Namibia

Criminal Procedure Act, 2004

Act 25 of 2004

Legislation as at 24 December 2004

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Criminal Procedure Act, 2004
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Annotated Statutes

Criminal Procedure Act, 2004
Act 25 of 2004

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ACT

To make provision for procedures and related matters in criminal proceedings.

BE IT ENACTED by the Parliament of the Republic of Namibia, as follows:-

Chapter 1
PRELIMINARY

1. Definitions

(1) In this Act, unless the context otherwise indicates -

"**alibi**" means a defence in a criminal trial according to which the accused alleges that he or she was elsewhere on the day or at the time when the offence with which he or she is charged was allegedly committed;

"**assessor**", in relation to a criminal trial, means a person who, in the opinion of the judge who presides at the trial, has experience in the administration of justice or skill in any matter that may be considered at the trial;

"**banking institution**" means a banking institution authorized under the Banking Institutions Act, 1998 (Act No. 2 of 1998), to conduct business as such, and includes the Agribank referred to in section 3 of the Agricultural Bank of Namibia Act, 2003 (Act No. 5 of 2003), and a building society as defined in section 1 of the Building Societies Act, 1986 (Act No. 2 of 1986);

"**charge**" means an indictment, charge sheet, summons or written notice;

"**clerk of the court**" means a clerk of the court appointed in terms of the Magistrates' Courts Act, and includes an assistant clerk of the court so appointed;

"**complainant**" means -

(a) in relation to an offence of a sexual or indecent nature, a person towards or in connection with whom any such offence is alleged to have been committed, irrespective of whether or not that person has actually laid a complaint or gives evidence in the criminal proceedings in question; or

(b) in relation to a domestic violence offence, a complainant as defined in section 1 of the Combating of Domestic Violence Act, 2003 (Act No. 4 of 2003);

"**correctional supervision**" means a community-based punishment to which a person is subject in accordance with the laws relating to prisons if -

(a) it has been imposed on that person under section 307(1)(d);

(b) it is a condition on which the passing of that person's sentence has been postponed and that person has been released under section 322(1)(a)(i)(dd); or

(c) it is a condition on which the operation of -

(i) the whole or a part; or

(ii) only a part,

of that person's sentence has been suspended under section 322(1)(b) or (5), respectively;

"**criminal proceedings**" includes a preparatory examination under Chapter 26;

"**day**" means the space of time between sunrise and sunset;

"**dependant**", in relation to a deceased victim, means -

(a) the spouse of that victim;

(b) a child of that victim, including a posthumous child, an adopted child and an illegitimate child, who, at the time of the victim's death, was in fact dependent on the victim; or

(c) any other person in respect of whom that victim was legally liable for maintenance;

"**district court**" means a court established for a magisterial district under the Magistrates' Courts Act, and includes any other court established under that Act, other than a court for a magisterial division;

"**district magistrate**" means a magistrate appointed under the Magistrates' Courts Act for a magisterial district established under that Act, but does not include a divisional magistrate;

"**divisional court**" means a court established for a magisterial division under the Magistrates' Courts Act;

"**divisional magistrate**" means a magistrate appointed under the Magistrates' Courts Act for a magisterial division established under that Act;

"**domestic violence offence**" means a domestic violence offence within the meaning of the Combating of Domestic Violence Act, 2003 (Act No. 4 of 2003);

"**High Court**" means the High Court of Namibia constituted in terms of Article 80(1) of the Namibian Constitution;

"**informer**" means a person who provides information to the police, in writing or orally, relating to the commission of an offence, for the purpose of assisting the police in the investigation of offences, whether for reward or otherwise and on the express or implied condition that the identity of the informer will not be disclosed;

"**justice of the peace**" means a person who is a justice of the peace under the Justices of the Peace and Commissioners of Oaths Act, 1963 (Act No. 16 of 1963);

"**law enforcement officer**" includes a member of the prison service and a member of the Namibia Central Intelligence Service constituted in terms of section 3 of the Namibia Central Intelligence Service Act, 1997 (Act No. 10 of 1997);

"**legal practitioner**" means a person who, in terms of the Legal Practitioners Act, 1995 (Act No. 15 of 1995), has been admitted and authorized to practise as a legal practitioner or is deemed to have been so admitted and authorized;

"**life imprisonment**" means imprisonment for the rest of the natural life of a convicted person;

"**local authority**" means any municipal council, town council or village council established under the Local Authorities Act, 1992 (Act No. 23 of 1992);

"**magistrate**" means a district magistrate or a divisional magistrate;

"**magistrate's court**" means any district court or divisional court established under the Magistrates' Courts Act pursuant to Article 83(1) of the Namibian Constitution;

"**Magistrates' Courts Act**" means the Magistrates' Courts Act, 2004;

"**marriage**", for the purposes of the law of evidence in criminal proceedings, includes a marriage by customary law;

"**member of the police**" means a member of the Namibian Police Force as defined in section 1 of the Police Act, 1990 (Act No. 19 of 1990), and "police" has a similar meaning;

"**member of the prison service**" means a member of the Namibian Prison Service within the meaning of the Prisons Act, 1998 (Act No. 17 of 1998);

[The Prisons Act 17 of 1998 has been replaced by the Correctional Service Act 9 of 2012. Section 2 of Act 9 of 2012 transformed the Namibian Prison Service into the Namibian Correctional Service.]

"**Minister**" means the Minister responsible for justice;

"**night**" means the space of time between sunset and sunrise;

"**offence**" means an act or omission punishable by law;

"**peace officer**" means any magistrate, justice of the peace, member of the police, member of the prison service and, in relation to any area, offence, class of offences or power referred to in a notice issued under section 358(1), any person who is a peace officer under that section;

"**premises**" includes land, any building or structure, or any vehicle, conveyance, ship, boat or aircraft;

"**prison**" means a prison established under section 13 of the Prisons Act, 1998 (Act No. 17 of 1998), and includes a temporary prison declared under section 14 of that Act;

[The Prisons Act 17 of 1998 has been replaced by the Correctional Service Act 9 of 2012. In terms of section 15 of Act 9 of 2012, prisons established under Act 17 of 1998 operate as if they were correctional facilities established under Act 9 of 2012.]

"**probation officer**" means a probation officer appointed under section 58 of the Children's Act, 1960 (Act No. 33 of 1960);

"**registrar**" means the registrar of the High Court, and includes an assistant registrar;

"**rules of court**" means the rules made under section 37(1) of the Supreme Court Act, 1990 (Act No. 15 of 1990), or section 39 of the High Court Act, 1990 (Act No. 16 of 1990), or under the Magistrates' Courts Act;

"**sexual act**" means a sexual act as defined in section 1(1) of the Combating of Rape Act, 2000 (Act No. 8 of 2000);

"**social worker**" means a social worker as defined in section 1 of the Social Work and Psychology Act, 2004 (Act No. 6 of 2004);

"**spouse**" means a person's partner in marriage, and includes a partner in a marriage by customary law;

"**State**" means the Republic of Namibia;

"**State-owned enterprise**" means a company, corporation or other entity in which the State -

(a) is the majority or controlling shareholder; or

(b) has a controlling interest;

"**superior court**" means the High Court or the Supreme Court;

"**Supreme Court**" means the Supreme Court of Namibia constituted in terms of Article 79(1) of the Namibian Constitution;

"**this Act**" includes the rules of court and any regulations made under this Act;

"**victim**", in relation to an offence against the person or against property, means a person who directly or indirectly suffered harm, including physical or mental injury, emotional suffering, damage or loss, as a result of the commission of the offence, regardless of any familial relationship between that person and the person who committed the offence, and includes -

(a) any person who suffered any such harm as a result of that person intervening to assist the person in respect of whom the offence was committed; and

(b) for the purposes of awarding compensation under this Act in respect of public money or other public property stolen, damaged or misappropriated, the State,

and, where the victim is deceased, also a dependant of the victim;

"**victim impact statement**" means a victim impact statement referred to in section 39(3).

(2) Any reference in any other law to an inferior court is, unless the context of such other law indicates otherwise, to be construed as a reference to a magistrate's court as defined in subsection (1).

Chapter 2
PROSECUTING AUTHORITY

2. Authority to prosecute vests in State

(1) The authority to institute and conduct a prosecution in criminal proceedings in respect of any offence in relation to which a magistrate's court or the High Court in Namibia has jurisdiction, vests in the State and must, pursuant to and in accordance with Article 88(2) of the Namibian Constitution, be exercised by the Prosecutor-General in the name of the Republic of Namibia.

(2) Criminal proceedings purporting to be instituted in the name of the State in any court in Namibia are for all purposes deemed to be instituted in the name of the Republic of Namibia.

3. Delegation of authority to prosecute

Pursuant to Article 88(2)(d) of the Namibian Constitution, the Prosecutor-General may in writing delegate to any person employed in the Public Service, subject to the control and direction of the Prosecutor-General, authority to -

(a) conduct any prosecution in criminal proceedings in any court and perform any necessary functions incidental to conducting such prosecution;

(b) prosecute or defend in any superior court any appeal arising from criminal proceedings.

4. Power to withdraw charge or stop prosecution

The Prosecutor-General or any person delegated by the Prosecutor-General under section 3 to conduct a prosecution at the instance of the State, or any body or person conducting a prosecution under section 6, may -

(a) before an accused pleads to a charge, withdraw that charge, in which event the accused is not entitled to an acquittal in respect of that charge;

(b) at any time after an accused has pleaded, but before conviction, stop the prosecution in respect of that charge, in which event the court trying the accused must acquit the accused in respect of that charge, but where a prosecution is conducted by a person other than the Prosecutor-General or a body or person referred to in section 6, the prosecution may not be stopped unless the Prosecutor-General or any person authorized thereto by the Prosecutor-General, whether in general or in a particular case, has consented thereto in writing.

5. Private prosecution on certificate nolle prosequi

(1) In any case in which the Prosecutor-General declines to prosecute for an alleged offence -

(a) any private person who proves some substantial interest in the issue of the trial arising out of some injury that that person individually suffered in consequence of the commission of the said offence;

(b) a spouse, if the said offence was committed in respect of the other spouse;

(c) the spouse or child or, if there is no spouse or child, any of the next of kin of any deceased person, if the death of that person is alleged to have been caused by the said offence; or

(d) the legal guardian or curator of a minor or lunatic, if the said offence was committed against his or her ward,

may, subject to section 7, either in person or by a legal practitioner, institute and conduct a prosecution in respect of the said offence in any court competent to try that offence.

(2) (a) No private prosecutor under this section may obtain the process of any court for summoning any person to answer any charge unless such private prosecutor produces to the person authorized by law to issue such process a certificate signed by the Prosecutor-General that he or she has seen the statements or affidavits on which the charge is based and that he or she declines to prosecute at the instance of the State.

(b) The Prosecutor-General must, in any case in which the Prosecutor-General declines to prosecute -

(i) at the written request of the person intending to prosecute, grant the certificate referred to in paragraph (a);

(ii) at the written request of any witness who made a statement in writing in relation to the alleged offence or, if authorized thereto in writing by such witness, the person

intending to prosecute, furnish that witness or other person with a copy of the statement so made,

within 30 days of receipt of any such request.

(c) A certificate issued under this subsection lapses unless proceedings in respect of the offence in question are instituted by the issue of the process referred to in paragraph (a) within six months of the date of the certificate.

(d) Paragraph (c) applies also in respect of a certificate granted before the commencement of this Act under any law repealed by this Act, and the date of such certificate is for the purposes of this paragraph deemed to be the date of commencement of this Act.

(3) (a) The Prosecutor-General must as soon as practicable, but not later than six months after receipt of the police docket relating to the investigation in a criminal case, decide whether or not to prosecute, unless the Prosecutor-General is for good reason unable to do so.

(b) If the Prosecutor-General is unable to make a decision whether or not to prosecute within the period mentioned in paragraph (a), the Prosecutor-General must, at the written request of the person intending to prosecute, give reasons therefor to that person in writing.

(4) A person authorized under subsection (1) to institute a private prosecution who feels aggrieved by any failure of the Prosecutor-General to comply with subsection (2)(b)(i) or (ii) or (3)(a) or (b), may apply to the High Court for an order compelling the Prosecutor-General to comply therewith.

6. Private prosecution under statutory right

(1) Any body on which or person on whom the right to prosecute in respect of any offence is expressly conferred by law may, subject to subsection (2), institute and conduct a prosecution in respect of such offence in any court competent to try that offence.

(2) A body which or person who intends exercising a right of prosecution under subsection (1), may exercise such right only after consultation with the Prosecutor-General and after the Prosecutor-General has withdrawn his or her right of prosecution in respect of any specified offence or any specified class or category of offences with reference to which that body or person may by law exercise such right of prosecution.

(3) The Prosecutor-General may withdraw his or her right of prosecution under subsection (2) on such conditions as the Prosecutor-General may consider fit, including a condition that the appointment by a body or person referred to in subsection (1) of a prosecutor to conduct a prosecution under that subsection is subject to the approval of the Prosecutor-General, and that the Prosecutor-General may at any time exercise with reference to any such prosecution any power that the Prosecutor-General might have exercised if he or she had not withdrawn the right of prosecution.

7. Security by private prosecutor

(1) No private prosecutor referred to in section 5 may take out or issue any process commencing a private prosecution unless such prosecutor deposits with the district court in whose area of jurisdiction the offence in question was committed the amount that court may determine as security for the costs that may be incurred in respect of the accused's defence to the charge.

(2) The accused in respect of whom a private prosecution is instituted may, when called upon to plead to the charge, apply to the court hearing the charge to review the amount determined under subsection (1), whereupon the court may, before the accused pleads -

(a) require the private prosecutor to deposit such additional amount as the court may determine with the district court in which the said amount was deposited; or

(b) direct that the private prosecutor enter into a recognizance, with or without sureties, in such additional amount as the court may determine.

(3) Nothing in subsection (1) contained is to be construed as precluding a district court referred to in that subsection from determining, when the interests of justice so require, that no amount is payable as security for costs, in which event subsection (2) applies with the necessary charges.

8. Private prosecution in name of private prosecutor

(1) A private prosecution must be instituted and conducted and all process in connection therewith issued in the name of the private prosecutor.

(2) The indictment, charge sheet or summons issued must describe the private prosecutor with certainty and precision and must, except in the case of a body referred to in section 6, be signed by the private prosecutor or his or her legal practitioner.

(3) Two or more persons may not prosecute in the same charge, except where two or more persons have been injured by the same offence.

9. Failure of private prosecutor to appear

(1) If the private prosecutor fails to appear on the day set down for the appearance of the accused in the district court or for the trial of the accused, the charge against the accused must be dismissed unless the court has reason to believe that the private prosecutor was prevented from being present by circumstances beyond his or her control, in which event the court may adjourn the case to a later date.

(2) Where the charge is dismissed in terms of subsection (1), the accused must immediately be discharged from custody and may not in respect of that charge be prosecuted privately again, but the Prosecutor-General or a public prosecutor with the written consent of the Prosecutor-General, may at the instance of the State prosecute the accused in respect of that charge.

10. Mode of conducting private prosecution

(1) A private prosecution must, subject to this Act, be proceeded with in the same manner as if it were a prosecution at the instance of the State, but the accused may be brought before the court only by way of a summons in the case of a magistrate's court, or an indictment in the case of the High Court, except where the accused is under arrest in respect of an offence with regard to which a right of private prosecution is vested in any body or person under section 6.

(2) Where a prosecution is instituted under section 5(1) and the accused pleads guilty to the charge, the prosecution may be continued at the instance of the State, but only if the private prosecutor or the person on whose behalf the private prosecutor so prosecutes consents thereto.

11. Prosecutor-General may intervene in private prosecution

(1) The Prosecutor-General or a public prosecutor with the written consent of the Prosecutor-General, may in respect of any private prosecution apply by motion to the court before which the private prosecution is pending to stop all further proceedings in the case in order that a prosecution for the offence in question may be instituted or continued at the instance of the State, and the court must, subject to subsection (2), make such an order if the private prosecutor or the person on whose behalf the private prosecutor so prosecutes consents thereto.

(2) When the Prosecutor-General intends to take over the prosecution from a private prosecutor, the Prosecutor-General must offer to pay to the private prosecutor all costs and expenses incurred by such prosecutor in connection with the private prosecution up to the date of the offer, and if the offer is accepted by the private prosecutor or the person on whose behalf such prosecutor so prosecutes, the court before which the private prosecution is pending must make an order giving effect to the agreement concluded between the parties.

12. Costs in respect of process

A private prosecutor, other than a prosecutor contemplated in section 6, must in respect of any process relating to the private prosecution, pay to the clerk of the court in question or the registrar the fees prescribed under the rules of court for the service or execution of such process.

13. Costs of private prosecution

(1) The costs and expenses of a private prosecution must, subject to subsection (2), be paid by the private prosecutor.

(2) The court may order a person convicted upon a private prosecution, other than a prosecution instituted and conducted under section 6, to pay the costs and expenses of the private prosecution, including the costs of any appeal against such conviction or any sentence, but where such a private prosecution is instituted after the grant of a certificate by the Prosecutor-General that he or she declines to prosecute and the accused is convicted, the court may order the costs and expenses of the private prosecution, including the costs of an appeal arising from such prosecution, to be paid by the State.

14. Costs of accused in private prosecution

(1) Where in a private prosecution, other than a prosecution contemplated in section 6, the charge against the accused is dismissed or the accused is acquitted or a decision in favour of the accused is given on appeal, the court dismissing the charge or acquitting the accused or deciding in favour of the accused on appeal, may order the private prosecutor to pay to the accused the whole or part of the costs and expenses incurred by the accused in connection with the prosecution or appeal.

(2) Where the court is of the opinion that a private prosecution was unfounded and vexatious, it must award to the accused at his or her request such costs and expenses incurred by the accused in connection with the prosecution as it may consider fit.

15. Taxation of costs

(1) Section 326(4) applies in respect of any order or award made under section 13 or 14 in connection with costs and expenses.

(2) Costs awarded under section 13 or 14 must be taxed according to the scale in civil cases of the court that makes the award or, if the award is made by a divisional court, according to the scale in civil cases of a district court, or, where there is more than one such scale, according to the scale determined by the court making the award.

16. Prescription of right to institute prosecution

(1) The right to institute a prosecution for any offence, other than the offences of -

(a) treason;

(b) murder;

(c) rape, whether under a statute or at common law;

(d) kidnapping;

(e) childstealing; or

(f) robbery, when committed in any of the circumstances contemplated in Part I of Schedule 5,

lapses, unless some other period is expressly provided by law, after the expiration of a period of 20 years from the time when the offence was committed.

(2) The right to institute a prosecution for any of the offences mentioned in subsection (1) is not barred by the lapse of time.

Chapter 3
LEGAL REPRESENTATION OF ACCUSED AND OF VICTIM IN CRIMINAL PROCEEDINGS

17. Legal representation of accused

Pursuant to Article 12(1)(e) of the Namibian Constitution, an accused has the right to be represented by a legal practitioner of his or her choice before the commencement of and during his or her trial in any criminal proceedings.

18. Legal representation of victim

(1) A victim of an offence against the person or against property may appoint at his or her own expense a legal practitioner of his or her choice to represent in general the interests of the victim at the trial of the accused for the offence that caused injury, damage or loss to the victim, and in that capacity, but subject to subsection (2), to -

(a) hold a watching brief at that trial on behalf of the victim, without any right to adduce evidence or to cross-examine witnesses or to address the court, except when bringing an application contemplated in paragraph (c) and then only for that purpose;

(b) be available to consult with and advise, where necessary, the prosecutor and the victim; and

(c) apply, immediately after the conviction of the accused, to the court for the award of compensation to the victim in terms of section 326.

