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*Fighting for human rights in Namibia since 1988*



# Pro Bono

## INFORMATION ABOUT NAMIBIA'S LAW

### THE OMBUDSMAN & CHILDREN IN DETENTION

The Ombudsman has long crusaded for the rights of Namibian children in detention, carrying out several investigations and producing reports setting out concerns in this regard over the years.

These efforts seem to have made some difference, but problems remain. An investigation last year by the Office of the Ombudsman found that 30 children awaiting criminal trial were being detained in the same cells as adult offenders.

Children awaiting trial are usually released into the custody of a parent or guardian if possible. Moreover, many countries, including Namibia, try to divert children out of the criminal justice system altogether where possible, especially where they are first offenders for less serious crimes. The aim is to help children turn their lives around, instead of putting them in prison, where they may actually learn to be more skilled at committing future crimes.

But it is not safe or appropriate in every situation to release young suspects or offenders, and there are sometimes no adults willing and available to give them the support that they need. It is important to protect young offenders who must be held in custody against abuse or brutalization that may injure or harden them.

This means that the best intentions for helping young offenders will not work without suitable facilities for detaining children who must be kept in custody, with targeted education and rehabilitation programmes. At a bare minimum, children must be separated from adults.

The Correctional Service Act 9 of 2012 requires that young offenders (“juveniles”) be kept separately from adult offenders “so far as the correctional facility accommodation renders it practicable”.<sup>1</sup> This Act also requires that juveniles awaiting trial must be detained in a correctional facility only if a court

<sup>1</sup> Correctional Service Act, section 64:

**Separation and security classification and re-classification of offenders**

**64.** (1) Offenders must, on admission to a correctional facility, be separated by the officer in charge into one or more of the following groups, namely -

- (a) convicted offenders;
- (b) unconvicted offenders;
- (c) juvenile offenders;
- (d) female offenders
- (e) offenders who are suffering from a mental illness; and
- (f) such other groups as the Commissioner-General may determine,

and so far as the correctional facility accommodation renders it practicable, each group must be detained separately.

(2) The officer in charge must assign or cause to be assigned a security classification or re-classification to each offender in accordance with the conditions, manner and procedures as may be determined by the Commissioner-General.

decides that detention is necessary and there are no suitable alternatives.<sup>2</sup> The suitability of a place of detention for juveniles must be assessed in light of their age, sex and character, as well as the nature of their offence. Female juveniles in detention must be under the supervision of a female guard, and children awaiting trial or sentencing should be separated from those already convicted.

Children in prisons and police cells are further protected by the Child Care and Protection Act 3 of 2015, which requires that they must be held separately from adults. There are only two narrow exceptions: (1) Children who are being detained may eat or exercise in the same room as adults if there is proper supervision by police or a correctional officer. (2) Children under age two may stay together with an imprisoned parent, guardian or care-giver in circumstances where this would be in the best interests of the child.<sup>3</sup>

The Child Care and Protection Act gives the Ministry of Gender Equality, Poverty Eradication, and Social Welfare power to establish specialized child detention centres for the detention of juveniles, which would probably be the most suitable alternative for a juvenile where release is not possible. Currently, however, there are no such facilities in Namibia.

After discovering juveniles being detained with adults, the Ombudsman twice asked the Minister to place them in specialized detention centres. But, according to the court papers, the Ombudsman alleged that the Minister “horribly failed in her duties to establish these centres”.

The Ombudsman approached the High Court in December last year to compel Minister Sioka and the other respondents – who included the Inspector General of the Namibian Police Force and the station commanders of sixteen police stations – to separate all the children in detention from adult detainees.

On 22 December 2020, the High Court ordered that the detained children must be separated from adults. The Minister was additionally ordered to deliver, under oath, “a plan and programme which she will implement without delay” to ensure that places of safety and child detention centres are established. This

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<sup>2</sup> Correctional Service Act, section 69:

**Custody of juveniles awaiting trial or awaiting conclusion of trial**

69. (1) A juvenile who is awaiting trial or awaiting the conclusion of his or her trial must not be detained in a correctional facility, unless, in the opinion of the court, such detention is necessary and no suitable place of detention as defined in the Children’s Act, 1960 (Act No. 33 of 1960) [which has been replaced by the Child Care and Protection Act 3 of 2015] is available for his or her detention.

(2) In deciding as to the suitability of a place of detention for a juvenile referred to in subsection (1), regard must be had to -

- (a) the juvenile’s age, sex and character; and
- (b) the nature of the offence with which he or she is charged.

(3) Where a female juvenile is detained in a correctional facility, she must at all times be under the care and charge of a female correctional officer.

