

# CORRECTIONAL FACILITIES

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## Transfer of Convicted Offenders Act 9 of 2005

**Summary:** This Act ([GG 3495](#)) makes provision for the mutual transfer of sentenced offenders between Namibia and foreign States. It was brought into force on 28 July 2006 by GN 116/2006 ([GG 3674](#)).

**Amendments:** The Act is amended with respect to the use of various terms by the Correctional Service Act 9 of 2012 ([GG 5008](#)), which was brought into force on 1 January 2014 by GN 330/2013 ([GG 5365](#)).

**Regulations:** Regulations are contained in GN 117/2006 ([GG 3674](#)).

**Notices:** GN 309/2012 ([GG 5109](#)) announces the ratification of an agreement on the transfer of sentenced offenders between Zambia and Namibia, in terms of section 20(3) of the Act. (The text of the agreement is not included in the notice.)

According to the Ministry of Safety and Security, the National Assembly ratified this bilateral agreement on 9 October 2012 and notified Zambia of the ratification on 23 January 2013. On 11 November 2015, Namibia received notification from Zambia that they had fulfilled their domestic procedures in respect of the agreement. The agreement then entered into force on 12 December 2015 (in terms of Article 20(1) of the Agreement).

GN 277/2020 ([GG 7386](#)) announces the ratification of an agreement on the transfer of sentenced offenders between Russia and Namibia, in terms of section 20(3) of the Act. (The text of the agreement is not included in the notice.)

GN 277/2020 gives notice “that the National Assembly has, on 17 June 2020, ratified the Agreement on the Transfer of Sentenced Offenders between the Republic of Namibia and the Russian Federation” entered into under section 20(1) of the Act.

### Related international agreements:

**\*\*SADC Protocol on the Inter-State Transfer of Sentenced Offenders, 2019.**

## Correctional Service Act 9 of 2012

**Summary:** This Act ([GG 5008](#)) provides for the establishment of the Namibian Correctional Service and correctional facilities (previously known as prisons). It also covers health care services and hygiene for incarcerated offenders, discipline and rehabilitation programmes for incarcerated offenders, and rules for searches and seizures in correctional facilities. It establishes the National Release Board and provides for parole, remission and pardons. The Act repeals the Prisons Act 17 of 1998 ([GG 1894](#)), which was brought into force on 24 August 1998 by GN 206/1998, [GG 1927](#)). This Act was brought into force on 1 January 2014 by GN 330/2013 ([GG 5365](#)).

The Prisons Act 17 of 1998 replaced the *Prisons Act 8 of 1959*. Because there is a chain of savings clauses which stretch back to that Act, it may be relevant to note its applicability to SWA. Section 96 of the *Prisons Act 8 of 1959* stated: “The State President may, by proclamation in the Gazette and subject to such conditions, modifications, exceptions and additions as he may specify in such proclamation, apply the provisions of this Act and of any amendments thereof to the territory of South West Africa including that portion of the said territory known as the ‘Rehoboth Gebiet’ and defined in the First Schedule to Proclamation No. 28 of 1923 of

the said territory and also that portion of the said territory known as the ‘Eastern Caprivi Zipfel’ referred to in section 38 of the South West Africa Constitution Act, 1968 (Act No. 39 of 1968), and he may in the like manner amend or repeal any such proclamation”. The Act was initially applied to South West Africa by *SA Proclamation 271 of 1959*, which was subsequently replaced by *RSA Proclamation R.130 of 1969*, as amended by *RSA Proclamation R.211 of 1977*. These Proclamations made several amendments to the Act as it applied to SWA. Although these South African proclamations functioned in some respects as transfer proclamations, the administration of this Act was also transferred to SWA by the Executive Powers (Prisons) Transfer Proclamation (AG 6/1977, as amended), dated 13 October 1977. This transfer proclamation predates the General Proclamation regarding transfers (AG 7/1977, as amended).

**Regulations:** Anything done under any provision of any law repealed by this Act which could be done under a provision of this Act is deemed to have been done under this Act in terms of section 134(3) – including the issue of regulations.

Regulations made under laws repealed by the *Prisons Act 8 of 1959* survived pursuant to section 95(b) of that Act.

Regulations under the *Prisons Act 8 of 1959* appeared to have survived pursuant to the general wording of section 127(2) of the Prisons Act 17 of 1998, which states:

“(2) Anything done under any provision of any law repealed by subsection (1) and which could be done under a provision of this Act shall be deemed to have been done under the last-mentioned provision.”

However, according to the Namibian Supreme Court in *Kamahere & Others v Government of the Republic of Namibia & Others* 2016 (4) NR 919 (SC) at para [38], there was “no savings provision in respect of the regulations promulgated under the 1959 Act or orders issued under reg 148 [of those regulations] in s 127 of the 1998 Act”. The Court does not discuss the reasoning behind this interpretation, other than to state:

“When the minister made regulations under s 124 of the 1998 Act on 8 November 2001 [referring to the regulations contained in GN 266/2001 ([GG 2643](#)), as amended by GN 34/2009 ([GG 4223](#)) and GN 134/2009 ([GG 4272](#))], those regulations did not repeal the regulations made under the 1959 Act, further demonstrating that those regulations had been repealed by s 127 of the 1998 Act.”