(2) A legal practitioner appointed under subsection (1) must, at the beginning of the trial, identify himself or herself to the court trying the accused and indicate to the court that he or she intends applying on behalf of the victim for compensation in terms of section 326.

Chapter 4
SEARCH WARRANTS, ENTERING OF PREMISES, SEIZURE, FORFEITURE AND DISPOSAL OF PROPERTY CONNECTED WITH OFFENCES

19. Saving as to certain powers conferred by other laws

This Chapter does not derogate from any power conferred by any other law to enter any premises or to search any person, container or premises or to seize any matter, to declare any matter forfeited or to dispose of any matter.

20. State may seize certain articles

The State may, in accordance with this Chapter, seize anything (in this Chapter referred to as an article) -

(a) which is concerned in or is on reasonable grounds believed to be concerned in the commission or suspected commission of an offence, whether within Namibia or elsewhere;

(b) which may afford evidence of the commission or suspected commission of an offence, whether within Namibia or elsewhere;

(c) which is intended to be used or is on reasonable grounds believed to be intended to be used in the commission of an offence; or

(d) which was used for escape after the commission of an offence.

21. Article to be seized under search warrant

(1) Subject to sections 22(1), 24(1) and 25, an article referred to in section 20 may be seized only by virtue of a search warrant issued -

(a) by a district magistrate or justice of the peace, if it appears to that magistrate or justice of the peace from information on oath that there are reasonable grounds for believing that any such article is in the possession or under the control of or on any person or on or at any premises within his or her area of jurisdiction; or

(b) by a judge or magistrate presiding at criminal proceedings, if it appears to that judge or magistrate that any such article in the possession or under the control of any person or on or at any premises is required in evidence at such proceedings.

(2) A search warrant issued under subsection (1) must require a member of the police to seize the article in question and must to that end authorize such member to search any person identified in the warrant, or to enter and search any premises identified in the warrant and to search any person found on or at such premises.

(3) (a) A search warrant must be executed by day, unless the person issuing the warrant in writing authorizes the execution thereof by night.

(b) A search warrant may be issued on any day and is of force until it is executed or is cancelled by the person who issued it or, if that person is not available, by a person with like authority.

(4) A member of the police executing a warrant under this section or section 25 must, after such execution, hand to any person whose rights in respect of any search or article seized under the warrant have been affected a copy of the warrant and, if any article is so seized, an inventory of articles seized.

(5) To the extent that subsection (2) authorizes the interference with a person's fundamental right to privacy by conducting a search thereunder, such interference is authorized only on the grounds of the prevention of crime and disorder and the protection of the rights of others as contemplated in Article 13(1) of the Namibian Constitution.

22. Circumstances in which article may be seized without search warrant

(1) A member of the police may without a search warrant search any person or container or premises for the purpose of seizing any article referred to in section 20 -

(a) if the person concerned consents to the search for and the seizure of the article in question, or if the person who may consent to the search of the container or premises consents to the search and the seizure of the article in question; or

(b) if such member on reasonable grounds believes -

(i) that a search warrant will be issued to him or her under paragraph (a) of section 21(1) if he or she applies for such warrant; and

(ii) that the delay in obtaining a search warrant would defeat the object of the search.

(2) To the extent that subsection (1) authorizes the interference with a person's fundamental right to privacy by conducting a search thereunder, such interference is authorized only on the grounds of the prevention of crime and disorder and the protection of the rights of others as contemplated in Article 13(1) of the Namibian Constitution.

23. Search of arrested person and seizure of article

(1) On the arrest of any person, the person making the arrest may -

(a) if such person is a peace officer, search the person arrested and seize any article referred to in section 20 that is found in the possession of or in the custody or under the control of the person arrested, and where such peace officer is not a member of the police, that peace officer must immediately deliver any such article to a member of the police; or

(b) if such person is not a peace officer, seize any article referred to in section 20 that is in the possession of or in the custody or under the control of the person arrested and must immediately deliver any such article to a member of the police.

(2) On the arrest of any person, the person making the arrest may place in safe custody any object found on the person arrested and which is capable of being used to cause bodily harm to himself or herself or to others.

(3) To the extent that subsection (1) authorizes the interference with a person's fundamental right to privacy by conducting a search thereunder, such interference is authorized only on the grounds of the prevention of crime and disorder and the protection of the rights of others as contemplated in Article 13(1) of the Namibian Constitution.

24. Search of premises

(1) Any person who is lawfully in charge or occupation of any premises and who reasonably suspects that stolen stock or produce, as defined in any law relating to the theft of stock or produce, is on or in the premises in question, or that any article has been placed thereon or therein or is in the custody or possession of any person on or in such premises in contravention of any law relating to intoxicating liquor, dependence-producing drugs or substances, arms and ammunition or explosives, may at any time, if a member of the police is not readily available, enter such premises for the purpose of searching that premises and any person thereon or therein, and if any such stock, produce or article is found, that person must take possession thereof and immediately deliver it to a member of the police.

(2) To the extent that subsection (1) authorizes the interference with a person's fundamental right to privacy by conducting a search thereunder, such interference is authorized only on the grounds of the prevention of crime and disorder and the protection of the rights of others as contemplated in Article 13(1) of the Namibian Constitution.

25. Power of police to enter premises in connection with State security or any offence

(1) If it appears to a district magistrate or justice of the peace from information on oath that there are reasonable grounds for believing -

(a) that the security of Namibia or the maintenance of law and order is likely to be endangered by or in consequence of any meeting that is being held or is to be held in or on any premises within his or her area of jurisdiction; or

(b) that an offence has been or is being or is likely to be committed or that preparations or arrangements for the commission of any offence are being or are likely to be made in or on any premises within his or her area of jurisdiction,

he or she may issue a warrant authorizing a member of the police to enter the premises in question at any reasonable time for the purpose -

(i) of carrying out such investigations and of taking such steps as the member of the police may consider necessary for the preservation of the security of Namibia or for the maintenance of law and order or for the prevention of any offence;

(ii) of searching the premises or any person in or on the premises for any article referred to in section 20 that the member of the police on reasonable grounds suspects to be in or on or at the premises or on that person; and

(iii) of seizing any such article.

(2) A warrant under subsection (1) may be issued on any day and is of force until it is executed or is cancelled by the person who issued it or, if that person is not available, by a person with like authority.

(3) A member of the police may without warrant act under paragraphs (i), (ii) and (iii) of subsection (1) if such member on reasonable grounds believes -

(a) that a warrant will be issued to him or her under paragraph (a) or (b) of subsection (1) if he or she applies for such warrant; and

(b) that the delay in obtaining a search warrant would defeat the object of the search.

(4) To the extent that subsection (1) authorizes the interference with a person's fundamental right to privacy by conducting a search thereunder, such interference is authorized only on the grounds of the preservation of the security of Namibia, the prevention of crime and disorder and the protection of the rights of others as contemplated in Article 13(1) of the Namibian Constitution.

26. Entering of premises for purposes of obtaining evidence

Where a member of the police in the investigation of an offence or alleged offence reasonably suspects that a person who may furnish information with reference to any such offence is on any premises, the member of the police may without warrant enter that premises for the purpose of questioning that person and obtaining a statement from him or her, but the member of the police may not enter any private dwelling without the consent of the occupier thereof.

27. Resistance against entry or search

(1) A member of the police who may lawfully search any person or premises or who may enter any premises under section 26, may, subject to subsection (2), use such force as may be reasonably necessary to overcome any resistance against such search or against such entry of the premises in question, including the breaking of any door or window of that premises.

(2) A member of the police who intends using force under subsection (1) must first audibly demand admission to the premises and notify the purpose for which he or she seeks to enter that premises.

(3) Subsection (2) does not apply where the member of the police referred to therein is on reasonable grounds of the opinion that any article that is the subject of the search may be destroyed or disposed of if that subsection is first complied with.

28. Wrongful search an offence, and award of compensation

(1) A member of the police -

(a) who acts contrary to the authority of a search warrant issued under section 21 or a warrant issued under section 25(1); or

(b) who, without being authorized thereto under this Chapter -

(i) searches any person or container or premises or seizes or detains any article; or

(ii) performs any act contemplated in paragraph (i), (ii) or (iii) of section 25(1),

commits an offence and is liable on conviction to a fine not exceeding N$2 000 or to imprisonment for a period not exceeding six months, and is in addition subject to an award under subsection (2).

(2) Where a person falsely gives information on oath under section 21(1) or 25(1) and a search warrant or a warrant is issued and executed on such information, and that person is in consequence of such false information convicted of perjury, the court convicting that person may, on the application of a person who has suffered damage in consequence of the unlawful entry, search or seizure or on the application of the prosecutor acting on the instructions of that person, award compensation in respect of such damage, whereupon section 326 applies with the necessary changes in respect of the award.

29. Search to be conducted in decent and orderly manner

(1) A search of any person or premises must be conducted with strict regard to decency and order, including the protection of a person's right to respect for human dignity and to privacy, and the person of someone may, subject to subsection (2), be searched by a person of the same sex only.

(2) If a search of any person is to be conducted by the police and no member of the police of the same sex is available, the search may be made by any other person of the same sex designated for that purpose by a member of the police.

30. Disposal by member of police of article after seizure

A member of the police who seizes an article referred to in section 20 or to whom any such article is under this Chapter delivered -

(a) may, if the article is perishable, with due regard to the interests of the persons concerned, dispose of the article in such a manner as the circumstances may require; or

(b) may, if the article is stolen property or property suspected to be stolen, with the consent of the person from whom it was seized, deliver the article to the person from whom, in the opinion of the member of the police, it was stolen, and must warn that person to hold the article available for production at any resultant criminal proceedings, if required to do so; or

(c) must, if the article is not disposed of or delivered under paragraph (a) or (b), give it a distinctive identification mark and retain it in police custody or make such other arrangement with regard to the custody thereof as the circumstances may require.

31. Disposal of article where no criminal proceedings are instituted or where it is not required for criminal proceedings

(1) (a) If no criminal proceedings are instituted in connection with any article referred to in section 30(c) or if it appears that such article is not required at the trial for purposes of evidence or for purposes of an order of court, the article must be returned to the person from whom it was seized, if that person may lawfully possess the article, or, if that person may not lawfully possess the article, to the person who may lawfully possess it.

(b) If no person may lawfully possess the article referred to in paragraph (a) or if the member of the police charged with the investigation reasonably does not know of any person who may lawfully possess such article, the article must be forfeited to the State.

(2) The person who may lawfully possess the article referred to in subsection (1)(a) must be notified by registered post at such person's last-known address that he or she may take possession of the article, and if that person fails to take delivery of the article within 30 days from the date of such notification, the article must be forfeited to the State.

32. Disposal of article where criminal proceedings are instituted and admission of guilt fine is paid

(1) If criminal proceedings are instituted in connection with any article referred to in section 30(c) and the accused admits his or her guilt in accordance with section 59, the article must be returned to the

person from whom it was seized, if that person may lawfully possess the article, or, if that person may not lawfully possess the article, to the person who may lawfully possess it, whereupon section 31(2) applies to any such person.

(2) If no person may lawfully possess the article referred to in subsection (1) or if the member of the police charged with the investigation reasonably does not know of any person who may lawfully possess such article, the article must be forfeited to the State.

33. Article to be transferred to court for purposes of trial

(1) If criminal proceedings are instituted in connection with any article referred to in section 30(c) and such article is required at the trial for purposes of evidence or for purposes of an order of court, the member of the police charged with the investigation must, subject to subsection (2), deliver the article to the clerk of the court where the criminal proceedings are instituted or, if such proceedings are instituted in the High Court, to the registrar.

(2) If it is by reason of the nature, bulk or value of the article in question impracticable or undesirable that the article should be delivered to the clerk of the court or the registrar in terms of subsection (1), the clerk of the court or the registrar may require the member of the police charged with the investigation to retain the article in police custody or in such other custody as may be determined in terms of section 30(c).

(3) (a) The clerk of the court or the registrar must place any article received under subsection (1) in safe custody, which may include the deposit of money in an official banking account if the money is not required at the trial in question for the purposes of evidence.

(b) Where the trial in question is to be conducted in a court other than a court of which that clerk is the clerk of the court, the clerk of the court must -

(i) transfer any article received under subsection (1), other than money deposited in a banking account under paragraph (a), to the clerk of the court in which the trial is to be conducted or, if the trial is to be conducted in the High Court, to the registrar, and the clerk of the court or the registrar must place the article so received in safe custody;

(ii) in the case of an article retained in police custody or in some other custody in accordance with subsection (2) or in the case of money deposited in a banking account under paragraph (a), advise the clerk of such other court or the registrar of the fact of such custody or such deposit.

34. Disposal of article after commencement of criminal proceedings

(1) The judge or magistrate presiding at criminal proceedings must, at the conclusion of such proceedings but subject to this Act or any other law under which any matter must or may be forfeited, make an order that any article referred to in section 33 -

(a) be returned to the person from whom it was seized, if that person may lawfully possess the article; or

(b) if the person from whom it was seized is not entitled to the article or may not lawfully possess the article, be returned to any other person entitled thereto, if that person may lawfully possess the article; or

(c) if no person is entitled to the article or if no person may lawfully possess the article or, if the person who is entitled thereto cannot be traced or is unknown, be forfeited to the State.

(2) The court may, for the purpose of any order under subsection (1), hear such additional evidence, whether by affidavit or orally, as it may consider fit.

(3) If the judge or magistrate presiding at criminal proceedings does not, at the conclusion of such proceedings, make an order under subsection (1), that judge or magistrate or, if he or she is not available, any other judge or magistrate of the court in question, may at any time after the

conclusion of the proceedings make any such order, and for that purpose hear such additional evidence, whether by affidavit or orally, as he or she may consider fit.

(4) Any order made under subsection (1) or (3) may be suspended pending any appeal or review.

(5) Where the court makes an order under subsection (1)(a) or (b), section 31(2) applies with the necessary changes to the person in whose favour such order is made.

(6) If the circumstances so require or if the criminal proceedings in question cannot for any reason be concluded, the presiding judge or magistrate may make any order referred to in subsection (1)(a), (b) or (c) at any stage of the proceedings.

35. Forfeiture of article to State

(1) Subject to subsection (2), a court that convicts an accused of an offence may, without notice to any person, declare -

(a) any weapon, instrument or other article by means whereof the offence in question was committed or that was used in the commission of the offence; or

(b) if the conviction is in respect of an offence referred to in Schedule 2, any vehicle, container or other article that was used for the purpose of or in connection with the commission of the offence in question or for the conveyance or removal of the stolen property in question,

and that was seized under this Act, forfeited to the State.

(2) A forfeiture under subsection (1) does not affect any right referred to in subsection (5)(a)(i) or (ii), if it is proved that the person who claims such right did not know that the weapon, instrument, vehicle, container or other article in question was being used or would be used for the purpose of or in connection with the commission of the offence in question or for the conveyance or removal of the stolen property in question, or that he or she could not prevent such use, and that he or she may lawfully possess such weapon, instrument, vehicle, container or other article.

(3) A court that convicts an accused or that finds an accused not guilty of an offence, must declare forfeited to the State any article seized under this Act that is forged or counterfeited or that cannot lawfully be possessed by any person.

(4) Any weapon, instrument, vehicle, container or other article declared forfeited under subsection (1) must be kept for a period of 30 days with effect from the date of declaration of forfeiture or, if an application is within that period received from any person for the determination of any right referred to in subsection (5)(a)(i) or (ii), until a final decision in respect of the application has been given.

(5) (a) The court in question or, if the judge or magistrate concerned is not available, any judge or magistrate of the court in question, may at any time within a period of three years with effect from the date of declaration of forfeiture, on the application of any person, other than the accused, who claims that any right referred to in subparagraph (i) or (ii) is vested in him or her, inquire into and determine any such right, and if the court finds that the weapon, instrument, vehicle, container or other article in question -

(i) is the property of that person, the court must set aside the declaration of forfeiture and direct that the weapon, instrument, vehicle, container or other article in question be returned to that person, or, if the State has disposed of such weapon, instrument, vehicle, container or other article, direct that that person be compensated by the State to the extent to which the State has been enriched by the disposal;

(ii) was sold to the accused in pursuance of a contract under which the accused becomes the owner of the weapon, instrument, vehicle, container or other article in question on the payment of a stipulated price, whether by instalments or otherwise, and under which the seller becomes entitled to the return of such weapon, instrument, vehicle,

container or other article on default of payment of the stipulated price or any part thereof -

(aa) the court must direct that such weapon, instrument, vehicle, container or other article be sold by public auction and that the seller be paid out of the proceeds of the sale an amount equal to the value of his or her rights under the contract to that weapon, instrument, vehicle, container or other article, but not exceeding the proceeds of the sale; or

(bb) if the State has disposed of such weapon, instrument, vehicle, container or other article, the court must direct that the seller be likewise compensated by the State.

(b) If a determination by the court under paragraph (a) is adverse to the applicant, the applicant may appeal therefrom as if it were a conviction by the court making the determination, and that appeal may be heard either separately or jointly with an appeal against the conviction as a result whereof the declaration of forfeiture was made, or against a sentence imposed as a result of the conviction.

(c) When determining any rights under this subsection, the record of the criminal proceedings in which the declaration of forfeiture was made forms part of the relevant proceedings, and the court making the determination may hear such additional evidence, whether by affidavit or orally, as it may consider fit.

36. Disposal of article concerned in an offence committed outside Namibia

(1) Where an article is seized in connection with which -

(a) an offence was committed or is on reasonable grounds suspected to have been committed in a country other than Namibia;

(b) there are reasonable grounds for believing that it will afford evidence as to the commission in a country other than Namibia of any offence or that it was used for the purpose of or in connection with such commission of any offence,

the district magistrate within whose area of jurisdiction the article was seized may, on application and if satisfied that the offence in question is punishable in that other country by a fine of N$1 000 or more or by imprisonment for a period of 12 months or more, order the article so seized to be delivered to a member of a police force established in that country or to any other authorized representative of that country, who may thereupon remove the article from Namibia in accordance with any applicable law or any international agreement or arrangement to which Namibia is a party.

(2) When an article removed from Namibia under subsection (1) is returned to the district magistrate, or when that magistrate refuses to order that the article be delivered under that subsection, the article must be returned to the person from whose possession it was taken, unless that magistrate is authorized or required by law to dispose of it otherwise.

Chapter 5
QUESTIONING OF CERTAIN PERSONS IN CONNECTION WITH CRIME, ASCERTAINMENT OF BODILY FEATURES OF ACCUSED AND VICTIM IMPACT STATEMENT

37. Power and duty of police to question certain persons in connection with crime, and warning explanations to be given in respect thereof

(1) Without derogating from Article 12(1)(f) of the Namibian Constitution, a member of the police investigating an offence or alleged offence has the power and the duty to question -

(a) subject to section 26, any person who is likely to give material or relevant information as to any such offence, whether or not it is known by whom the offence was committed or allegedly committed;

(b) subject to subsections (2) and (3), any person, whether or not arrested or detained in custody or charged, who is reasonably suspected of having committed or having attempted to commit the offence or alleged offence under investigation.

(2) A member of the police conducting an investigation under subsection (1) must, before questioning a person reasonably suspected of having committed an offence, give a warning explanation substantially in the following form to that person:

(a) That the member of the police is investigating an offence or alleged offence, and the nature thereof;

(b) that the purpose of the investigation is to attempt to establish the truth and to establish whether an offence has in fact been committed and, if so, by whom and under what circumstances;

(c) that the member of the police would welcome any assistance that that person can give to establish the truth and to bring the investigation to a speedy conclusion;

(d) that the person to be questioned is a suspect in respect of the offence under investigation and, where applicable, that the member of the police is in possession of evidence under oath indicating that that person has committed the offence;

(e) that the person to be questioned not only has the right to remain silent but also has the right to answer questions put to him or her or to give an explanation of his or her conduct or of his or her defence, if any;

(f) that the person to be questioned has the right to consult a legal practitioner of his or her own choice before deciding whether or not to remain silent or to answer questions or give an explanation of his or her conduct or defence and that the legal practitioner is entitled to be present during the questioning;

(g) that the warning explanation and any statement made in response thereto will be recorded in writing or mechanically and a certified copy of such recording be made available to that person in the circumstances contemplated in section 359; and

(h) that the warning explanation and any statement made in response thereto may be used in evidence in any criminal proceedings instituted against that person in respect of the offence in question, whether it be against or in favour of that person.

