or both.

Confidentiality

There are detailed rules to prevent unauthorised disclosure of information about the Witness Protection Programme or the identity of people who are being protected. There are also rules to make sure that authorised disclosures are made with careful regard for the safety of all persons who may be affected. Unauthorised disclosure is a crime that is punishable by a fine of up to N$100 000 or prison for up to 10 years, or both.

The Minister of Justice may cooperate on witness protection with authorities in other countries or with international courts or tribunals.

How does this law fit together with the *Whistleblower Protection Act 10 of 2017*?

The two laws offer different kinds of protection for people who provide information to combat wrongdoing. Whistleblowers fall under the definition of *"witness"* in the *Witness Protection Act*, whether or not the whistleblower gives information in court. This means that a whistleblower may be entitled to the protections provided by the *Whistleblower Protection Act* (explained in a separate summary), and to the protections in the *Witness Protection Act*. But not every witness is also a whistleblower, since the definitions of *"witness"* and *"whistleblower"* do not overlap entirely. Whistleblower protection is about preventing retaliation, especially detrimental action in the workplace. Witness protection involves broader protective measures such as relocation or identity change. The two laws complement each other.

Criticism

It has been suggested that the appointment of persons to the Witness Protection Review Tribunal should not be made by a political appointee, even though the decisions on appointments involve consultation with the Chief Justice. Security of tenure for the Tribunal members is also not guaranteed, since the Minister can end the term of office for a Tribunal member for any reason that the Minister "considers good and sufficient". The concern is that this approach is not sufficient to protect the independence of the Tribunal from possible political interference.[2]

[2] Iheb Chalouat, Carlos Carrión-Crespo and Margherita Licata, "Law and practice on protecting whistle-blowers in the public and financial services sectors", International Labour Office (ILO), 2019, page 43.