Regulations made under the Prisons Act 17 of 1998 survived pursuant to section 134(3) of the Correctional Service Act 9 of 2012, but have subsequently been repealed.

Namibian Correctional Service Regulations, made under the current Act, are contained in GN 331/2013 ([GG 5365](#)). These regulations repeal the regulations contained in GN 266/2001 ([GG 2643](#)), as amended by GN 34/2009 ([GG 4223](#)) and GN 134/2009 ([GG 4272](#)).

**Establishment of prisons:** Several new prisons were established under the Prisons Act 17 of 1998 by GN 201/1998 ([GG 1927](#)), and the Katima Mulilo police cells were declared to be a prison under that Act by GN 160/1999 ([GG 2163](#)).

In terms of section 15(1) of this Act, GN 228/2020 ([GG 7333](#)) establishes the Windhoek Female Correctional Facility in Khomas Region and the (Okatyali Correctional Facility in Oshana Region.

**Presidential pardons:** While the Prisons Act 17 of 1998 was in force, Presidential pardons were issued in terms of the Namibian Constitution to certain categories of prisoners in Proc. 15/1993 ([GG 642](#)), Proc. 11/1994 ([GG 836](#)), Proc. 3/1995 ([GG 1051](#)), Proc. 4/1997 ([GG 1533](#)), Proc. 1/2000 ([GG 2306](#)), Proc. 12/2003 ([GG 2956](#)), Proc. 1/2005 ([GG 3397](#)), Proc. 4/2006 ([GG 3626](#)), Proc. 6/2009 ([GG 4230](#)), Proc. 14/2010 ([GG 4552](#)) and Proc. 28/2013 ([GG 5270](#)).

After this Act came into force, Presidential pardons were issued in terms of the Namibian Constitution to certain categories of prisoners in Proc. 8/2020 ([GG 7154](#)), which was withdrawn and replaced by Proc 19/2020 ([GG 7212](#)).

Notices listing the names of the persons covered by some of these pardons have not been listed here.

**Cases:** The following cases relate to this Act –

- Lomboleni & 10 Other Appeal Cases v The State & Others* 2016 (1) NR 22 (NLD) (discussion of official duties in section 3(3) in context of inability of prisons to account for whereabouts of prisoners seeking to prosecute appeals)
- Katjivena & Others v Prime Minister of the Republic of Namibia & Others* 2016 (3) NR 903 (HC) (section 133(3))
- Kamahere & Others v Government of the Republic of Namibia & Others* 2016 (4) NR 919 (SC) (effect of successive repeals of previous legislation on regulations and orders issued under previous Acts, in respect of eligibility for parole in respect of life imprisonment; section 117 and Regulation 281 of the Namibian Correctional Service Regulations, 2013 apply to persons sentenced under the Prisons Act 17 of 1998, but not under the *Prisons Act 8 of 1959*; persons sentenced under the *Prisons Act 8 of 1959* continue to be governed by the right to parole acquired under that Act).

The following cases relate to the Prisons Act 17 of 1998, which was repealed by this Act –

- S v Babiep* 1999 NR 170 (HC) (meaning of “prison”, section 54, section 75(1))
- S v Njuluwa* 2000 NR 97 (HC) (it would derogate from the statutory powers conferred by sections 92, 95-98 if judicial officers were allowed to order that convicted persons may not be paroled)
- Kennedy & Others v Minister of Prisons and Correctional Services* 2008 (2) NR 631 (HC) (legal duty of care of members of Namibian Prison Services; discussion at 654G-I of reasonable force under section 30(1))
- Alugodhi v Minister for Safety and Security & Others and Eight Similar Cases* 2015 (4) NR 1021 (HC) (relationship between section 86 and section 280 of *Criminal Procedure Act 51 of 1977*, with reference to similar provisions of the previous *Prisons Act 8 of 1959* (section 32) and the current Act (section 99))
- Katjivena & Others v Prime Minister of the Republic of Namibia & Others* 2016 (3) NR 903 (HC) (interpretation of 2010 directive of Prime Minister on organisational structure)
- Kamahere & Others v Government of the Republic of Namibia & Others* 2016 (4) NR 919 (SC) (section 126; absence of provision for parole in respect of life imprisonment; section 117 and Regulation 281 of the Namibian Correctional Service Regulations, 2013 apply to persons sentenced under the Prisons Act 17 of 1998).