(3) The provisions of subsection (2) apply, to the extent that they can with the necessary changes be applied, to a person charged with an offence, but before questioning the person so charged the member of the police conducting the investigation must warn that person that he or she is charged with the offence in respect of which he or she is to be questioned.

(4) A warning explanation given under subsection (2) or (3) and any statement made in response thereto must -

(a) be in writing or be reduced to writing; or

(b) where, by reason of the urgency of the matter or any other just cause, paragraph (a) cannot at the relevant time be complied with, be recorded in writing by the member of the police as soon as practicable after the questioning of the person suspected or accused of having committed the offence under investigation, and such member must then -

(i) give the person concerned an opportunity to comment thereon; and

(ii) record in writing any comments made under subparagraph (i); or

(c) where mechanical means are available, be mechanically recorded and as soon as practicable thereafter be transcribed.

38. Powers in respect of prints and bodily appearance of accused

(1) Subject to subsection (2), a member of the police may -

(a) take the fingerprints, palm-prints or footprints or cause any such prints to be taken -

(i) of any person arrested on any charge;

(ii) of any such person released on bail under Chapter 11 or on warning under section 78;

(iii) of any person arrested in respect of any matter referred to in paragraph (m), (n) or (o) of section 42(1);

(iv) of any person on whom a summons has been served in respect of any offence referred to in Schedule 1 or any offence with reference to which the suspension, cancellation or endorsement of any licence or permit or the disqualification in respect of any licence or permit is permissible or prescribed; or

(v) of any person convicted by a court;

(b) make a person referred to in paragraph (a)(i) or (ii) available or cause such person to be made available for identification in such condition, position or apparel as the member of the police may determine;

(c) take such steps or cause such steps to be taken (including the taking of a blood or other bodily fluid sample, or a hair, skin, handwriting or voice sample, or nail clippings or scrapings) as the member of the police may consider necessary to ascertain whether the body of a person referred to in paragraph (a)(i) or (ii) has any mark, characteristic or distinguishing feature or shows any condition or appearance, but no member of the police may personally -

(i) take any blood or other bodily fluid sample of such person; or

(ii) make any examination of the body of such person where that person is not of the same sex as the member of the police intending to make such examination;

(d) take a photograph or cause a photograph to be taken of a person referred to in paragraph (a)(i) or (ii).

(2) The fingerprints and palm-prints of a person arrested on a charge of having committed any offence referred to in Schedule 1 must be taken or caused to be taken by the member of the police charged with the investigation as soon as practicable after the arrest or detention of that person and the fingerprints and palm-prints so taken must be processed without delay to ascertain whether that person has any previous convictions or is sought elsewhere for any other offence.

(3) (a) A medical officer of any prison or a district surgeon must, and any other registered medical practitioner or registered nurse may, if requested thereto by a member of the police acting in the execution of his or her duties, take such steps (including the taking of a blood or other bodily fluid sample, or a hair or skin sample, or nail clippings or scrapings) as may be considered necessary to ascertain whether the body of a person referred to in paragraph (a) (i) or (ii) of subsection (1) has any mark, characteristic or distinguishing feature or shows any condition or appearance, and may in taking any such steps be assisted where necessary by a member of the police of the same sex as that person.

(b) If a registered medical practitioner or registered nurse attached to any hospital is on reasonable grounds of the opinion that the contents of the blood of any person admitted to the hospital for medical attention or treatment may be relevant at any later criminal proceedings, the medical practitioner or registered nurse may take a blood sample of that person or cause such sample to be taken.

(c) Nothing in paragraph (a) contained is to be construed as preventing a medical officer of any prison or a district surgeon from taking any steps contemplated in that paragraph without having been requested thereto by a member of the police.

(4) A court before which criminal proceedings are pending may -

(a) in any case in which a member of the police is not empowered under subsection (1) to take fingerprints, palm-prints or footprints or to take steps to ascertain whether the body of a person has any mark, characteristic or distinguishing feature or shows any condition or appearance, order that any such prints be taken of an accused at such proceedings or that the steps (including the taking of a blood or other bodily fluid sample, or a hair, skin, handwriting or voice sample, or nail clippings or scrapings) be taken which the court may consider necessary to ascertain whether the body of an accused at such proceedings has any mark, characteristic or distinguishing feature or shows any condition or appearance;

(b) order that the steps, including the taking of a blood or other bodily fluid sample, be taken which the court may consider necessary to ascertain the state of health of an accused at such proceedings.

(5) A court that has convicted a person of any offence or that has concluded a preparatory examination against a person on any charge, or a district magistrate, may order that the fingerprints, palm-prints or footprints or a photograph of that person be taken.

(6) Fingerprints, palm-prints or footprints, photographs and the record of steps taken under this section must be destroyed if the person concerned is found not guilty at his or her trial or if his or her conviction is set aside by a superior court or if he or she is discharged at a preparatory examination or if no criminal proceedings with reference to which any such prints or photographs were taken or such record was made are instituted against the person concerned in any court or if the prosecution declines to prosecute that person.

(7) A person who, without sufficient cause, refuses or fails to comply with -

(a) a request made under subsection (1) by a member of the police to submit to -

(i) the taking of fingerprints, palm-prints or footprints or a photograph;

(ii) an identification parade; or

(iii) any other steps to be lawfully taken under paragraph (c) of that subsection;

(b) a request made under subsection (3)(a) by any person referred to therein to submit to any steps to be lawfully taken under that subsection; or

(c) an order made under subsection (4)(a) or (b) or (5),

commits an offence and is liable on conviction to a fine not exceeding N$20 000 or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment.

39. Victim impact statement

(1) The member of the police charged with an investigation, or any other member of the police charged with such duty, must obtain a victim impact statement in respect of every victim of an offence against the person or against property and file the statement so obtained with the prosecuting authority in such manner and within such period, but not later than the date of commencement of the trial of the accused, as the Prosecutor-General may determine.

(2) If for whatever reason a victim is incapable of preparing a victim impact statement -

(a) the victim's legal practitioner or the spouse or any dependant or other relative of the victim or, where the victim is a minor, his or her parent or guardian, may prepare the victim impact statement on behalf of the victim; and

(b) where no person referred to in paragraph (a) is available to prepare the victim impact statement, any member of the police referred to in subsection (1) must, with the assistance of -

(i) the victim; and

(ii) where necessary, the Prosecutor-General or any public prosecutor designated by the Prosecutor-General for that purpose or the public prosecutor conducting the prosecution of the accused concerned or any other prosecutor attached to the same court,

prepare the victim impact statement on behalf of the victim.

(3) A victim impact statement must -

(a) be prepared in writing substantially in the form prescribed by Schedule 8;

(b) contain full particulars of any injury, damage or loss suffered by the victim concerned, including the amount of compensation to be applied for in respect thereof; and

(c) be sworn to or affirmed before a commissioner of oaths that the contents thereof are true.

(4) (a) A victim impact statement is, subject to paragraph (b), on its mere production at criminal proceedings admissible in evidence to the same extent as oral evidence to the same effect by the victim concerned, but only for the purposes of -

(i) informing the court, without derogating from section 305, as to the proper sentence to be passed;

(ii) applying for the award of compensation to a victim in terms of section 326.

(b) A victim impact statement -

(i) complying with the requirements of subsection (3); and

(ii) of which a copy, together with a notification that such statement will be tendered in evidence at the trial of the accused but that the accused may dispute the correctness of any fact contained therein before it being so tendered, was handed or delivered to the accused or his or her legal practitioner a reasonable time before the statement is to be tendered in evidence,

may, on the mere production thereof at criminal proceedings, be admitted in evidence to the extent that the facts contained therein are not disputed by the accused, and the court may then consider any fact or facts not so placed in issue to have been sufficiently proved at such proceedings.

(c) If a victim impact statement is admitted in evidence only to the extent that the facts contained therein are not disputed by the accused, oral evidence may be adduced to prove the fact or facts placed in issue.

(d) Notwithstanding that a victim impact statement may be admitted or partly admitted in evidence under this subsection, the court may of its own motion, and must on the application of any party to the criminal proceedings in question, cause the victim concerned or other person by whom such statement was prepared to be subpoenaed to give oral evidence before the court regarding any fact, whether or not disputed, contained in the statement.

Chapter 6
METHODS OF SECURING ATTENDANCE OF ACCUSED IN COURT

40. Methods of securing attendance of accused in court

The methods of securing the attendance of an accused in court for the purposes of his or her trial are arrest, summons, written notice and indictment in accordance with the relevant provisions of this Act.

Chapter 7
ARREST

41. Manner and effect of arrest

(1) An arrest is effected with or without a warrant and, unless the person to be arrested submits to custody, by actually touching that person's body or, if the circumstances so require, by forcibly confining that person's body.

(2) The person effecting an arrest must, at the time of effecting the arrest or immediately thereafter, inform the arrested person of the cause of the arrest or, in the case of an arrest effected by virtue of a warrant, on demand of the person arrested, hand that person a copy of the warrant.

(3) The effect of an arrest is that the person arrested is in lawful custody and that that person is detained in custody until he or she is lawfully discharged or released from custody.

(4) To the extent that this Chapter authorizes the deprivation of the personal liberty of a person by making an arrest thereunder, such deprivation is authorized only on the grounds of the procedures established under this Chapter pursuant to Article 7 of the Namibian Constitution.

42. Arrest by peace officer without warrant

(1) A peace officer may without warrant arrest any person -

(a) who commits or attempts to commit any offence in his or her presence;

(b) whom the peace officer reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody;

(c) who has escaped or who attempts to escape from lawful custody;

(d) who has in his or her possession any implement of housebreaking and who is unable to account for such possession to the satisfaction of the peace officer;

(e) who is found in possession of anything that the peace officer reasonably suspects to be stolen property or property dishonestly obtained, and whom the peace officer reasonably suspects of having committed an offence with respect to such thing;

(f) who is found at any place by night in circumstances that afford reasonable grounds for believing that that person has committed or is about to commit an offence;

(g) who is reasonably suspected of being or having been in unlawful possession of stock or produce as defined in any law relating to the theft of stock or produce;

(h) who is reasonably suspected of committing or of having committed an offence under any law governing the making, supply, possession or conveyance of intoxicating liquor or of dependence-producing drugs or substances or the possession or disposal of arms or ammunition;

(i) who willfully obstructs the peace officer in the execution of his or her duty;

(j) who has been concerned in or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists that that person has been concerned in any act committed outside Namibia which, if committed in Namibia, would have been punishable as an offence, and for which that person is, under any law relating to extradition or fugitive offenders, liable to be arrested or detained in custody in Namibia;

(k) who is reasonably suspected of being a prohibited immigrant in Namibia in contravention of any law regulating entry into or residence in Namibia;

(l) who is reasonably suspected of being a deserter from the Namibian Defence Force;

(m) who is reasonably suspected of having failed to observe any condition imposed in postponing the passing of sentence or in suspending the operation of any sentence under this Act;

(n) who is reasonably suspected of having failed to pay any fine or part thereof on the date fixed by order of court under this Act; or

(o) who fails to surrender himself or herself in order that he or she may undergo periodical imprisonment when and where he or she is required to do so under an order of court or any law relating to prisons.

(2) If a person may be arrested under any other law without warrant and subject to conditions or the existence of circumstances set out in that law, any peace officer may without warrant arrest such person subject to such conditions or circumstances.

43. Name and address of certain persons and power of arrest by peace officer without warrant

(1) A peace officer may call upon any person -

(a) whom the peace officer has power to arrest;

(b) who is reasonably suspected of having committed or having attempted to commit an offence;

(c) who, in the opinion of the peace officer, may be able to give evidence in regard to the commission or suspected commission of an offence,

to furnish the peace officer with his or her full name and address, and if that person fails to furnish his or her full name and address, the peace officer may immediately and without warrant arrest him or her, or, if that person furnishes to the peace officer a name or address which the peace officer reasonably suspects to be false, the peace officer may arrest that person without warrant and detain him or her for a period not exceeding 12 hours until the name or address has been verified.

(2) A person who, when called upon under subsection (1) to furnish his or her name and address, fails to do so or furnishes a false or incorrect name and address, commits an offence and is liable on conviction to a fine not exceeding N$1 000 or to imprisonment for a period not exceeding three months.

44. Arrest by private person without warrant

(1) A private person may without warrant arrest any person -

(a) who commits or attempts to commit in his or her presence or whom such private person reasonably suspects of having committed an offence referred to in Schedule 1;

(b) whom such private person reasonably believes to have committed an offence and to be escaping from and to be immediately pursued by a person whom that private person reasonably believes to have authority to arrest that person for that offence;

(c) whom such private person is by law authorized to arrest without warrant in respect of any offence specified in that law;

(d) whom such private person sees engaged in an affray.

(2) A private person who may without warrant arrest any person under subsection (1)(a) may immediately pursue that person, and any other private person to whom the purpose of the pursuit has been made known, may join and assist therein.

(3) The owner, lawful occupier or person in charge of property on or in respect of which any person is found committing an offence, and any other person authorized thereto by that owner, occupier or person in charge, may without warrant arrest the person so found.

45. Warrant of arrest may be issued by district magistrate or justice of the peace

(1) A district magistrate or justice of the peace may issue a warrant for the arrest of a person on the written application of a member of the police of the rank of commissioned officer -

(a) which sets out the offence alleged to have been committed;

(b) which alleges that the offence in question was committed within the area of jurisdiction of the district magistrate or, in the case of a justice of the peace, within the area of jurisdiction of the district magistrate within whose district or area application is made to the justice of the peace for the warrant of arrest, or where the offence was not committed within that area of jurisdiction, which alleges that the person in respect of whom the application is made, is known or is on reasonable grounds suspected to be within that area of jurisdiction; and

(c) which states that from information taken on oath there is a reasonable suspicion that the person in respect of whom the warrant of arrest is applied for has committed the alleged offence.

(2) A warrant of arrest issued under this section must direct that the person described in the warrant be arrested by a peace officer in respect of the offence mentioned in the warrant and that that person be brought before a magistrate's court in accordance with section 52.

(3) A warrant of arrest may be issued on any day and remains in force until it is cancelled by the person who issued it or, if that person is not available, by any person with like authority, or until it is executed.

46. Execution of warrants

A warrant of arrest issued under this Act may be executed by a peace officer, and the peace officer executing the warrant must do so in accordance with the terms thereof.

47. Arrest on facsimile or telegraphic authority

(1) A facsimile or telegraphic or similar written or printed communication from a district magistrate, justice of the peace or other peace officer stating that a warrant has been issued for the arrest of a person, is sufficient authority to any peace officer for the arrest and detention of that person.

(2) Section 52 applies in respect of an arrest effected under subsection (1).

48. Non-liability for wrongful arrest

(1) A person who is authorized to arrest another under a warrant of arrest or a communication under section 47 and who in the reasonable belief that he or she is arresting that person arrests another, is exempt from liability in respect of that wrongful arrest.

(2) A person who is called upon to assist in making an arrest as contemplated in subsection (1), or who is required to detain a person so arrested, and who reasonably believes that that person is the person whose arrest has been authorized by the warrant of arrest or the communication referred to in that subsection, is likewise exempt from liability in respect of that assistance or detention.

49. Private persons to assist in arrest when called upon

(1) Every resident of Namibia of an age not below 16 and not exceeding 60 years must, when called upon by a member of the police to do so, assist the member of the police -

(a) in arresting any person;

(b) in detaining any person so arrested.

(2) A person who, without sufficient cause, refuses or fails to assist a member of the police as provided in subsection (1), commits an offence and is liable on conviction to a fine not exceeding N$1 000 or to imprisonment for a period not exceeding three months.

(3) A private person who has incurred expenditure or suffered damage in the course of assisting a member of the police in making an arrest or detaining a person so arrested as contemplated in subsection (1), is entitled to reimbursement by the State of reasonable expenditure incurred or actual damage suffered by him or her in consequence of so assisting the member of the police.

50. Breaking open premises for purpose of arrest

(1) A person who may lawfully arrest another in respect of any offence and who knows or reasonably suspects such other person to be on any premises, may, if he or she first audibly demands entry into the premises in question and notifies the purpose for which he or she seeks entry and fails to gain entry, break open, enter and search that premises for the purpose of effecting the arrest.

(2) To the extent that subsection (1) authorizes the interference with a person's fundamental right to privacy by conducting a search thereunder, such interference is authorized only on the grounds of the preservation of the security of Namibia, the prevention of crime and disorder and the protection of the rights of others as contemplated in Article 13(1) of the Namibian Constitution.

51. Use of force in effecting arrest

(1) In this section -

"serious offence" means -

(a) treason;

(b) sedition;

(c) public violence;

(d) murder;

(e) rape, whether under a statute or at common law;

(f) assault, when a dangerous wound is inflicted;

(g) kidnapping;

(h) childstealing;

(i) robbery;

(j) housebreaking with the intent to commit an offence;

(k) escaping from lawful custody;

(l) any other offence involving the use of life threatening violence or the infliction or threatened infliction of grievous bodily harm; or

(m) an attempt to commit any offence mentioned in paragraphs (a) to (l);

"suspect" means a person who is liable to be arrested by a person authorized under this Act in respect of an offence committed or reasonably suspected of being or having been committed by the person so liable.

(2) If a person authorized under this Act to arrest or to assist in arresting another, attempts to arrest a suspect and the suspect -

(a) resists the attempt; or

(b) flees; or

(c) resists the attempt and flees,

when it is clear that an attempt to arrest him or her is being made, and the suspect cannot be arrested without the use of force, the person so authorized may, in order to effect the arrest but subject to subsection (3), use such force as may in the circumstances be reasonably necessary to overcome the resistance or to prevent the suspect from fleeing, but the force so used must be proportional to -

(i) the seriousness of the offence committed or reasonably suspected of being or having been committed by the suspect; and

(ii) the circumstances surrounding such resistance or fleeing.

(3) A person authorized under subsection (2) to use force in effecting an arrest, is justified in terms of this section in using force that is likely to cause death or grievous bodily harm to a suspect, only if the suspect -

(a) is to be arrested for a serious offence; and

(b) cannot be prevented by reasonable means in a less violent manner from fleeing.

(4) Notwithstanding section 42, a person who, under and in accordance with this section, used force in order to effect the arrest of a suspect, is not liable to be arrested or detained pending that person's trial on a charge arising from such use of force or the killing or injury of the suspect in the course of the attempted arrest if -

(a) that person raises the claim of lawfulness of his or her action at the earliest possible opportunity, gives a full explanation in writing of the facts and circumstances relating to the incident and gives his or her full cooperation to the member of the police investigating the incident; and

(b) there are no reasonable grounds for believing that the claim of lawfulness is false or does not constitute a sufficient defence or that that person did not act in the bona fide belief that the force used by him or her in effecting the arrest was lawful in the circumstances.

(5) Nothing in subsections (2) and (3) contained is to be construed as derogating from the right of a person attempting to arrest a suspect in any of the circumstances contemplated in those subsections -

(a) to act in self-defence or in the defence of another when necessary for the purpose of protecting himself or herself, or any person lawfully assisting him or her, or any other person from imminent or future death or grievous bodily harm;

(b) to raise the defence of self-defence or defence of another in conjunction with the justification provided for in subsection (2) or (3), if charged with an offence arising from the killing or injury of the suspect in the course of the attempted arrest.