<sup>3</sup> This is evident from section 231(1)(a) of the Child Care and Protection Act read together with section 62(1)-(2) of the Correctional Service Act. Section 231(1)(a) of the Child Care and Protection Act:

(1) In the absence of a court order to the contrary, a child detained in a place used as a prison or police cell or present in a prison or police cell in the company of a parent, guardian or care-giver must be -

(a) kept separately from adults, with the following exceptions:

- (i) children may eat or exercise in the same room as adults provided that there is proper supervision by a member of the police or correctional officer; and
- (ii) children may stay with a parent, guardian or care-giver under the prescribed conditions in circumstances where this would be in the best interests of the child.

Section 62(1)-(2) of the Correctional Service Act:

(1) A female offender may be admitted into a correctional facility for custody with her infant.

(2) An infant referred to in subsection (1) must be supplied with clothing and other necessities by the State until such infant attains the age of two years, in which case the officer in charge must, on the recommendation of the medical officer and on considering the best interests of the infant -

- (a) on being satisfied that there is a relative or friend of the infant able and willing to support such infant, cause the infant to be handed over to such relative or friend; or
- (b) if in his or her opinion there is no relative or friend able and willing to support that infant, hand such infant over, subject to the relevant laws, to the care of such welfare authority as the Commissioner-General may approve for that purpose.

plan was to state what steps would be taken to ensure that appropriate facilities were “approved, established and operated” under the Child Care and Protection Act, with a timeline for each step.

Minister Sioka was given until 31 March 2021 to deliver her plan to the Office of the Ombudsman and the High Court, but she missed the deadline. As a result, on 28 April 2021, the Ombudsman instituted contempt proceedings against the Minister for failing to comply with the court order. Anyone who fails to comply with a court order can be found to be in contempt of court and can, if necessary, be held in prison until such time as there is compliance. targeted education and rehabilitation programmes.

The Ombudsman noted that Minister Sioka had not sought any extension from the Court for delivering the required plan. The Government Attorney representing Minister Sioka stated that the delay was reasonable because the Minister had to have all 30 detained juveniles assessed by social workers, in addition to compiling information on the location of a future juvenile detention centre. The Government Attorney assured the Court on 5 May 2020 that the Ministry would file the required plan the next day, which would make the contempt proceedings “water under the bridge”.

Indeed, the Minister did file a plan with the Court on 6 May, after consultation with various stakeholders, including the Ministry of Home Affairs, Immigration, Safety and Security, which is the umbrella for both NAMPOL and the Correctional Service. The Minister indicated, without providing details, that the Correctional Service had agreed to assist with sentenced children to the extent possible, and to consider how best to handle children awaiting trial in detention.

The Ministry also reported that it has been allocated a farm which it intends to utilize for safe custody, prevention, early intervention, rehabilitation and reintegration programmes for children in conflict with the law, as well as for diversion programmes and services for children released after serving their sentences. However, this farm has no appropriate infrastructure for such uses as yet. Upgrades to the farm were to commence in April 2021, with consultations about vocational development programmes taking place during April-June 2021.

The plan indicated that work on the farm facilities would continue through August 2021, depending on the availability of funds. But no timeline was provided for when it will become operational. The ultimate goal is to equip the farm as a fully functional child detention centre, with prison guards, medical and psychological personnel, instructors and rehabilitation officers – but the Minister conceded that the Ministry currently lacks both human and capital resources to provide a healthy, hygienic and safe environment for children at this venue, and hopes to make arrangements to share financial responsibility for the centre with the Correctional Service.

Minister Sioka cited the shortage of social workers as another barrier to action in her submission to the Court, noting that the Ministry currently has only one social worker for every 13 409 children under the age of 18 years – certainly a highly inadequate ratio.

Nevertheless, social workers managed to assess the situation of all the juveniles identified in the main application, and the Minister of Home Affairs, Immigration, Safety and Security provided the Court with an update from each region on juvenile offenders in custody and the arrangements made for holding them separately from adults.

It is disturbing to note that the Minister’s affidavit seems to suggest that courts should not overstep the boundaries of the principle of separation of powers, “which provides that the courts should be slow in interfering in the province of the legislature”. Her affidavit indicates that she believes the Court should accept her plan without question; she states that the plans, policies and timelines provided should “be accepted as most suitable, reasonable and appropriate for the Ministry, which forms part and parcel of the legislative arm of government”.

On the contrary, whenever a law places a legal duty on a government official, it is entirely appropriate for the courts to act to ensure that the legal duty is not ignored. There is in fact a specific procedure for this. Courts have the power to issue an order called a “mandamus” when an administrative body or official has not carried out a statutory duty. Any person who can show that they have been aggrieved by this can apply for a court order to compel the official to carry out that legal duty and to remedy any effects of the previous failure to act.

It is a good time for this issue to be under the spotlight, with a new law on young offenders set to be tabled in Parliament this year.

Protecting and assisting young offenders is not only an obligation under Namibian law – it is also crucial for reducing future crime in Namibia. We should all look forward to seeing the Minister’s plan being put into action without further delay.

*This article was made possible by support from  
the Hanns Seidel Foundation.*