The following cases relate to the *Prisons Act 8 of 1959*, which was repealed by the Prisons Act 17 of 1998 –

- Ex Parte Attorney-General, Namibia: In Re Corporal Punishment by Organs of State* 1991 NR 178 (SC) (sections 36, 37, 48(1), 54(2), 56(3) and Regulation 100 of the Prison Regulations)
- S v Haruseb* 1991 NR 155 (HC) (section 48(1)(a))
- S v Mbahapa* 1991 NR 274 (HC) (section 48(1)(a))
- S v Vihajo & Others* 1993 NR 233 (HC) (section 48(1)(a))
- S v Matsuis* 1993 NR 234 (HC) (section 48(1)(a))
- S v Matthias* 1993 NR 420 (HC) (section 48(1)(a))

*Namunjepo & Others v Commanding Officer, Windhoek Prison & Another* 1999 NR 271 (SC) (section 80 and Regulation 102) (discussed in L Gaum, “The use of mechanical restraints by correctional services in South Africa and Namibia: *Namunjepo v Commanding officer, Windhoek Prison* 6 BCLR 671 (NmS) (2000)”, *African Human Rights Law Journal*, Volume 2, Issue 1, 2002)

*S v Linyando* 1999 NR 300 (HC) (section 48(2) read together with section 32(2))

*Amakali v Minister of Prisons and Correctional Services* 2000 NR 221 (HC) (section 48)

*Kamahere & Others v Government of the Republic of Namibia & Others* 2016 (4) NR 919 (SC) (section 90; Prison Order 43.7.4.7 issued under Regulation 148 of the Prison Regulations, 1965 contained in GN R.2080 of 31 December 1965; persons sentenced under the *Prisons Act 8 of 1959* continue to be governed by the right to parole acquired under that Act).

**Commentary:**

SH Bukurura & JW Nyoka, “The Namibian Prison Service and the Constitution: Lessons and experiences, 1990-2000”, 34(1) *De Jure* 96 (2001)

SH Bukurura, “Prison Overcrowding in Namibia: The Problem and Suggested Solutions”, 16 (1) *Acta Criminologica* 82 (2003)

“*Prisons In Namibia: Report of The Special Rapporteur on Prisons And Conditions of Detention in Africa, adopted by the African Commission on Human and Peoples’ Rights at the 33rd Ordinary Session, 15-29 May 2003*”, available from [www.achpr.org/states/namibia/missions/prisons-2001/](http://www.achpr.org/states/namibia/missions/prisons-2001/)

SK Amoo & Davy Y Kambinda, “Community service orders as part of judicial discretion in the criminal justice system”, *Namibia Law Journal*, Volume 3, Issue 2, 2011

Clever Mapaure & Raphael T Hamunyela, “Once jailed, wait for fuzzy mercy: A critical legal analysis of the blurred prison and parole laws of Namibia”, *Namibia Law Journal*, Volume 4, Issue 2, 2012

Chuks Okpaluba, “State liability for acts and omissions of police and prison officers: recent developments in Namibia” 46 (2) *The Comparative and International Law Journal of Southern Africa* 184 (2013)

Law Reform and Development Commission, *Discussion Paper on the Possible Statutory Interventions to Curb the Alarming Spate of Domestic Violence, Murder and Gender Based Violence*, LRDC 33, 2014 (parole)

Obonye Jonas & Tshepiso Ndzingo-Makhamisa, “Anti-retroviral drugs for foreign inmates in Botswana: *Tapela & Anor v Attorney-General & Others*”, *Namibia Law Journal*, Volume 6, Issue 2, 2014

Legal Assistance Centre, “Use of force by law enforcement officials in Namibia”, 2019, available at [www.lac.org.na](http://www.lac.org.na).

**Conditions in police cells:** The Correctional Service Act defines “correctional facility” to include, for certain purposes, every place used as a police cell or lock-up. *McNab & Others v Minister of Home Affairs & Others* 2007 (2) NR 531 (HC) at 548C-ff found that conditions in the holding cells in which the plaintiffs were detained were inhuman and degrading and therefore a violation of the constitutional right to human dignity. See also:

Adv JR Walters, “Follow-up Report on Conditions Prevailing at Police Cells in Namibia”, Office of the Ombudsman, 2008, available at [www.ombudsman.org.na](http://www.ombudsman.org.na)

“Report of the Standing Committee on Foreign Affairs, Defence And Security on Visits to Police Stations, Police Cells, Prisons, Border Posts and Military Installations”, National Assembly, 2006

Adv JR Walters, “Special Report on Conditions Prevailing at Police Cells throughout Namibia”, Windhoek: Office of the Ombudsman, 2006

Oliver C Ruppel and Angelique L Groenewald, “Conditions of Police Cells in Namibia, Human Rights and Documentation Centre”, University of Namibia, undated, available at [www.unam.na](http://www.unam.na) and [www.kas.de](http://www.kas.de).

## **APPOINTMENTS**

Appointment of First Commissioner of Prisons, Proc. 19/1990

Appointment of Commissioner of Prisons, Proc. 34/1997 ([GG 1765](#))

Commissioner-General of Correctional Service, Proc. 4/2014 ([GG 5407](#)).

## **COMMENTARY**

Legal Assistance Centre / University of Wyoming College of Law, *Struggle to Survive: A Report on HIV/AIDS and Prisoners' Rights in Namibia*, 2008, available at [www.lac.org.na](http://www.lac.org.na)

Legal Assistance Centre, *Understanding Prisoners' Rights*, undated pamphlet, available at [www.lac.org.na](http://www.lac.org.na).

See also Security Commission Act 18 of 2001 (**CONSTITUTION**).

See also **DISASTERS** (involvement of uniformed forces in disaster situations).