52. Procedure after arrest

(1) In this section -

"court day" means a day on which the court in question normally sits as a court, and "ordinary court day" has a similar meaning;

"ordinary court hours" means the hours from 09:00 until 16:00 on a court day.

(2) (a) A person who is arrested with or without warrant for allegedly committing an offence, or for any other reason under this Act, must as soon as practicable be brought to a police station or, in the case of an arrest by warrant, to any other place that is expressly mentioned in the warrant.

(b) A person who is detained in custody as contemplated in paragraph (a) must, as soon as reasonably practicable, be informed of his or her right to institute bail proceedings.

(c) Subject to paragraph (d), if an arrested person referred to in paragraph (a) is not released by reason that -

(i) no charge is to be brought against the arrested person; or

(ii) bail is not granted to the arrested person under section 62,

the arrested person must be brought before a magistrate's court as soon as reasonably practicable, but not later than 48 hours after the arrest.

(d) If the period of 48 hours expires -

(i) outside ordinary court hours or on a day that is not an ordinary court day, the arrested person must be brought before a magistrate's court not later than the end of the first court day following the expiration of the period of 48 hours;

(ii) at a time when the arrested person is outside the area of jurisdiction of the magistrate's court to which he or she is being brought for the purposes of further detention and he or she is at such time in transit from a police station or other place of detention to that court, the period of 48 hours is deemed to expire at the end of the court day next succeeding the day on which the arrested person is brought within the area of jurisdiction of that court;

(iii) or will expire at, or if the time at which that period expires or is deemed to expire under subparagraph (i) or (ii) is or will be, a time when the arrested person cannot, because of his or her physical illness or other physical condition, be brought before a magistrate's court, the court before which the arrested person would, but for the illness or other condition, have been brought, may on application by the prosecutor, which, if not made before the expiration of the period of 48 hours, may be made at any time before, or on, the next succeeding court day, and in which the circumstances relating to the illness or other condition are set out, supported by a certificate of a registered medical practitioner, authorize in the absence of the arrested person that the arrested person be detained at a place specified by the court and for such period as the court may consider necessary so that he or she may recuperate and be brought before the court, and that court may, on like application, authorize that the arrested person be further detained at a place specified by the court and for such period as the court may consider necessary.

(3) The parent or guardian of an arrested person under the age of 18 years must, if it is known that the parent or guardian can be readily reached or can be traced without undue delay, be notified

immediately of the arrest of that person by the member of the police charged with the investigation of the case.

(4) The probation officer in whose area of jurisdiction the arrest of a person under the age of 18 years has taken place, must as soon as practicable thereafter be notified thereof by the member of the police charged with the investigation of the case, unless there is no probation officer in the area in question or that probation officer is not readily available.

(5) (a) At his or her first appearance in court a person contemplated in subsection (2)(a) who -

(i) was arrested for allegedly committing an offence must -

(aa) be informed by the court of the reason for his or her further detention; or

(bb) be charged and, subject to paragraph (b) and section 63, be entitled to apply to be released on bail,

and if the person so arrested is not so charged or informed of the reason for his or her further detention, that person must be released from detention; or

(ii) was arrested for any other reason under this Act than for an offence, is entitled to adjudication on the cause of his or her arrest.

(b) The magistrate's court before which a person is brought in terms of this subsection, may postpone any bail proceedings or bail application to any date or court for a period not exceeding seven days at a time, on the terms which the court may consider proper and which are not inconsistent with this Act, if -

(i) the court is of the opinion that it does not have sufficient information or evidence at its disposal to reach a decision on the bail application;

(ii) it appears to the court that it is necessary to provide the State with a reasonable opportunity to -

(aa) procure material evidence that may be lost if bail is granted; or

(bb) perform the functions referred to in section 38; or

(iii) it appears to the court that it is necessary in the interests of justice to do so.

(6) Subject to subsection (5), nothing in this section contained is to be construed as modifying the provisions of this Act or any other law whereby a person under detention may be released on bail or on warning or on a written notice to appear in court.

53. Escaping and aiding escaping before incarceration and from police-cells and lock-ups

(1) A person who escapes or attempts to escape from custody -

(a) after he or she has been lawfully arrested and before he or she has been lodged in a prison, police-cell or lock-up; or

(b) while he or she is lawfully detained in a police-cell or lock-up,

commits an offence and is liable on conviction to a fine not exceeding N$8 000 or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment.

(2) A person who -

(a) rescues or attempts to rescue from custody another person -

(i) after that person has been lawfully arrested and before that person has been lodged in a prison, police-cell or lock-up; or

(ii) while that person is lawfully detained in a police-cell or lock-up;

(b) in the circumstances contemplated in subparagraph (i) or (ii) of paragraph (a), aids the person so arrested or detained to escape or to attempt to escape from any such custody; or

(c) harbours or conceals or assists in harbouring or concealing a person who escapes from custody -

(i) after that person has been lawfully arrested and before that person has been lodged in a prison, police-cell or lock-up; or

(ii) while that person is lawfully detained in a police-cell or lock-up,

commits an offence and is liable on conviction to a fine not exceeding N$20 000 or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment.

54. Saving of other powers of arrest

Nothing in this Chapter contained relating to arrest is to be construed as removing or diminishing any authority expressly conferred by any other law to arrest, detain or put any restraint on any person.

55. Saving of civil rights and liabilities

Subject to sections 48 and 355, nothing in this Chapter contained relating to arrest is to be construed as removing or diminishing any civil right or liability of any person in respect of a wrongful or malicious arrest.

Chapter 8
SUMMONS

56. Summons as method of securing attendance of accused in magistrate's court

(1) Where the prosecution intends prosecuting an accused in respect of an offence and the accused is not in custody in respect of that offence and no warrant has been or is to be issued for the arrest of the accused for that offence, the prosecutor may secure the attendance of the accused for a summary trial in a magistrate's court having jurisdiction by drawing up the relevant charge and handing such charge, together with information relating to the name and, where known and where applicable, the residential address and occupation or status of the accused, to the clerk of the court who must -

(a) issue a summons containing the charge and the information handed to him or her by the prosecutor, and specifying the place, date and time for the appearance of the accused in court on that charge; and

(b) deliver such summons, together with so many copies thereof as there are accused to be summoned on the same charge, to a person empowered to serve a summons in criminal proceedings.

(2) (a) Except where otherwise expressly provided by any law, the summons must be served by a person referred to in subsection (1)(b) by delivering it to the person named therein or, if that person cannot be found, by delivering it at his or her residence or place of employment or business to a person apparently over the age of 16 years and apparently residing or employed there.

(b) A return by the person who served the summons that the service thereof has been effected in terms of paragraph (a) may, on the failure of the person concerned to attend the relevant proceedings, be handed in at such proceedings and is prima facie proof of the service.

(3) A summons under this section must be served on an accused so that the accused is in possession thereof at least 14 days (Saturdays, Sundays and public holidays excluded) before the date appointed for the trial.

57. Failure of accused to appear on summons

(1) An accused who is summoned under section 56 to appear at criminal proceedings and who fails to appear at the place and on the date and at the time specified in the summons or who fails to remain in attendance at such proceedings, commits an offence and is liable on conviction to the punishment prescribed by subsection (2).

(2) The court may, if satisfied from the return of service referred to in paragraph (b) of section 56(2) that the summons was served on the accused in terms of paragraph (a) of that section and that the accused has failed to appear at the place and on the date and at the time specified in the summons, or if satisfied that the accused has failed to remain in attendance at the proceedings in question, issue a warrant for the arrest, subject to subsection (3), of the accused and, when the accused is brought before the court, in a summary manner enquire into his or her failure so to appear or so to remain in attendance and, unless the accused satisfies the court that there is a reasonable possibility that his or her failure was not due to fault on his or her part, convict the accused of the offence referred to in subsection (1) and sentence him or her to a fine not exceeding N$2 000 or to imprisonment for a period not exceeding six months.

(3) Where a warrant is issued under subsection (2) for the arrest of an accused who has failed to appear in answer to the summons, the person executing the warrant -

(a) may, where it appears to that person that the accused received the summons in question and that the accused will appear in court in accordance with a warning under section 78; or

(b) must, where it appears to that person that the accused did not receive the summons in question or that the accused has paid an admission of guilt fine in terms of section 59 or that there are other grounds on which it appears that the failure of the accused to appear on the summons was not due to any fault on the part of the accused, for which purpose that person may require the accused to furnish an affidavit or affirmation,

release the accused on warning under section 78 in respect of the offence of failing to appear in answer to the summons, whereupon that section applies with the necessary changes in respect of that offence.

(4) (a) If, in any case in which a warrant of arrest is issued, it was permissible for the accused under section 59 to admit his or her guilt in respect of the summons on which he or she failed to appear and to pay a fine in respect thereof without appearing in court, and the accused is arrested under that warrant in the area of jurisdiction of a district court other than the district court that issued the warrant of arrest, such other district court may, notwithstanding anything to the contrary in this Act or any other law contained, and if satisfied that the accused has, since the date on which he or she failed to appear on the summons in question, admitted his or her guilt in respect of that summons and has paid a fine in respect thereof without appearing in court, in a summary manner enquire into his or her failure to appear on such summons and, unless the accused satisfies the court that there is a reasonable possibility that his or her failure was not due to fault on his or her part, convict the accused of the offence referred to in subsection (1) and sentence him or her to a fine not exceeding N$2 000 or to imprisonment for a period not exceeding six months.

(b) In proceedings under paragraph (a) before such other district court, it is, on production in that court of the relevant warrant of arrest and in the absence of evidence to the contrary, presumed that the accused failed to appear on the summons in question.

Chapter 9
WRITTEN NOTICE TO APPEAR IN COURT

58. Written notice as method of securing attendance of accused in district court

(1) If an accused is alleged to have committed an offence and a peace officer on reasonable grounds believes that a district court, on convicting the accused of that offence, will not impose a sentence of imprisonment only or of a fine exceeding N$3 000, the peace officer may, whether or not the accused is in custody, hand to the accused a written notice which must -

(a) specify the name, the residential address and the occupation or status of the accused;

(b) call upon the accused to appear at a place and on a date and at a time specified in the written notice to answer a charge of having committed the offence in question;

(c) contain an endorsement in terms of section 59 that the accused may admit his or her guilt in respect of the offence in question and that the accused may pay a fine stipulated in the written notice in respect of that offence without appearing in court; and

(d) contain a certificate under the hand of the peace officer that he or she has handed the original of the written notice to the accused and that he or she has explained to the accused the import thereof.

(2) If an accused is in custody, the effect of a written notice handed to the accused under subsection (1) is that the accused be released immediately from custody.

(3) The peace officer who under subsection (1) handed a written notice to an accused must immediately forward a duplicate original of the written notice to the clerk of the court having jurisdiction in the matter.

(4) The mere production to the court of the duplicate original of a written notice referred to in subsection (3) is prima facie proof of the issue of the original thereof to the accused and that such original was handed to the accused.

(5) Section 57 applies with the necessary changes in respect of a written notice handed to an accused under subsection (1).

Chapter 10
ADMISSION OF GUILT

59. Admission of guilt and payment of fine without appearance in court

(1) Where -

(a) a summons is issued against an accused under section 56 (in this section referred to as a summons) and the public prosecutor concerned on reasonable grounds believes that a district court, on convicting the accused of the offence in question, will not impose a sentence of imprisonment only or of a fine exceeding N$3 000, and that public prosecutor endorses the summons to the effect that the accused may admit his or her guilt in respect of the offence in question and that the accused may pay a fine stipulated in the summons in respect of that offence without appearing in court; or

(b) a written notice under section 58 (in this section referred to as a written notice) is handed to the accused and the endorsement in terms of paragraph (c) of subsection (1) of that section purports to have been made by a peace officer,

the accused may, without appearing in court, admit his or her guilt in respect of the offence in question by paying the fine so stipulated (in this section referred to as an admission of guilt fine)

either to the clerk of the district court having jurisdiction or at any police station within the area of jurisdiction of that court.

(2) (a) A summons or written notice may stipulate that the admission of guilt must be paid before a date specified in the summons or written notice.

(b) An admission of guilt fine may be accepted by the clerk of the court concerned, notwithstanding the fact that the date referred to in paragraph (a) or the date on which the accused should have appeared in court has expired.

(3) An admission of guilt fine may not be accepted under subsection (1) or (2)(b), unless the accused surrenders the relevant summons or written notice at the time of the payment of the fine.

(4) (a) An admission of guilt fine stipulated in respect of a summons or written notice must be in accordance with a determination that the magistrate of the magisterial district in question may from time to time make in respect of any offence or, if that magistrate has not made such a determination, in accordance with an amount determined in respect of any particular summons or any particular written notice by either a public prosecutor attached to the court of that magistrate or a member of the police of the rank of commissioned officer attached to a police station within the magisterial district in question or, in the absence of such a member of the police at any such police station, by the member of the police in charge of that police station.

(b) An admission of guilt fine determined under paragraph (a) may not exceed the maximum of the fine prescribed in respect of the offence in question or the amount of N$3 000, whichever is the lesser.

(5) An admission of guilt fine paid at a police station in terms of subsection (1) and the relevant summons or written notice surrendered under subsection (3), must, as soon as is expedient, be forwarded to the clerk of the district court having jurisdiction, and that clerk of the court must thereafter, as soon as is expedient, enter the essential particulars of that summons or written notice and of any summons or written notice surrendered to the clerk of the court under subsection (3), in the criminal record book for admissions of guilt, whereupon the accused concerned is, subject to subsection (6), deemed to have been convicted and sentenced by the court in respect of the offence in question.

(6) The magistrate presiding at the court in question must examine the documents and if it appears to that magistrate that a conviction or sentence under subsection (5) is not in accordance with justice or that any such sentence is not in accordance with a determination made by the magistrate of the magisterial district under subsection (4)(a) or, where the determination under that subsection has not been made by that magistrate, that the sentence is not adequate, the magistrate so presiding may set aside the conviction and sentence and direct that the amount of the admission of guilt fine paid by the accused be refunded to the accused and that the accused be prosecuted in the ordinary course, whereupon the accused may be summoned to answer such charge as the public prosecutor may consider fit to prefer, but where the admission of guilt fine that has been paid exceeds the amount determined by the magistrate of the magisterial district under subsection (4)(a), the magistrate so presiding may, instead of setting aside the conviction and sentence in question, direct that the amount by which the admission of guilt fine exceeds the determination so made be refunded to the accused concerned.

60. Admission of guilt and payment of fine after appearing in court

(1) Subject to subsection (2), if an accused who is alleged to have committed an offence has appeared in court and is -

(a) in custody awaiting trial on that charge and not on another more serious charge;

(b) released on bail under section 62 or 63; or

(c) released on warning under section 78,

the public prosecutor concerned may, before the accused has entered a plea and if that prosecutor on reasonable grounds believes that a district court, on convicting the accused of that offence, will not impose a sentence of imprisonment only or of a fine exceeding N$3 000, hand to the accused a written notice, or cause such notice to be delivered to the accused by a peace officer, containing an endorsement in terms of section 59 that the accused may admit his or her guilt in respect of the offence in question and that the accused may pay a fine stipulated in the written notice in respect of that offence without appearing in court again.

(2) Subsection (1) does not apply to an accused who is in custody as contemplated in paragraph (a) of that subsection and in respect of whom an application for bail has been refused or bail proceedings are pending.

(3) A written notice referred to in subsection (1) must contain -

(a) the case number;

(b) a certificate under the hand of a public prosecutor or peace officer that he or she has handed or delivered the original of such notice to the accused and that he or she has explained to the accused the import thereof; and

(c) the particulars and instructions contemplated in paragraphs (a) and (b) of section 58(1).

(4) The public prosecutor must endorse the charge sheet to the effect that a written notice under this section has been issued, and that prosecutor or, if the written notice was delivered to the accused concerned by a peace officer, that peace officer must immediately forward a duplicate original of the written notice to the clerk of the court having jurisdiction in the matter.

(5) Sections 57, 58(2) and (4) and 59(2) to (6), inclusive, apply with the necessary changes in respect of the relevant written notice handed or delivered to an accused under subsection (1) as if, in respect of section 59, such notice were a written notice contemplated in that section and the fine stipulated in such written notice were also an admission of guilt fine contemplated in that section.

Chapter 11
BAIL

61. Effect of bail

The effect of bail granted in terms of the succeeding provisions is that an accused who is in custody must be released from custody on payment of, or on the furnishing of a guarantee to pay, the sum of money determined for his or her bail, and that the accused must appear at the place and on the date and at the time appointed for his or her trial or to which the proceedings relating to the offence in respect of which the accused is released on bail are adjourned, and that the release must, unless sooner terminated under those provisions, endure until a verdict is given by a court in respect of the charge to which the offence in question relates, or, where sentence is not imposed immediately after verdict and the court in question extends bail, until sentence is imposed, but where a court convicts an accused of an offence contemplated in Schedule 3 or 4, the court must, in considering the question whether the accused's bail should be extended, apply section 63(12)(a) or (b), whichever may be applicable, and take into account -

(a) the fact that the accused has been convicted of that offence; and

(b) the likely sentence that the court might impose.

62. Bail before first appearance of accused in magistrate's court

(1) (a) An accused who is in custody in respect of any offence, other than an offence referred to in Schedule 3, may, before his or her first appearance in a magistrate's court, be released on bail in respect of that offence by a member of the police of the rank of commissioned officer or,

in the absence of such a member of the police, by the member of the police in charge of the police station where the accused is detained, after consultation with -

(i) the member of the police charged with the investigation; and

(ii) in the case of an offence against the person, the victim of that offence, but only if that victim is readily available,

if the accused deposits at the police station the sum of money determined by that member of the police.

(b) The member of the police referred to in paragraph (a) must, at the time of releasing the accused on bail, complete and hand to the accused a recognizance on which a receipt is given for the sum of money deposited as bail and on which the offence in respect of which the bail is granted and the place, date and time of the trial of the accused are entered.

(c) The member of the police who released an accused on bail must immediately forward a duplicate original of the recognizance to the clerk of the court having jurisdiction in the matter.

(2) Bail granted under this section, if in force at the time of the first appearance of the accused in a magistrate's court, remains, subject to section 65, in force after such appearance in the same manner as bail granted by the court under section 63 at the time of such first appearance.

63. Bail application of accused in court

(1) (a) Without derogating from section 52(5)(a), an accused who is in custody in respect of an offence is, subject to subsection (2)(a), entitled to be released on bail at any stage preceding his or her conviction or acquittal in respect of that offence, but only if the court is satisfied that the interests of justice so permit.

(b) The court referring an accused to any other court for trial or sentencing retains jurisdiction relating to the powers, functions and duties in respect of bail under this Act until the accused appears in such other court for the first time.

(c) If the question of the possible release of an accused on bail is not raised by the accused or the prosecutor, the court must ascertain from the accused whether he or she wishes that question to be considered by the court.

(2) In bail proceedings the court in question -

(a) may postpone any such proceedings as contemplated in section 52(5)(b);

(b) may, in respect of matters that are not in dispute between the accused and the prosecutor, acquire in an informal manner the information that is needed for its decision or order regarding bail;

(c) may, in respect of matters that are in dispute between the accused and the prosecutor, require of the prosecutor or the accused that evidence be adduced;

(d) must, where the prosecutor does not oppose bail in respect of matters referred to in subsection (12)(a) and (b), require of the prosecutor to place on record the reasons for not opposing the bail application.

(3) If the court considering a bail application is of the opinion that it does not have reliable or sufficient information or evidence at its disposal or that it lacks certain important information to reach a decision on the bail application, the judge or magistrate presiding at the bail proceedings must order that such information or evidence be placed before the court.

(4) The interests of justice do not permit the release from detention of an accused where one or more of the following grounds are established:

(a) Where there is the likelihood that the accused, if he or she were released on bail, will endanger the safety of the public or any particular person or will commit an offence referred to in Schedule 1; or

(b) where there is the likelihood that the accused, if he or she were released on bail, will attempt to evade his or her trial; or

(c) where there is the likelihood that the accused, if he or she were released on bail, will attempt to influence or intimidate witnesses or to conceal or destroy evidence; or

(d) where there is the likelihood that the accused, if he or she were released on bail, will undermine or jeopardize the objectives or the proper functioning of the criminal justice system, including the bail system; or

(e) where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security.

(5) In considering whether the ground in subsection (4)(a) has been established, the court may, where applicable, take into account the following factors:

(a) The degree of violence towards others implicit in the charge against the accused;

(b) any threat of violence that the accused may have made to any person;

(c) any resentment the accused is alleged to harbour against any person;

(d) any disposition to violence on the part of the accused, as is evident from the accused's past conduct;

(e) any disposition of the accused to commit offences referred to in Schedule 1, as is evident from the accused's past conduct;

(f) the prevalence of a particular type of offence;

(g) any evidence that the accused previously committed an offence referred to in Schedule 1 while released on bail;

(h) whether the victim of the offence in question objects to bail being granted to the accused;

(i) any other factor that in the opinion of the court should be taken into account.

(6) In considering whether the ground in subsection (4)(b) has been established, the court may, where applicable, take into account the following factors:

(a) The family, community or occupational ties of the accused to the place at which he or she is to be tried;

(b) the assets held by the accused and where such assets are situated;

(c) the means, and travel documents held by the accused, which may enable the accused to leave the country;

(d) the extent, if any, to which the accused can afford to forfeit the amount of bail that may be set;

(e) the question whether the extradition of the accused could be readily effected should the accused flee across the borders of Namibia in an attempt to evade his or her trial;

(f) the nature and the gravity of the charge on which the accused is to be tried;

(g) the strength of the case against the accused and the incentive that the accused may in consequence have to attempt to evade his or her trial;

(h) the nature and gravity of the punishment that is likely to be imposed should the accused be convicted of the charges against him or her;

(i) the binding effect and enforceability of the conditions of bail that may be imposed and the ease with which those conditions could be breached;

(j) any other factor that in the opinion of the court should be taken into account.

(7) In considering whether the ground in subsection (4)(c) has been established, the court may, where applicable, take into account the following factors:

(a) The fact that the accused is familiar with the identity of witnesses and with the evidence that they may bring against him or her;

(b) whether the witnesses have already made statements and agreed to testify;

(c) whether the investigation against the accused has already been completed;

(d) the relationship of the accused with the various witnesses and the extent to which they could be influenced or intimidated;

(e) how effective and enforceable the conditions of bail prohibiting communication between the accused and witnesses are likely to be;

(f) whether the accused has access to evidentiary material that is to be presented at his or her trial;

(g) the ease with which evidentiary material could be concealed or destroyed;

(h) any other factor that in the opinion of the court should be taken into account.

(8) In considering whether the ground in subsection (4)(d) has been established, the court may, where applicable, take into account the following factors:

(a) The fact that the accused, knowing it to be false, supplied false information at the time of his or her arrest or during the bail proceedings;

(b) whether the accused is in custody on another charge or whether the accused is on parole;

(c) any previous failure on the part of the accused to comply with conditions of bail or any indication that the accused will not comply with any conditions of bail;

(d) any other factor that in the opinion of the court should be taken into account.

(9) In considering whether the ground in subsection (4)(e) has been established, the court may, where applicable, take into account the following factors:

(a) Whether the nature of the offence or the circumstances under which the offence was committed is likely to induce a sense of shock or outrage in the community where the offence was committed;

(b) whether the outrage of the community might lead to public disorder if the accused is released;

(c) whether the safety of the accused might be jeopardized by his or her release;

(d) whether the sense of peace and security among members of the public will be undermined or jeopardized by the release of the accused;

(e) whether the release of the accused will undermine or jeopardize the public confidence in the criminal justice system;

(f) any other factor that in the opinion of the court should be taken into account.

(10) In considering the question in subsection (4), the court must decide the matter by weighing the interests of justice against the right of the accused to his or her personal freedom and in particular

the prejudice the accused is likely to suffer if he or she were to be detained in custody, taking into account, where applicable, the following factors:

(a) The period for which the accused has already been in custody since his or her arrest;

(b) the probable period of detention until the disposal or conclusion of the trial if the accused is not released on bail;

(c) the reason for any delay in the disposal or conclusion of the trial and any fault on the part of the accused with regard to the delay;

(d) any financial loss that the accused may suffer owing to his or her detention;

(e) any impediment to the preparation of the accused's defence or any delay in obtaining legal representation that may be brought about by the detention of the accused;

(f) the state of health of the accused;

(g) any other factor that in the opinion of the court should be taken into account.

(11) Notwithstanding the fact that the prosecution does not oppose the granting of bail, the court has the duty contemplated in subsection (10) to weigh up the personal interests of the accused against the interests of justice.

(12) Notwithstanding anything to the contrary in this Act contained, where an accused is charged with an offence referred to -

(a) in Schedule 4, the court must order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence that satisfies the court that exceptional circumstances exist which in the interests of justice permit his or her release;

(b) in Schedule 3, but not in Schedule 4, the court must order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence that satisfies the court that the interests of justice permit his or her release.

(13) (a) In bail proceedings the accused, or his or her legal practitioner, is compelled to inform the court whether -

(i) the accused has previously been convicted of any offence; and

(ii) there are any charges pending against the accused and whether the accused has been released on bail in respect of those charges.

(b) Where the legal practitioner of an accused on behalf of the accused submits the information contemplated in paragraph (a), whether in writing or orally, the accused must be required by the court to declare whether he or she confirms such information or not.

(c) The record of the bail proceedings, excluding the information contemplated in paragraph (a), forms part of the record of the trial of the accused following on the bail proceedings, but, if the accused elects to testify during the course of the bail proceedings the court must inform the accused of the fact that anything he or she says, may be used against him or her at his or her trial and such evidence becomes admissible in any subsequent proceedings.

(d) An accused who willfully -

(i) fails or refuses to comply with any provision of paragraph (a); or

(ii) furnishes the court with false information required in terms of paragraph (a),

commits an offence and is liable on conviction to a fine not exceeding N$8 000 or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment.

(14) The court may make the release of an accused on bail subject to conditions that, in the court's opinion, are in the interests of justice.

(15) The court releasing an accused on bail in terms of this section, may order that the accused -

(a) deposit with the clerk of the court or the registrar or with a member of the prison service at the prison where the accused is in custody or with a member of the police at the place where the accused is in custody, the sum of money determined by the court in question; or

(b) must furnish a guarantee, with or without sureties, that he or she will pay and forfeit to the State the amount that has been set as bail, or that has been increased or reduced in terms of section 66(1), in circumstances in which the amount would, had it been deposited, have been forfeited to the State.

(16) The fact that a particular judge or magistrate has heard an application for bail by an accused does not preclude that judge or magistrate from presiding at the trial of the accused, notwithstanding the fact that any findings of credibility were made during such application and notwithstanding the fact that the merits of the case were covered during that application.

64. Rights of complainant in bail application where accused is charged with rape or a domestic violence offence

(1) A complainant of rape or of a domestic violence offence has the right -

(a) to attend any proceedings where the question is considered whether an accused who is in custody on a charge of rape or a domestic violence offence should be released on bail or, if bail has been granted to the accused, whether any further conditions of bail should be imposed under section 65 or whether any such conditions of bail should be amended or supplemented under section 66; and

(b) to request the prosecutor in proceedings referred to in paragraph (a) to present any information or evidence to the court that might be relevant to any question under consideration by the court in such proceedings.

(2) Where a complainant is a minor, the right conferred by subsection (1) vests, notwithstanding that subsection, in the complainant's parent or guardian, unless that parent or guardian -

(a) cannot be readily reached or cannot be traced without undue delay; or

(b) is unable or unwilling to attend the bail proceedings in question,

and if the right so vests in that parent or guardian, this section applies to that parent or guardian as if the parent or guardian were the complainant.

(3) If an accused is in custody on a charge of rape or a domestic violence offence, the person in charge of the police station or any other place where the accused is detained in terms of section 52(2)(a), or any other person designated by the person so in charge, must as soon as practicable inform the complainant concerned of -

(a) the place, date and time of the first appearance of the accused in court; and

(b) the rights of the complainant under subsection (1).

(4) If an accused who is in custody on a charge of rape or a domestic violence offence intends to apply to the court for bail on a date or at a time of which the complainant has not been otherwise informed in terms of this section, the accused or his or her legal practitioner must request the person referred to in subsection (3) to inform the complainant accordingly, whereupon that person must so inform the complainant.

(5) The person who informs, or who is required to inform, the complainant in terms of subsection (3) or (4) must prepare an affidavit stating -

(a) whether the provisions of subsection (3) or (4), whichever may be applicable, have been duly complied with and, if they have not been so complied with, the reasons for not complying with any such provision;

(b) the manner in which the complainant has been so informed; and

(c) the date and time when the complainant has been so informed.

(6) An affidavit prepared in terms of subsection (5) must be handed to the judge or magistrate presiding at the proceedings at which bail is considered, and that affidavit forms part of the record of the bail proceedings.

(7) If a complainant is present at proceedings at which bail is considered in respect of an accused who is in custody on a charge of rape or a domestic violence offence, and such proceedings are postponed, the court must inform the complainant of the date and time to which the proceedings have been postponed and of the complainant's rights under subsection (1).

(8) If a complainant is not present at proceedings referred to in subsection (7), the court must enquire into the question whether the complainant has had knowledge of such proceedings, and -

(a) must, if it is satisfied that it is likely that the complainant has had knowledge of the proceedings, direct that the matter be dealt with in the absence of the complainant; or

(b) must, if it is not so satisfied, postpone the proceedings in order to obtain the presence of the complainant, but, if it is in the interests of justice (with due regard to the interests of the complainant) that the matter be dealt with immediately, the matter may be dealt with in the absence of the complainant.

(9) If a complainant is not present as contemplated in subsection (8), the prosecutor in the bail proceedings in question must inform the complainant -

(a) where bail has been granted to the accused, of the granting of bail and the conditions of bail imposed;

(b) where such proceedings have been postponed, of the date and time to which such proceedings have been postponed and of the complainant's rights under subsection (1).

(10) Subsections (5) and (6) apply with the necessary changes in respect of a notification given in terms of subsection (9)(b).

65. Addition of further conditions of bail

(1) A court before which a charge is pending in respect of which bail has been granted, may at any stage, whether the bail was granted by that court or any other court, on application by the prosecutor, add any further condition of bail -

(a) with regard to the reporting in person by the accused at any specified time and place to any specified person or authority;

(b) with regard to any place to which the accused is forbidden to go;

(c) with regard to the prohibition of or control over communication by the accused with witnesses for the prosecution;

(d) with regard to the place at which any document may be served on the accused under this Act;

(e) which, in the opinion of the court, will ensure that the proper administration of justice is not placed in jeopardy by the release of the accused;

(f) which provides that the accused must be placed under the supervision of a probation officer.

(2) If an accused who is in custody on a charge of rape is released on bail, the court must, notwithstanding section 63(14) and subsection (1) of this section, add such further conditions of bail as will, in the opinion of the court, ensure that the accused does not make contact with the complainant concerned.

(3) (a) If an accused who is in custody on a charge of a domestic violence offence is released on bail, the court must, notwithstanding section 63(14) and subsection (1) of this section, add the following further conditions of bail, unless the court finds special circumstances that would make any or all of those conditions inappropriate, which circumstances must then be entered by the court in the record of the bail proceedings:

(i) A condition prohibiting any direct or indirect contact with the complainant during the course of the relevant criminal proceedings;

(ii) a condition prohibiting the possession by the accused, while so released on bail, of any firearm or other weapon specified by the court; and

(iii) where the accused is legally liable to maintain the complainant or any child or other dependant of the complainant, a condition requiring the accused to support the complainant or any such child or other dependant at the same or greater level as before the arrest.

(b) Where the court imposes a condition of bail contemplated in paragraph (a)(ii), any firearm or other weapon specified by the court that is in the possession of the accused, must, on the release on bail of the accused, be delivered to the member of the police charged with the investigation and be retained in police custody for the duration of such release.

66. Amendment of conditions of bail

(1) A court before which a charge is pending in respect of which bail has been granted may, on the application of the prosecutor or the accused or of its own motion, but after hearing the parties concerned, increase or reduce the amount of bail determined under section 62 or 63, or amend or supplement any condition imposed under section 63 or 65, whether imposed by that court or any other court, and may, where the application is made by the prosecutor and the accused is not present when the application is made, issue a warrant for the arrest of the accused and, when the accused is present in court, determine the application.

(2) If the court referred to in subsection (1) is the High Court, an application under that subsection may be made to any judge of the High Court in chambers if the High Court is not sitting at the time of the application.

67. Proceedings with regard to bail and conditions to be recorded in full

The court dealing with bail proceedings as contemplated in section 52(5) or that considers bail under section 63 or that imposes any further condition under section 65 or that under section 66 amends the amount of bail or amends or supplements any condition or refuses to do so, must record the relevant proceedings in full, including the conditions imposed and any amendment or supplementation thereof, or must cause such proceedings to be recorded in full, and where that court is a magistrate's court, any document purporting to be an extract from the record of proceedings of that court and purporting to be certified as correct by the clerk of the court, and which sets out the conditions of bail and any amendment or supplementation thereof, is, on its mere production in any court in which the relevant charge is pending, prima facie proof of such conditions or any amendment or supplementation thereof.

68. Appeal to High Court with regard to bail

(1) (a) An accused who feels aggrieved by the refusal by a magistrate's court to release him or her on bail or by the imposition by that court of a condition of bail, including a condition relating to the amount of bail money and including an amendment or supplementation of a condition of bail, may, subject to subsection (2), appeal against such refusal or the imposition of such

condition to the High Court or to any judge of the High Court in chambers if the High Court is not then sitting.

(b) The appeal may be heard by a single judge.

(2) No appeal lies in respect of new facts that arise or are discovered after the decision against which the appeal is brought, unless such new facts are first placed before the magistrate against whose decision the appeal is brought and that magistrate gives a decision against the accused on such new facts.

(3) (a) An accused noting an appeal under subsection (1)(a) must serve a copy of the notice of appeal, setting out the grounds of appeal, on the Prosecutor-General and on the magistrate against whose decision the appeal is brought, within 14 days of the refusal of bail or the imposition of a condition of bail.

(b) The magistrate against whose decision the appeal is brought, must as soon as practicable, but not later than 14 days after receipt of the notice of appeal, prepare and transmit, or cause to be prepared and transmitted, to the registrar a certified copy of the record of the bail proceedings, together with the reasons for his or her decision.

(c) On receipt of the copy of the record of the bail proceedings in terms of paragraph (b), the registrar must, in consultation with the Judge President and after notice to the parties concerned, place the matter on the roll for hearing by the High Court or by a judge of the High Court in chambers if the High Court is not then sitting.

(d) An appeal under this section must be heard as a matter of urgency.

(4) The High Court or judge hearing an appeal under this section may not set aside the decision against which the appeal is brought, unless the High Court or judge is satisfied that the decision was wrong, in which event the High Court or judge may give the decision that in its or his or her opinion the magistrate's court should have given.

69. Appeal by Prosecutor-General against decision of court to release accused on bail

(1) (a) The Prosecutor-General may appeal to the High Court against the decision of a magistrate's court to release an accused on bail or against the imposition of a condition of bail in like manner as in section 68(1)(a).

(b) Except where otherwise expressly provided by any law, section 68(1)(b), (2), (3) and (4) applies with the necessary changes in respect of the noting and prosecution of an appeal lodged by the Prosecutor-General under paragraph (a).

(2) (a) Where a magistrate's court has ordered the release of an accused on bail and an appeal is noted by the Prosecutor-General under subsection (1)(a), the order for the release of the accused remains in force pending the decision on appeal, unless the court granting the release suspends the order for the release and orders the continued detention of the accused pending the decision on appeal -

(i) on application by the Prosecutor-General, of which notice is given as soon as practicable, but not later than 14 days after the order has been made for the release of the accused, by the Prosecutor-General; and

(ii) if the court is satisfied that there is a reasonable prospect of success on appeal and that, on reconsideration, there is a reasonable possibility that the ends of justice may be defeated by the release of the accused on bail before the decision on appeal.

(b) If the application under paragraph (a)(i) for the suspension of an order for the release of an accused pending the decision on appeal is successful, and the accused has been released, the court ordering the suspension must issue a warrant for the arrest and further detention of the accused pending the decision on appeal.

(3) (a) The Prosecutor-General may appeal to the Supreme Court against a decision of the High Court to release an accused on bail.

(b) Except where otherwise expressly provided by any law, section 343, to the extent that it relates to an application or appeal by an accused under that section, applies with the necessary changes in respect of the noting and prosecution of an appeal lodged by the Prosecutor-General under paragraph (a).

(4) If an appeal brought by the Prosecutor-General under subsection (1)(a) or (3)(a) is dismissed, the court dismissing the appeal may order that the State pay the accused concerned the whole or any part of the costs to which the accused may have been put in opposing the appeal, taxed according to the scale in civil cases of that court.

(5) If an appeal by the Prosecutor-General under subsection (1)(a) or (3)(a) is successful, the court hearing the appeal must issue a warrant for the arrest of the accused if the accused has been released on bail before the appeal has been decided, unless the accused has been arrested under a warrant issued in terms of subsection (2)(b).

70. Failure by accused to observe condition of bail

(1) If an accused is released on bail subject to any condition imposed under section 63 or 65, including any amendment or supplementation under section 66 of a condition of bail, and the prosecutor applies to the court before which the charge with regard to which the accused has been released on bail is pending, to lead evidence to prove that the accused has failed to comply with such condition, the court must, if the accused is present and denies that he or she failed to comply with such condition or that his or her failure to comply with such condition was due to fault on his or her part, proceed to hear such evidence as the prosecutor and the accused may place before it.

(2) If the accused is not present when the prosecutor applies to the court under subsection (1), the court may issue a warrant for the arrest of the accused, and must, when the accused appears before the court and denies that he or she failed to comply with the condition in question or that his or her failure to comply with such condition was due to fault on his or her part, proceed to hear such evidence as the prosecutor and the accused may place before it.

(3) If the accused admits that he or she failed to comply with the condition in question or if the court finds that the accused failed to comply with such condition, the court may, if it finds that the failure by the accused was due to fault on his or her part, cancel the bail and declare the bail money forfeited to the State.

(4) The proceedings and evidence under this section must be recorded.

71. Failure of accused on bail to appear

(1) If an accused who is released on bail -

(a) fails to appear at the place and on the date and at the time -

(i) appointed for his or her trial; or

(ii) to which the proceedings relating to the offence in respect of which the accused is released on bail are adjourned; or

(b) fails to remain in attendance at such trial or at such proceedings,

the court before which the matter is pending must declare the bail provisionally cancelled and the bail money provisionally forfeited to the State, and issue a warrant for the arrest of the accused.

(2) (a) If the accused appears before court within 14 days of the issue under subsection (1) of the warrant of arrest, the court must confirm the provisional cancellation of the bail and the provisional forfeiture of the bail money, unless the accused satisfies the court that his or her

failure under subsection (1) to appear or to remain in attendance was not due to fault on his or her part.

(b) If the accused satisfies the court that his or her failure under subsection (1) to appear or to remain in attendance was not due to fault on his or her part, the provisional cancellation of the bail and the provisional forfeiture of the bail money lapse.

(c) If the accused does not appear before court within 14 days of the issue under subsection (1) of the warrant of arrest or within such extended period as the court may on good course determine, the provisional cancellation of the bail and the provisional forfeiture of the bail money automatically become final.

(3) The court may hear such evidence as it may consider necessary to satisfy itself that the accused has under subsection (1) failed to appear or failed to remain in attendance, and such evidence must be recorded.

72. Criminal liability of person who is on bail because of failure to appear or to comply with condition of bail

A person who has been released on bail and who fails without sufficient cause to appear at the place and on the date and at the time determined for his or her appearance, or to remain in attendance until the proceedings in which he or she must appear have been disposed of, or who fails without sufficient cause to comply with a condition of bail imposed by a court under section 63 or 65, including an amendment or supplementation thereof under section 66, commits an offence and is, in addition to the cancellation of the bail and the forfeiture of the bail money under section 70 or 71, liable on conviction to a fine not exceeding N$4 000 or to imprisonment for a period not exceeding one year.

73. Cancellation of bail

(1) A court before which a charge is pending in respect of which bail has been granted may, whether the accused has been released on bail or not -

(a) on information on oath that -

(i) the accused is about to evade justice or is about to abscond in order to evade justice;

(ii) the accused has interfered or threatened or attempted to interfere with witnesses;

(iii) the accused has defeated or attempted to defeat the ends of justice;

(iv) the accused poses a threat to the safety of the public or of a particular person;

(v) further evidence has since become available or factors have arisen, including the fact that the accused has furnished false information in the bail proceedings, that might have affected the decision to grant bail; or

(vi) it is in the interests of justice to do so; or

(b) if satisfied from evidence placed before it at the trial of the accused that circumstances relevant to the granting of bail to the accused have since changed substantially and that as a result thereof the ends of justice would otherwise be defeated, of its own motion,

issue a warrant for the arrest of the accused, if the accused has been released on bail, and make such order as it may consider proper, including an order that the bail be cancelled and that the accused be committed to prison until the conclusion of the criminal proceedings in question.

(2) A magistrate may, in circumstances in which it is not practicable to obtain a warrant of arrest under subsection (1), on the application of a peace officer and on a written statement on oath by the peace officer that -

(a) he or she has reason to believe that an accused who has been released on bail -

(i) is about to evade justice or is about to abscond in order to evade justice;

(ii) has interfered or threatened or attempted to interfere with witnesses;

(iii) has defeated or attempted to defeat the ends of justice; or

(iv) poses a threat to the safety of the public or of a particular person;

(b) further evidence has since become available or factors have arisen, including the fact that the accused has furnished false information in the bail proceedings, that might have affected the decision to release the accused on bail; or

(c) it is in the interests of justice to do so,

issue a warrant for the arrest of the accused, and may, if satisfied that the ends of justice may be defeated if the accused is not placed in custody, cancel the bail and commit the accused to prison, which committal remains in force until the conclusion of the criminal proceedings in question, unless the court before which the proceedings are pending sooner reinstates the bail.

74. Cancellation of bail at request of accused

A court before which a charge is pending in respect of which the accused has been released on bail may, on application by the accused, cancel the bail and direct that the bail money be refunded if the accused is in custody on any other charge or is serving a sentence.

75. Payment of bail money by person other than accused

(1) Nothing in section 62 or 63 contained is to be construed as preventing the payment by any person, other than the accused, of bail money on behalf of the accused.

(2) Bail money, whether deposited by an accused or any other person on behalf of the accused, may, notwithstanding that the bail money or any part thereof may have been ceded to any person, be refunded only to the depositor.

(3) No person is allowed to deposit on behalf of an accused any bail money under this section if the person to whom the deposit is to be made has reason to believe that such other person, at any time before or after depositing the bail money, has been indemnified or will be indemnified by another in any manner against loss of the bail money or that such other person has received or will receive any financial benefit in connection with the deposit of the bail money.

(4) Subject to section 74, no person who paid bail money on behalf of an accused is entitled to a refund of the bail money before the conclusion of the relevant criminal proceedings.

76. Remission of bail money

The Minister or any person employed in the Public Service acting under the Minister's authority may remit the whole or any part of any bail money forfeited under section 70 or 71.

77. Juvenile may be placed in place of safety instead of release on bail or detention in custody

If an accused under the age of 18 years is in custody in respect of an offence, and a member of the police or a court may in respect of that offence release the accused on bail under section 62 or 63, respectively, the member of the police or court may, instead of releasing the accused on bail or detaining the accused in custody, place the accused in a place of safety as defined in section 1 of the Children's Act, 1960 (Act No. 33 of 1960), pending his or her appearance or further appearance before a court in respect of the offence in question or until he or she is otherwise dealt with in accordance with the law.

Chapter 12
RELEASE ON WARNING

78. Accused may be released on warning instead of bail

(1) If an accused is in custody in respect of an offence and a member of the police or a court may in respect of that offence release the accused on bail under section 62 or 63, respectively, the member of the police or the court may, if the offence is not, in the case of the member of the police, an offence referred to in Schedule 3, instead of bail -

(a) release the accused from custody and warn the accused to appear before a specified court at a specified time on a specified date in connection with the offence in question or to remain in attendance at the proceedings relating to that offence and, if so released by a court, that court may, at the time of the release or at any time thereafter, impose any condition referred to in section 65 in connection with the release;

(b) in the case of an accused under the age of 18 years who is released under paragraph (a), place the accused in the care of the person in whose custody he or she is, and warn that person to bring the accused or cause the accused to be brought before a specified court at a specified time on a specified date and to have the accused remain in attendance at the proceedings relating to the offence in question and, if a condition has been imposed under paragraph (a), to ensure that the accused complies with that condition.

(2) (a) An accused who is released under subsection (1)(a) and who fails to appear or to remain in attendance at the proceedings in question in accordance with a warning under that subsection, or who fails to comply with a condition imposed under that subsection, commits an offence and is liable on conviction to the punishment prescribed by subsection (4).

(b) A person in whose care an accused is placed under subsection (1)(b) and who fails in accordance with a warning under that subsection to bring the accused or cause the accused to be brought before court or to have the accused remain in attendance at the proceedings in question, or who fails to ensure that the accused complies with a condition imposed under subsection (1)(a), commits an offence and is liable on conviction to the punishment prescribed by subsection (4).

(3) (a) A member of the police who releases an accused under subsection (1)(a) must, at the time of releasing the accused, complete and hand to the accused and, in the application of subsection (1)(b), to the person in whose care the accused is placed, a written notice on which must be entered the offence in respect of which the accused is being released on warning and the court before which and the time at which and the date on which the accused is to appear.

(b) A court that releases an accused under subsection (1) must, at the time of releasing the accused, record or cause the relevant proceedings to be recorded in full, and where that court is a magistrate's court, any document purporting to be an extract from the record of proceedings of that court and purporting to be certified as correct by the clerk of the court, and which sets out the warning relating to the court before which and the time at which and the date on which the accused is to appear or the condition on which the accused was released, is, on its mere production in any court in which the relevant charge is pending, prima facie proof of such warning.

(4) The court may, if satisfied that an accused referred to in subsection (2)(a) or a person referred to in subsection (2)(b) was duly warned in terms of paragraph (a) or paragraph (b), respectively, of subsection (1), and that that accused or that person has failed to comply with the warning or to comply with a condition imposed, issue a warrant for the arrest of that accused or that person, and must, when he or she is brought before the court, in a summary manner enquire into his or her failure to comply with the warning or condition and, unless that accused or that person satisfies the court that there is a reasonable possibility that his or her failure was not due to fault on his or

her part, sentence him or her to a fine not exceeding N$4 000 or to imprisonment for a period not exceeding one year.

79. Cancellation of release on warning

Notwithstanding section 78(4), section 73 applies with the necessary changes to an accused who has been released on warning as if that accused were released on bail.

Chapter 13
ASSISTANCE TO ACCUSED

80. Accused entitled to assistance after arrest and at criminal proceedings

(1) An accused who is arrested, whether with or without warrant, is, subject to any law relating to the management of prisons, entitled to the assistance of his or her own legal practitioner as from the time of his or her arrest.

(2) An accused is, as contemplated in section 17, entitled to be defended by a legal practitioner of his or her choice at criminal proceedings.

(3) An accused who is under the age of 18 years may be assisted by his or her parent or guardian at criminal proceedings, and any accused who, in the opinion of the court, requires the assistance of another person at criminal proceedings, may, with the permission of the court, be so assisted at such proceedings.

81. Parent or guardian of accused under 18 years to attend proceedings

(1) Where an accused is under the age of 18 years, a parent or the guardian of the accused must be warned, in accordance with subsection (2), to attend the criminal proceedings in question.

(2) The parent or guardian of an accused, if the parent or guardian is known to be within the magisterial district in question and can be traced without undue delay, must, for the purposes of subsection (1), be warned to attend the criminal proceedings in question -

(a) in any case in which the accused is arrested, by the peace officer effecting the arrest or, where the arrest is effected by a person other than a peace officer, the member of the police to whom the accused is handed over, and that peace officer or member of the police must inform the parent or guardian of the place and date and time at which the accused is to appear; or

(b) in the case of a summons under section 56 or a written notice under section 58, by the person serving the summons on or handing the written notice to the accused, and that person must serve a copy of the summons or written notice on the parent or guardian, as well as a notice warning the parent or guardian to attend the proceedings in question at the place and on the date and at the time specified in the summons or written notice.

(3) A parent or guardian who has been warned in terms of subsection (2), may apply to a magistrate of the court in which the accused is to appear for exemption from the obligation to attend the proceedings in question, and if that magistrate exempts that parent or guardian, the magistrate must do so in writing.

(4) A parent or guardian who has been warned in terms of subsection (2) and who has not under subsection (3) been exempted from the obligation to attend the proceedings in question, or a parent or guardian who is present at criminal proceedings and who is warned by the court to remain in attendance thereat, must remain in attendance at the relevant criminal proceedings, whether in that court or any other court, unless excused by the court before which the proceedings are pending.

(5) If a parent or guardian has not been warned under subsection (2), the court before which the relevant proceedings are pending may, at any time during the proceedings, direct any person to warn the parent or guardian of the accused to attend such proceedings.

(6) A parent or guardian who has been warned in terms of subsection (2), (4) or (5) and who fails to attend the criminal proceedings in question or who fails to remain in attendance at such proceedings in accordance with subsection (4), commits an offence and is liable on conviction to the punishment prescribed by subsection (7).

(7) The court, if satisfied from evidence placed before it that a parent or guardian has been warned to attend the criminal proceedings in question and that that parent or guardian has failed to attend such proceedings, or that a parent or guardian has failed to remain in attendance at such proceedings, may issue a warrant for the arrest of that parent or guardian and, when he or she is brought before the court, in a summary manner enquire into his or her failure to attend or to remain in attendance and, unless that parent or guardian satisfies the court that there is a reasonable possibility that his or her failure was not due to fault on his or her part, sentence him or her to a fine not exceeding N$4 000 or to imprisonment for a period not exceeding one year.

Chapter 14
SUMMARY TRIAL

82. Summary trial and court of trial

(1) When an accused is to be tried in a court in respect of an offence, the accused must, subject to sections 134, 138 and 142, be tried at a summary trial in -

(a) a court which has jurisdiction and in which the accused appeared for the first time in respect of that offence in accordance with any method referred to in section 40;

(b) a court which has jurisdiction and to which the accused was referred under subsection (2); or

(c) any other court which has jurisdiction and which has been designated by the Prosecutor-General for the purposes of the summary trial.

(2) If an accused appears in a court that does not have jurisdiction to try the case, the accused must, at the request of the prosecutor, be referred by that court to a court having jurisdiction.

83. Charge sheet and proof of record of criminal case

(1) Unless an accused has been summoned to appear before the court, the proceedings at a summary trial in a magistrate's court are commenced by lodging a charge sheet with the clerk of the court, and, in the case of the High Court, by serving an indictment referred to in section 163 on the accused and the lodging thereof with the registrar.

(2) The charge sheet must, in addition to the charge against the accused, include the name and, where known and where applicable, the address and description of the accused with regard to sex, nationality and age.

(3) (a) The court must keep a record of the proceedings, whether in writing or mechanical, or must cause such record to be so kept, and the charge sheet, summons or indictment forms part thereof.

(b) The record referred to in paragraph (a) may be proved in a court by the mere production thereof or of a copy thereof in terms of section 266.

(c) Where the correctness of any record of proceedings is challenged, the court in which the record is challenged may, in order to satisfy itself whether any matter was correctly recorded or not, either orally or on affidavit hear such evidence as it may consider necessary.

(4) (a) Where at any stage of the proceedings at a summary trial, but before sentence is passed, the record of the proceedings is lost or, in the case of a mechanical record, the recording is found to be defective and that record cannot be reconstructed to the satisfaction of the court, the court must make a formal finding to that effect, whereupon the trial must start anew.

(b) Where the trial starts anew in terms of paragraph (a), the accused is deemed -

(i) not to have pleaded to the charge; and

(ii) if the trial starts anew after the accused has been convicted of the offence charged but before sentence is passed, not to have been convicted on that charge.

Chapter 15
ACCUSED: CAPACITY TO UNDERSTAND PROCEEDINGS: MENTAL ILLNESS AND CRIMINAL RESPONSIBILITY

84. Capacity of accused to understand proceedings

(1) If it appears to the court at any stage of criminal proceedings that the accused is by reason of mental illness or mental defect not capable of understanding the proceedings so as to make a proper defence, the court must direct that the matter be enquired into and be reported on in accordance with section 86.

(2) If the finding contained in the relevant report is the unanimous finding of the persons who under section 86 enquired into the mental condition of the accused, and the finding is not disputed by the prosecutor or the accused, the court may determine the matter on that report without hearing further evidence.

(3) If the finding referred to in subsection (2) is not unanimous or, if unanimous, is disputed by the prosecutor or the accused, the court must determine the matter after hearing evidence, and the prosecutor and the accused may to that end present evidence to the court, including the evidence of any person who under section 86 enquired into the mental condition of the accused.

(4) Where the finding is disputed as contemplated in subsection (3), the party disputing the finding may subpoena and cross-examine any person who under section 86 has enquired into the mental condition of the accused.

(5) If the court finds that the accused is capable of understanding the proceedings so as to make a proper defence, the proceedings must be continued in the ordinary way.

(6) (a) If the court finds that the accused is not capable of understanding the proceedings so as to make a proper defence, the court must direct that the accused be detained in a psychiatric hospital or a prison pending the decision of a judge in chambers under section 29 of the Mental Health Act, 1973 (Act No. 18 of 1973), and if the court so directs after the accused has pleaded to the charge, the accused is not entitled under section 120(4) to be acquitted or to be convicted in respect of the charge in question.

(b) If the court makes a finding in terms of paragraph (a) after the accused has been convicted of the offence charged but before sentence is passed, the court must set the conviction aside, and if the accused has pleaded guilty it is deemed that the accused has pleaded not guilty.

(7) Where a direction is issued in terms of subsection (6)(a) or (9) that the accused be detained in a psychiatric hospital or a prison pending the decision of a judge in chambers, the accused may at any time thereafter, when the accused is capable of understanding the proceedings so as to make a proper defence, be prosecuted and tried for the offence in question.

(8) (a) An accused against whom a finding is made -

(i) under subsection (5) and who is convicted;

(ii) under subsection (6) and against whom the finding is not made in consequence of an allegation by the accused under subsection (1),

may appeal against that finding.

(b) An appeal under paragraph (a) must be noted and prosecuted in the same manner and subject to the same conditions as an appeal against a conviction by the court for an offence.

(9) Where an appeal against a finding under subsection (5) is allowed, the court of appeal must set aside the conviction and sentence and direct that the person concerned be detained in a psychiatric hospital or a prison pending the decision of a judge in chambers under section 29 of the Mental Health Act, 1973 (Act No. 18 of 1973).

(10) Where an appeal against a finding under subsection (6) is allowed, the court of appeal must set aside the direction issued under that subsection and remit the case to the court that made the finding, whereupon the proceedings in question must be continued in the ordinary way.

85. Mental illness or mental defect and criminal responsibility

(1) A person who commits an act that constitutes an offence and who at the time of such commission suffers from a mental illness or mental defect that makes that person incapable -

(a) of appreciating the wrongfulness of his or her act; or

(b) of acting in accordance with an appreciation of the wrongfulness of his or her act,

is not criminally responsible for that act.

(2) If it is alleged at criminal proceedings that the accused is by reason of mental illness or mental defect not criminally responsible for the offence charged, or if it appears to the court at criminal proceedings that the accused might for such a reason not be so responsible, the court must direct that the matter be enquired into and be reported on in accordance with section 86.

(3) If the finding contained in the relevant report is the unanimous finding of the persons who under section 86 enquired into the relevant mental condition of the accused, and the finding is not disputed by the prosecutor or the accused, the court may determine the matter on that report without hearing further evidence.

(4) If the finding referred to in subsection (3) is not unanimous or, if unanimous, is disputed by the prosecutor or the accused, the court must determine the matter after hearing evidence, and the prosecutor and the accused may to that end present evidence to the court, including the evidence of any person who under section 86 enquired into the mental condition of the accused.

(5) Where the finding is disputed as contemplated in subsection (4), the party disputing the finding may subpoena and cross-examine any person who under section 86 enquired into the mental condition of the accused.

(6) If the court finds that the accused committed the act in question and that the accused at the time of such commission was by reason of mental illness or mental defect not criminally responsible for that act -

(a) the court must find the accused not guilty; or

(b) if the court so finds after the accused has been convicted of the offence charged but before sentence is passed, the court must set the conviction aside and find the accused not guilty,

by reason of mental illness or mental defect and direct that the accused be detained in a psychiatric hospital or a prison pending the decision of a judge in chambers under section 29 of the Mental Health Act, 1973 (Act No. 18 of 1973).

(7) If the court finds that the accused at the time of the commission of the act in question was criminally responsible for that act but that the accused's capacity to appreciate the wrongfulness of

the act or to act in accordance with an appreciation of the wrongfulness of the act was diminished by reason of mental illness or mental defect, the court may take the fact of such diminished responsibility into account when sentencing the accused.

(8) (a) An accused against whom a finding is made under subsection (6) may appeal against that finding if the finding is not made in consequence of an allegation by the accused under subsection (2).

(b) An appeal under paragraph (a) must be noted and prosecuted in the same manner and subject to the same conditions as an appeal against a conviction by the court for an offence.

(9) Where an appeal against a finding under subsection (6) is allowed, the court of appeal must set aside the finding and the direction under that subsection and remit the case to the court that made the finding, whereupon the proceedings in question must be continued in the ordinary way.

86. Panel for purposes of enquiry and report under sections 84 and 85

(1) In this section "psychiatrist" means person registered as a psychiatrist under the Medical and Dental Act, 2004 (Act No. 10 of 2004).

(2) Where a court issues a direction under section 84(1) or 85(2), the relevant enquiry must be conducted and be reported on -

(a) where the accused is charged with an offence other than an offence referred to in paragraph (b), by the medical superintendent of a psychiatric hospital designated by the court, or by a psychiatrist appointed by that medical superintendent at the request of the court; or

(b) where the accused is charged with murder or culpable homicide or rape (whether under a statute or at common law) or any other offence involving serious violence, or where the court in any particular case so directs -

(i) by the medical superintendent of a psychiatric hospital designated by the court, or by a psychiatrist appointed by that medical superintendent at the request of the court;

(ii) by a psychiatrist appointed by the court and who is not in the full-time employment of the State; and

(iii) by a psychiatrist appointed by the accused if the accused so wishes.

(3) The prosecutor undertaking the prosecution of the accused or any other prosecutor attached to the same court must provide the person or persons who, in terms of subsection (2), have to conduct the enquiry and report on the accused's mental condition or mental capacity with a report in which the following are stated:

(a) Whether the referral is taking place in terms of section 84 or 85;

(b) at whose request or on whose initiative the referral is taking place;

(c) the nature of the charge against the accused;

(d) the stage of the proceedings at which the referral took place;

(e) the purport of any statement made by the accused before or during the court proceedings that is relevant with regard to the accused's mental conditions or mental capacity;

(f) the purport of evidence that has been given that is relevant to the accused's mental condition or mental capacity;

(g) in so far as it is within the knowledge of the prosecutor, the accused's social background and family composition and the names and addresses of the accused's near relatives; and

(h) any other fact that may, in the opinion of the prosecutor, be relevant in the evaluation of the accused's mental condition or mental capacity.

(4) (a) The court may for the purposes of the relevant enquiry commit the accused to a psychiatric hospital or to any other place designated by the court, for such periods, not exceeding 30 days at a time, as the court may from time to time determine, and where the accused is in custody when he or she is so committed, the accused is, while so committed, deemed to be in the lawful custody of the person or authority in whose custody he or she was at the time of the committal.

(b) When the period of committal is for the first time extended under paragraph (a), such extension may be granted in the absence of the accused, unless the accused or his or her legal practitioner requests otherwise.

(5) The report in terms of subsection (2) must be in writing and must be submitted in triplicate to the registrar or the clerk of the court in question, who must make a copy thereof available to the prosecutor and the accused.

(6) The report in terms of subsection (2) must -

(a) include a description of the nature of the enquiry; and

(b) include a diagnosis of the mental condition of the accused; and

(c) if the enquiry is under section 84(1), include a finding as to whether the accused is capable of understanding the proceedings in question so as to make a proper defence; or

(d) if the enquiry is under section 85(2), include a finding as to the extent to which the capacity of the accused to appreciate the wrongfulness of the act in question or to act in accordance with an appreciation of the wrongfulness of that act was, at the time of the commission thereof, affected by mental illness or mental defect.

(7) If the persons conducting the relevant enquiry are not unanimous in their finding under subsection (6)(c) or (d), that fact must be mentioned in the report and each of those persons must give his or her finding on the matter in question.

(8) Subject to subsection (9), the contents of the report are admissible in evidence at criminal proceedings.

(9) A statement made by an accused at the relevant enquiry is not admissible in evidence against the accused at criminal proceedings, except to the extent to which it may be relevant to the determination of the mental condition of the accused, in which event that statement is admissible notwithstanding that it may otherwise be inadmissible.

(10) A psychiatrist appointed under subsection (2), other than a psychiatrist appointed by an accused, must, subject to subsection (12), be appointed from the list of psychiatrists referred to in subsection (11).

(11) The Permanent Secretary: Health and Social Services must compile and keep a list of psychiatrists who are prepared to conduct any enquiry under this section, and must provide the registrar and all clerks of magistrates' courts with a copy thereof.

(12) Where the list compiled and kept under subsection (11) does not include a sufficient number of psychiatrists who may conveniently be appointed for any enquiry under this section, a psychiatrist may be appointed for the purposes of such enquiry notwithstanding that that psychiatrist's name does not appear on that list.

(13) (a) A psychiatrist designated or appointed under subsection (2) by or at the request of the court to enquire into the mental condition of an accused and who is not in the full-time employment of the State, must be compensated for his or her services in connection with the enquiry by the Ministry of Justice in accordance with a tariff determined by the Minister in consultation with the Minister responsible for finance.

(b) A psychiatrist appointed under subsection (2)(b)(iii) by an accused to enquire into the mental condition of the accused and who is not in the full-time employment of the State, must

be compensated for his or her services in connection with the enquiry by the Ministry of Justice in the circumstances and in accordance with a tariff determined by the Minister in consultation with the Minister responsible for finance.

Chapter 16
THE CHARGE

87. Accused entitled to copy of charge sheet

(1) An accused is entitled to a copy of the charge sheet when he or she is formally charged in proceedings in a magistrate's court.

(2) Subsection (1) does not apply to an accused who appears before court on a summons under section 56 or a written notice under section 58.

88. Joinder of charges

(1) Any number of charges may be joined in the same proceedings against an accused at any time before any evidence has been led in respect of any particular charge, and where several charges are so joined, each charge must be numbered consecutively.

(2) (a) The court may, if in its opinion it will be in the interests of justice to do so, direct that an accused be tried separately in respect of any charge joined with any other charge.

(b) An order under paragraph (a) may be made before or during a trial, and the effect thereof is that the charge in respect of which an accused is not then tried, must be proceeded with in all respects as if the accused had in respect thereof been charged separately.

89. Several charges to be disposed of by same court

Where an accused is in the same proceedings charged with more than one offence, and any one charge is for any reason to be disposed of by a divisional court or the High Court, all the charges must be disposed of by the divisional court or the High Court in the same proceedings.

90. Charge where it is doubtful which offence committed

If by reason of any uncertainty as to the facts that can be proved or if for any other reason it is doubtful which of several offences is constituted by the facts that can be proved, the accused may be charged with the commission of all or any of those offences, and any number of the charges may be tried at once, or the accused may be charged in the alternative with the commission of any number of those offences.

91. Essentials of charge

(1) Subject to this Act or any other law relating to any particular offence, a charge must set out the relevant offence in such manner and with such particulars as to the time and place at which the offence is alleged to have been committed and the person, if any, against whom and the property, if any, in respect of which the offence is alleged to have been committed, as may be reasonably sufficient to inform the accused of the nature of the charge.

(2) Where any of the particulars referred to in subsection (1) are unknown to the prosecutor it is sufficient to state that fact in the charge.

(3) In criminal proceedings the description of any statutory offence in the words of the law creating the offence, or in similar words, is sufficient.

92. Objection to charge

(1) An accused may, before pleading to the charge under section 120 but subject to subsection (2), object to the charge on the ground -

(a) that the charge does not comply with the provisions of this Act relating to the essentials of the charge;

(b) that the charge does not set out an essential element of the offence in question;

(c) that the charge does not disclose an offence;

(d) that the charge does not contain sufficient particulars of any matter alleged in the charge; or

(e) that the accused is not correctly named or described in the charge.

(2) An accused must give reasonable notice to the prosecution of his or her intention to object under subsection (1) to the charge, and must in such notice state the ground on which he or she bases his or her objection, but the court may, on good cause shown, dispense with such notice or adjourn the trial to enable such notice to be given.

(3) (a) If the court decides that an objection under subsection (1) is well-founded, the court must make such order relating to the amendment of the charge or the delivery of particulars as it may consider fit.

(b) Where the prosecution fails to comply with an order under paragraph (a), the court may quash the charge.

93. Court may order that charge be amended

(1) Where a charge is defective for want of any essential averment therein, or where there appears to be any variance between any averment in a charge and the evidence adduced in proof of such averment, or where it appears that words or particulars that ought to have been inserted in the charge have been omitted therefrom, or where any words or particulars that ought to have been omitted from the charge have been inserted therein, or where there is any other error in the charge, the court may, at any time before judgment, if it considers that the making of the relevant amendment will not prejudice the accused in his or her defence, order that the charge, whether it discloses an offence or not, be amended, so far as it is necessary, both in that part thereof where the defect, variance, omission, insertion or error occurs and in any other part thereof which it may become necessary to amend.

(2) The amendment under subsection (1) may be made on such terms as to an adjournment of the proceedings as the court may consider fit.

(3) On the amendment of the charge in accordance with the order of the court, the trial must proceed at the appointed time on the amended charge in the same manner and with the same consequences as if it had been originally in its amended form.

(4) The fact that a charge is not amended as provided in this section, does not, unless the court refuses to allow the amendment, affect the validity of the proceedings thereunder.

94. Court may order delivery of particulars

(1) An accused may, at any stage before any evidence in respect of any particular charge has been led, in writing request the prosecution to furnish particulars or further particulars of any matter alleged in that charge, and the court before which a charge is pending may, having regard to the prosecution material that has previously been disclosed to the accused, at any time before any evidence in respect of that charge has been led, direct that particulars or further particulars be delivered to the accused of any matter alleged in the charge, and may, if necessary, adjourn the proceedings in order that such particulars may be delivered.

(2) The particulars must be delivered to the accused without charge and must be entered in the record, and the trial of the accused must proceed as if the charge had been amended in conformity with such particulars.

(3) In determining whether a particular is required or whether a defect in the indictment before the High Court is material to the substantial justice of the case, the court may have regard to the summary of the substantial facts under section 163(3)(a) or the record of the preparatory examination.

95. Defect in charge cured by evidence

Where a charge is defective for want of an averment that is an essential ingredient of the offence in question, the defect is, unless brought to the notice of the court before judgment, cured by evidence at the trial proving the matter that should have been averred.

96. Previous conviction not to be alleged in charge

Except where the fact of a previous conviction is an element of an offence with which an accused is charged, it may not in any charge be alleged that an accused has previously been convicted of any offence, whether in Namibia or elsewhere.

97. Charge need not specify or negative exception, exemption, proviso, excuse or qualification

In criminal proceedings any exception, exemption, proviso, excuse or qualification, whether it does or does not accompany in the same section the description of the offence in the law creating the offence, may be proved by the accused but need not be specified or negatived in the charge and, if so specified or negatived, need not be proved by the prosecution.

98. Charge need not state manner or means of act

A charge need not set out the manner in which or the means or instrument by which any act was done, unless the manner, means or instrument is an essential element of the offence in question.

99. Certain omissions or imperfections not to invalidate charge

(1) A charge is not to be held defective -

(a) for want of the averment of any matter that need not be proved;

(b) because any person mentioned in the charge is designated by a name of office or other descriptive appellation instead of by his or her proper name;

(c) because of an omission, in any case where time is not of the essence of the offence, to state the time at which the offence was committed;

(d) because the offence is stated to have been committed on a day subsequent to the laying of the complaint or the service of the charge or on a non-existent day or on a day that never happened;

(e) for want of, or imperfection in, the addition of any accused or any other person;

(f) for want of the statement of the value or price of any matter or thing, or the amount of damage, injury or spoil in any case where the value or price or the amount of damage, injury or spoil is not of the essence of the offence.

(2) If any particular day or period is alleged in a charge to be the day on which or the period during which any act or offence was committed, proof that that act or offence was committed on any other day or during any other period not more than three months before or after the day or period alleged

in the charge, is deemed to support that allegation if time is not of the essence of the offence in question, but -

(a) proof may be given that the act or offence in question was committed on a day or during a period more than three months before or after the day or period stated in the charge, unless it appears to the court before which the proceedings are pending that the accused is likely to be prejudiced thereby in his or her defence on the merits;

(b) if the court considers that the accused is likely to be prejudiced thereby in his or her defence on the merits, it must reject such proof, and the accused is then deemed not to have pleaded to the charge.

100. Alibi and date of act or offence

If the defence of an accused is an alibi and the court before which the proceedings are pending is of the opinion that the accused may be prejudiced in making that defence if proof is admitted that the act or offence in question was committed on a day or at a time other than the day or time stated in the charge, the court must reject such proof notwithstanding that the day or time in question is within a period of three months before or after the day or time stated in the charge, whereupon the same consequences follow as are mentioned in paragraph (b) of section 99(2).

101. Charge may allege commission of offence on divers occasions

Where it is alleged that an accused on divers occasions during any period committed an offence in respect of any particular person, the accused may be charged in one charge with the commission of that offence on divers occasions during a stated period.

102. Rules applicable to particular charges

(1) A charge relating to a testamentary instrument need not allege that the instrument is the property of any person.

(2) A charge relating to anything fixed in a square, street or open place or in a place appropriated for public use or decoration, or relating to anything in a public place or office or taken therefrom, need not allege that the thing in question is the property of any person.

(3) A charge relating to a document that is the evidence of title to land or of an interest in land may describe the document as being the evidence of the title of the person or of one of the persons having an interest in the land to which the document relates, and must describe the land or any relevant part thereof in a manner sufficient to identify it.

(4) A charge relating to the theft of anything leased to the accused may describe the thing in question as the property of the person who leased it to the accused.

(5) A charge against a person in the Public Service for an offence committed in connection with anything that came into that person's possession by virtue of his or her employment may describe the thing in question as the property of the State.

(6) A charge relating to anything in the possession or under the control of any public officer may describe the thing in question as being in the lawful possession or under the lawful control of the public officer without referring to him or her by name.

(7) A charge relating to movable or immovable property whereof any body corporate has by law the management, control or custody, may describe the property in question as being under the lawful management or control or in the lawful custody of the body corporate in question.

(8) If it is uncertain to which of two or more persons property in connection with which an offence has been committed belonged at the time when the offence was committed, the relevant charge may describe the property as the property of one or other of those persons, naming each of them but without specifying which of them, and it is sufficient at the trial to prove that at the time when the

offence was committed the property belonged to one or other of those persons without proving which of them.

(9) If property alleged to have been stolen was not in the physical possession of the owner thereof at the time when the theft was committed but in the physical possession of another person who had the custody thereof on behalf of the owner, it is sufficient to allege in a charge for the theft of that property that it was in the lawful custody or under the lawful control of that other person.

(10) A charge relating to theft from any grave need not allege that anything in the grave is the property of any person.

(11) In a charge in which any trade mark or forged trade mark is proposed to be mentioned, it is sufficient, without further description and without any copy or facsimile, to state that the trade mark or forged trade mark is a trade mark or forged trade mark.

(12) A charge relating to housebreaking or the entering of any house or premises with intent to commit an offence, whether the charge is brought under a statute or at common law, may state either that the accused intended to commit a specified offence or that the accused intended to commit an offence unknown to the prosecutor.

103. Naming of company, close corporation, firm or partnership in charge

A reference in a charge to a company, close corporation, firm or partnership is sufficient if the reference is to the name of the company, close corporation, firm or partnership.

104. Naming of joint owners of property in charge

A reference in a charge to joint owners of property is sufficient if the reference is to one specific owner and another owner or other owners.

105. Charge of murder or culpable homicide sufficient if it alleges fact of killing

It is sufficient in a charge of murder to allege that the accused unlawfully and intentionally killed the deceased, and it is sufficient in a charge of culpable homicide to allege that the accused unlawfully killed the deceased.

106. Charge relating to document sufficient if it refers to document by name

(1) In any charge relating to the forging, uttering, stealing, destroying or concealing of, or to some other unlawful dealing with any document, it is sufficient to describe the document by any name or designation by which it is usually known or by the purport thereof, without setting out any copy or facsimile thereof or otherwise describing it or stating its value.

(2) When it is necessary in any case not referred to in subsection (1) to make any allegation in any charge in relation to any document, whether it consists wholly or in part of writing, print or figures, it is sufficient to describe the document by any name or designation by which it is usually known or by the purport thereof, without setting out any copy or facsimile of the whole or any part thereof, unless the content of the document or any part thereof is an element of the offence.

107. Charge alleging theft may allege general deficiency

On a charge alleging the theft of money or property by a person entrusted with the control thereof, the charge may allege a general deficiency in a stated amount, notwithstanding that the general deficiency is made up of specific sums of money or articles or of a sum of money representing the value of specific articles, the theft of which extended over a period.

108. Charge relating to false evidence

(1) A charge relating to the administering or taking of an oath or the administering or making of an affirmation or the giving of false evidence or the making of a false statement or the procuring of false evidence or a false statement -

(a) need not set out the words of the oath or the affirmation or the evidence or the statement, if it sets out so much of the purport thereof as is material;

(b) need not allege, nor need it be established at the trial, that the false evidence or statement was material to any issue at the relevant proceedings or that it was to the prejudice of any person.

(2) A charge relating to the giving or the procuring or attempted procuring of false evidence need not allege the jurisdiction or state the nature of the authority of the court or tribunal before which or the official before whom the false evidence was given or was intended or proposed to be given.

109. Charge relating to insolvency

A charge relating to insolvency need not set out any debt, act of insolvency or adjudication or any other proceeding in any court, or any order made or any warrant or document issued by or under the authority of any court.

110. Charge alleging intent to defraud need not allege or prove that intent in respect of particular person or mention owner of property or set out details of deceit

In any charge in which it is necessary to allege that the accused performed an act with an intent to defraud, it is sufficient to allege and to prove that the accused performed the act with intent to defraud without alleging and proving that it was the intention of the accused to defraud any particular person, and such a charge need not mention the owner of any property involved or set out the details of any deceit.

111. Reference in charge to objectionable matter not necessary

A charge of printing, publishing, manufacturing, making or producing blasphemous, seditious, obscene or defamatory matter, or of distributing, displaying, exhibiting, selling or offering or keeping for sale any obscene book, pamphlet, newspaper or other printed or written matter, is neither open to objection nor deemed insufficient on the ground that it does not set out the words thereof, but the court may order that particulars be furnished by the prosecution stating what passages in such book, pamphlet, newspaper, printing or writing are relied on in support of the charge.

Chapter 17
DISCLOSURE

112. Application of Chapter, and general interpretation

(1) This Chapter applies where -

(a) the accused is charged with an offence referred to in Schedule 1 -

(i) at a summary trial in terms of section 82; or

(ii) in an indictment in terms of section 163; and

(b) the accused pleads not guilty to the charge.

(2) Where more than one accused is charged, this Chapter applies separately to each of the accused.

(3) Any reference in this Chapter to material is to be construed as a reference to material of all kind, and includes in particular a reference to -

(a) any information; and

(b) any object.

(4) Any reference in this Chapter to the recording of information is to putting it in a retrievable form.

113. Disclosure by prosecutor

(1) In this section "prosecution material" means material which -

(a) is in the prosecutor's possession, and which came into the prosecutor's possession in connection with the case against the accused; or

(b) is not in the prosecutor's possession, but which the prosecutor has inspected in connection with the case against the accused.

(2) (a) An accused may, at any stage before any evidence in respect of any particular charge has been led, in writing request the prosecution to disclose any prosecution material, and the court before which the charge is pending may, at any time before any evidence in respect of that charge has been led but having regard to subsection (6), direct the prosecutor to -

(i) disclose to the accused any prosecution material that has not previously been disclosed to the accused; or

(ii) give to the accused a written statement that there is no material of a description mentioned in subparagraph (i).

(b) The court may, if necessary, postpone the proceedings for a period determined by the court to enable the prosecutor to disclose the material contemplated in paragraph (a)(i).

(c) The court may, on application by the prosecutor and if good reasons exist for doing so, extend the period determined under paragraph (b).

(3) (a) Where prosecution material consists of information that has been recorded in whatever form, the prosecutor must disclose such information -

(i) by ensuring that a copy is made of it and that the copy is given to the accused; or

(ii) if in the prosecutor's opinion it is not practicable or desirable to comply with subparagraph (i), by allowing the accused to inspect such material at a reasonable time and at a reasonable place by taking steps to ensure that the accused is allowed to do so.

(b) A copy of the prosecution material may be in such form as the prosecutor thinks fit and need not be in the same form as that in which the information has already been recorded.

(4) (a) Where prosecution material consists of information that has not been recorded, the prosecutor must disclose such information by ensuring that it is recorded in such form as the prosecutor thinks fit and -

(i) by ensuring that a copy is made of it and that the copy is given to the accused; or

(ii) if in the prosecutor's opinion it is not practicable or desirable to comply with subparagraph (i), by allowing the accused to inspect such material at a reasonable time and at a reasonable place or by taking steps to ensure that the accused is allowed to do so.

(b) A copy of the prosecution material may be in such form as the prosecutor thinks fit and need not be in the same form as that in which the information has already been recorded.

(5) Where prosecution material does not consist of information, the prosecutor must disclose such material by allowing the accused to inspect it at a reasonable time and at a reasonable place or by taking steps to ensure that the accused is allowed to do so.

(6) The prosecutor may refuse to disclose prosecution material in terms of this section where the court, on application by the prosecutor, orders that -

(a) the prosecution material is not reasonably necessary in order to enable the accused to exercise his or her right to a fair trial;

(b) disclosure of the prosecution material would lead to the disclosure of State secrets or the identity of an informer; or

(c) there is a reasonable risk that such disclosure may lead to the intimidation of witnesses or otherwise defeat the ends of justice.

114. Disclosure by accused

(1) The prosecution may, at any stage before any evidence in respect of any particular charge has been led, in writing request the accused to give to the court and the prosecutor a written statement disclosing the material required by subsection (2), and the court before which the charge is pending may, at any time before any evidence in respect of that charge has been led, direct the accused to disclose the material so required.

(2) A statement by an accused in terms of subsection (1) must -

(a) set out in detailed manner the nature of the accused's defence;

(b) indicate the matters on which the accused takes issue with the prosecution;

(c) set out, in the case of each matter contemplated in paragraph (b), the reason why the accused takes issue with the prosecution; and

(d) include a list of witnesses, but witnesses not on the list may be called with the court's consent.

(3) (a) The court may, if necessary, postpone the proceedings for a period determined by the court to enable the accused to disclose the material required by subsection (2).

(b) The court may, on application by the accused and if good reasons exist for doing so, extend the period determined under paragraph (a).

(4) Nothing in this section contained is to be construed as preventing an accused to give of his or her own accord a written statement under this section.

115. Failure or faults in disclosure of accused

(1) Where an accused -

(a) fails to give a written statement in terms of section 114(1);

(b) gives a written statement in terms of section 114(1) after the expiration of the period determined under paragraph (a) of section 114(3) or, if that period has been extended by the court under paragraph (b) of that section, after the expiration of that extended period;

(c) sets out inconsistent defences in his or her written statement given in terms of section 114(1) or (4);

(d) at his or her trial puts forward a defence that is different from any defence set out in the written statement given in terms of section 114(1) or (4),

subsection (2) applies.

(2) When in criminal proceedings the court has to decide whether -

(a) the accused may under section 197 be discharged at the close of the case for the prosecution;

(b) the accused is guilty of the offence charged; or

(c) the accused is guilty of another offence that constitutes a competent verdict on the offence charged,

the court may, subject to subsection (3), draw such inference from the accused's failure contemplated in paragraph (a) of subsection (1) or the defect in or pertaining to the accused's written statement contemplated in paragraph (b), (c) or (d) of that subsection, as may be reasonable and justifiable in the circumstances.

(3) An accused may not be convicted of an offence solely on an inference drawn under subsection (2).

116. Reconsideration of decision not to disclose

(1) This section applies at all times before -

(a) the accused is discharged under section 197;

(b) the accused is acquitted;

(c) the accused is convicted; or

(d) the prosecutor decides to withdraw the case against the accused.

(2) The court may, if further factors have arisen, of its own motion or on application by the accused, reconsider its order made under section 113(6) that -

(a) the prosecution material is not reasonably necessary in order to enable the accused to exercise his or her right to a fair trial;

(b) disclosure of the prosecution material would lead to the disclosure of State secrets or the identity of an informer; or

(c) there is a reasonable risk that the disclosure of prosecution material may lead to the intimidation of witnesses or otherwise defeat the ends of justice.

(3) If the court in reconsidering its order under subsection (2) is of the opinion that the requested prosecution material should be disclosed, the court must so order, and section 113 then applies, to the extent that it can be applied, in respect of the disclosure of such material by the prosecutor.

117. Confidentiality of disclosed information

(1) If the accused or his or her legal practitioner or the prosecutor is given or is allowed to inspect a document or other object under this Chapter, he or she may, subject to subsections (2) and (3), not disclose the document or other object or any information recorded in it.

(2) The accused or his or her legal practitioner or the prosecutor may only use or disclose -

(a) the document or other object referred to in subsection (1), or the information recorded in it, in connection with the criminal proceedings for which purpose he or she was given the document or other object or was allowed to inspect it;

(b) the document or other object contemplated in paragraph (a) to the extent that the document or other object has been displayed to the public in open court;

(c) the information contemplated in paragraph (a) to the extent that the information has been communicated to the public in open court.

(3) If the accused or the prosecutor applies to the court for an order granting permission to use or disclose, otherwise than in accordance with subsection (2), the document or other object referred to

in subsection (1), or the information recorded in it, and the court makes such an order, the accused or the prosecutor may use or disclose that document or other object or information for the purposes and to the extent specified by the court.

(4) A person who contravenes this section commits an offence and is liable on conviction to a fine not exceeding N$8 000 or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment.

Chapter 18
CURTAILMENT OF PROCEEDINGS: PRE-TRIAL CONFERENCES

118. Pre-trial conferences

(1) When a criminal trial has been set down for hearing and the accused is represented by a legal practitioner, either the prosecutor or the legal practitioner representing the accused (in this section referred to as the parties) may, on a date before the commencement of the trial, call for a pre-trial conference to consider, in the presence of the accused, such matters as will curtail the proceedings at the trial and expedite the hearing.

(2) Without detracting from the generality of subsection (1), the parties must consider -

(a) the proposed plea by the accused, the plea explanation, and the basis for such plea;

(b) the willingness of the State to accept the proposed plea and, if acceptable, the basis on which the plea will be accepted;

(c) in the case of an offence against the person or against property, the victim impact statement, including the extent of agreement on the facts alleged therein, the willingness or otherwise of the accused to compensate the victim in accordance with the applicable provisions of this Act for any injury, damage or loss suffered and, having regard to section 18, the amount of compensation to be awarded to the victim;

(d) in the case of a proposed plea of guilty, the sentence agreed on as the sentence that will be proposed to the court;

(e) in the case of a proposed plea of not guilty, facts or issues not in dispute, including facts alleged by the State and not disputed by the defence and facts alleged by the defence and not disputed by the State;

(f) facts or issues that are in dispute;

(g) the possibility of agreeing on further facts or admissions;

(h) the holding of inspections of the scene of the alleged offence and other relevant places and objects;

(i) the making of further discovery of statements or documents where such discovery had not been made in the ordinary course to date of the conference to the satisfaction of the parties;

(j) the exchange between the parties of the reports of experts not yet discovered or exchanged;

(k) the giving of any particulars or any further particulars reasonably required for the purpose of the trial;

(l) the places, diagrams, photographs, models and the like to be used by both parties at the trial;

(m) the preparation and handing in at the trial of copies of correspondence and other documents in the form of a paginated bundle of documentation in chronological order; and

(n) any other matter or issue which the parties think may contribute to curtail the proceedings at the trial.

(3) (a) At the conclusion of the pre-trial conference, the parties must draw up a minute wherein are set out -

(i) the issues considered;

(ii) the facts and issues agreed on; and

(iii) the facts and issues not agreed on.

(b) The minute so drawn up must -

(i) be signed and dated by the parties and by the accused; and

(ii) if the accused has taken part in the pre-trial conference through an interpreter, contain a certificate by the interpreter to the effect that he or she interpreted accurately during such conference and in respect of the contents of the minute.

(4) The minute drawn up in terms of subsection (3)(a) and the paginated bundle of documentation prepared in terms of subsection (2)(m) must be handed into court by the prosecutor at the commencement of the trial before the charge is put to the accused.

(5) When the minute is handed into court in terms of subsection (4), the court -

(a) may put any question -

(i) to the prosecutor, the accused or his or her legal practitioner to clarify any matter set out in the minute; and

(ii) where the accused has in terms of subsection (2)(c) indicated his or her willingness to compensate the victim of an offence against the person or against property, also to the victim or his or her legal practitioner with regard to such compensation;

(b) must require the accused to declare whether he or she confirms any agreement between the parties under subsection (3)(a)(ii) with regard to the alleged facts of the case and any admission made by the accused in the minute.

(6) After compliance with subsection (5), and in accordance with section 119 -

(a) the charge must be put to the accused; and

(b) the accused must be required to plead to the charge.

(7) (a) Where the accused pleads guilty to the offence charged, or to an offence of which the accused may be convicted on the charge and the prosecutor accepts that plea, the court must act in terms of section 125 and, subject to paragraph (b), convict the accused of the offence to which he or she has pleaded guilty.

(b) The court must, if -

(i) the court is not satisfied that the accused is guilty of the offence to which he or she has pleaded guilty; or

(ii) it appears to the court that the accused does not admit an allegation in the charge or that the accused has incorrectly admitted any such allegation or that the accused has a valid defence to the charge; or

(iii) for any other reason, the court is of the opinion that the plea of guilty by the accused should not stand,

in terms of subsection (1) of section 126 record a plea of not guilty and require the prosecutor to proceed with the prosecution, and that section then applies with the necessary changes.

(c) Where the accused, whether or not in accordance with the minute handed into court in terms of subsection (4) -

(i) pleads not guilty to the offence charged; or

(ii) pleads guilty to the offence charged, but the court records a plea of not guilty in terms of section 126(1),

the court must act in terms of section 128.

(d) An agreement between the parties under subsection (2)(d) as to the proposed sentence is not binding on the court, but must be considered by the court and given due weight when imposing sentence, in so far as the proposed sentence is not in conflict with this Act or any other law relating to sentence.

(8) Nothing in this section contained is to be construed as preventing the parties from approaching the judge or magistrate concerned in chambers to inform him or her of any progress made in regard to the pre-trial conference, nor as preventing that judge or magistrate from initiating an enquiry as to such progress with a view to enable the court, with the assistance of the parties, to plan the further proceedings in advance so as to curtail the proceedings at the trial as far as possible.

Chapter 19
THE PLEA

119. Accused to plead to charge

The charge must be put to the accused by the prosecutor before the trial of the accused is commenced, and the accused must, subject to sections 84 and 92, be required by the court immediately to plead thereto in accordance with section 120.

120. Pleas

(1) When an accused pleads to a charge, the accused may plead -

(a) that he or she is guilty of the offence charged or of any offence of which he or she may be convicted on the charge; or

(b) that he or she is not guilty; or

(c) that he or she has already been convicted of the offence with which he or she is charged; or

(d) that he or she has already been acquitted of the offence with which he or she is charged; or

(e) that he or she has been indemnified under section 229 against prosecution for the offence charged; or

(f) that the court has no jurisdiction to try the offence; or

(g) that the prosecutor has no authority to prosecute; or

(h) that the prosecution may not be resumed or instituted by reason of an order by a court under section 371(3)(c).

(2) Two or more pleas may be pleaded together, except that a plea of guilty may not be pleaded with any other plea to the same charge.

(3) An accused must give reasonable notice to the prosecution of his or her intention to plead a plea other than the plea of guilty or of not guilty, and must in such notice state the ground on which he or she bases his or her plea, but the court may, on good cause shown, dispense with such notice or adjourn the trial to enable such notice to be given.

(4) An accused who pleads to a charge, other than a plea that the court has no jurisdiction to try the offence, or an accused on behalf of whom a plea of not guilty is entered by the court, is, except as otherwise expressly provided by this Act or any other law, entitled to demand that he or she be acquitted or be convicted.

121. Truth and publication for public benefit of defamatory matter to be specially pleaded

A person charged with the unlawful publication of defamatory matter, who sets up as a defence that the alleged defamatory matter is true and that it was for the public benefit that the matter should be published, must plead such defence specially, and may plead it with any other plea except the plea of guilty.

122. Issues raised by plea to be tried

If an accused pleads a plea other than a plea of guilty, the accused is, subject to sections 128, 137 and 160(3), by such plea deemed to demand that the issues raised by the plea be tried.

123. Accused refusing to plead

Where an accused in criminal proceedings refuses to plead to any charge, the court must record a plea of not guilty on behalf of the accused, and a plea so recorded has the same effect as if it had been actually pleaded.

Chapter 20
JURISDICTION

124. Accused before court that has no jurisdiction

(1) Where an accused does not plead that the court has no jurisdiction and it at any stage -

(a) after the accused has pleaded a plea of guilty or of not guilty; or

(b) where the accused has pleaded any other plea and the court has determined such plea against the accused,

appears that the court in question does not have jurisdiction, the court is for the purposes of this Act deemed to have jurisdiction in respect of the offence in question.

(2) Where an accused pleads that the court in question has no jurisdiction and the plea is upheld, the court must adjourn the case to the court having jurisdiction.

Chapter 21
PLEA OF GUILTY AT SUMMARY TRIAL

125. Plea of guilty

(1) Where an accused at a summary trial in any court pleads guilty to the offence charged, or to an offence of which the accused may be convicted on the charge and the prosecutor accepts that plea -

(a) the presiding judge or magistrate may, if he or she is of the opinion that the offence does not merit punishment of imprisonment or any other form of detention without the option of a fine or of a fine exceeding N$3 000, convict the accused of the offence to which he or she has pleaded guilty on his or her plea of guilty only and -

(i) impose any competent sentence, other than imprisonment or any other form of detention without the option of a fine or a fine exceeding N$3 000; or

(ii) deal with the accused otherwise in accordance with law;

(b) the presiding judge or magistrate must, if he or she is of the opinion that the offence merits punishment of imprisonment or any other form of detention without the option of a fine or of a fine exceeding N$3 000, or if requested thereto by the prosecutor, question the accused with reference to the alleged facts of the case in order to ascertain whether the accused admits the allegations in the charge to which he or she has pleaded guilty, and may, if satisfied that the accused is guilty of the offence to which he or she has pleaded guilty, convict the accused on his or her plea of guilty of that offence and impose any competent sentence.

(2) If an accused or his or her legal practitioner hands a written statement by the accused into court, in which the accused sets out the facts which he or she admits and on which he or she has pleaded guilty, the court may, instead of questioning the accused under subsection (1)(b), convict the accused on the strength of that statement and sentence the accused as provided in that subsection if the court is satisfied that the accused is guilty of the offence to which he or she has pleaded guilty, but the court may put any question to the accused to clarify any matter raised in the statement.

(3) Nothing in this section contained is to be construed as preventing the prosecutor from presenting evidence on any aspect of the charge, or the court from hearing evidence, including evidence or a statement by or on behalf of the accused, with regard to sentence, or from questioning the accused on any aspect of the case for the purposes of determining an appropriate sentence.

126. Change of plea of guilty

(1) If at any stage of the proceedings under section 125(1)(a) or (b) or 125(2) and before sentence is passed -

(a) the court is in doubt whether the accused is guilty of the offence to which he or she has pleaded guilty;

(b) it is alleged or appears to the court that the accused does not admit an allegation in the charge or that the accused has incorrectly admitted any such allegation or that the accused has a valid defence to the charge; or

(c) the court is of the opinion for any other reason that the accused's plea of guilty should not stand,

the court must record a plea of not guilty and require the prosecutor to proceed with the prosecution, but any allegation, other that an allegation referred to in paragraph (b), admitted by the accused up to the stage at which the court records a plea of not guilty, stands as proof in any court of such allegation.

[The phrase "other that an allegation" should be "other than an allegation".]

(2) If the court records a plea of not guilty in terms of subsection (1) before any evidence has been led, the prosecution must proceed on the original charge laid against the accused, unless the prosecutor explicitly indicates otherwise.

127. Committal by district court of accused for sentence by divisional court after plea of guilty

(1) If a district court, after conviction following on a plea of guilty but before sentence, is of the opinion -

(a) that the offence in respect of which the accused has been convicted is of such a nature or magnitude that it merits punishment in excess of the jurisdiction of a district court; or

(b) that the previous convictions of the accused are such that the offence in respect of which the accused has been convicted merits punishment in excess of the jurisdiction of a district court,

the court must stop the proceedings and commit the accused for sentence by a divisional court having jurisdiction.

(2) Where an accused is committed in terms of subsection (1) for sentence by a divisional court, the record of the proceedings in the district court must, upon proof thereof in the divisional court, be received by the divisional court and forms part of the record of that court, and the plea of guilty and any admission by the accused stand unless the accused satisfies the court that such plea or such admission was incorrectly recorded.

(3) (a) Unless the divisional court -

(i) is satisfied that a plea of guilty or an admission by the accused which is material to his or her guilt was incorrectly recorded; or

(ii) is not satisfied that the accused is guilty of the offence of which he or she has been convicted and in respect of which he or she has been committed for sentence,

that court must make a formal finding of guilty and sentence the accused.

(b) If the divisional court -

(i) is satisfied that a plea of guilty or an admission by the accused which is material to his or her guilt was incorrectly recorded; or

(ii) is not satisfied that the accused is guilty of the offence of which he or she has been convicted and in respect of which he or she has been committed for sentence or that he or she has no valid defence to the charge,

the court must enter a plea of not guilty and proceed with the trial as a summary trial in that court, but any admission by the accused, the recording of which is not disputed by the accused, stands as proof of the fact so admitted.

(4) Section 125(3) applies in respect of the proceedings under this section.

Chapter 22
PLEA OF NOT GUILTY AT SUMMARY TRIAL

128. Plea of not guilty and procedure in regard to issues

(1) Where an accused at a summary trial -

(a) pleads not guilty to the offence charged; or

(b) pleads guilty to the offence charged, but the court records a plea of not guilty in terms of section 126(1),

the presiding judge or magistrate must, subject to subsection (2), ask the accused whether he or she wishes to make an unsworn statement indicating the basis of his or her defence.

(2) The presiding judge or magistrate must, before taking an unsworn statement from the accused under subsection (1), give the following explanations to the accused:

(a) That the purpose of the unsworn statement is to establish which allegations in the charge are in dispute between the prosecution and the accused so as to curtail the duration of the trial and to decide on the relevance and need for certain evidence and the relevance of certain cross-examination, but that the accused is under no obligation to make such a statement;

(b) that the court may, whether the accused does or does not make an unsworn statement, question the accused under subsection (3) to establish which allegations in the charge are in dispute, but that the accused is under no obligation to answer any question so put to him or her by the court or to consent to the recording of any admission;

(c) that the accused has the right not to be compelled to give self-incriminating evidence;

(d) that, notwithstanding an unsworn statement made by the accused, the State is not relieved of the burden of proving the guilt of the accused beyond reasonable doubt, but that an admission made by the accused and recorded in terms of subsection (3)(b) is sufficient proof of the fact so admitted and relieves the State of the burden of adducing evidence to prove that fact;

(e) that an unsworn statement by the accused is not considered to be evidence by the accused in substitution of evidence under oath or affirmation after the conclusion of the evidence for the prosecution;

(f) that should the accused refuse or fail to make an unsworn statement or to answer questions in accordance with subsection (3), cross-examination of State witnesses by or on behalf of the accused may be curtailed by the court on the ground that the relevance of the questions cannot be ascertained in the absence of the disclosure of the basis of the accused's defence.

(3) (a) Where the accused does not make an unsworn statement under subsection (1) or does so and it is not clear from that statement to what extent the accused denies or admits the issues raised by the plea, the court may question the accused to establish which allegations in the charge are in dispute.

(b) The court may put any question to the accused to clarify any matter raised under subsection (1) or this subsection, and must enquire from the accused whether an allegation that is not placed in issue by the plea of not guilty, may be recorded as an admission by the accused of that allegation, and, if the accused so consents, that admission must be recorded and is deemed to be an admission under section 250.

(4) Where the legal practitioner of an accused on behalf of the accused replies, whether in writing or orally, to any question by the court under this section, the accused must be required by the court to declare whether he or she confirms that reply or not.

129. Committal of accused for trial by divisional court

(1) Where an accused in a district court -

(a) pleads not guilty to the offence charged; or

(b) pleads guilty to the offence charged, but the court records a plea of not guilty in terms of section 126(1),

the court must, subject to section 128, at the request of the prosecutor made before any evidence is tendered, refer the accused for trial to a divisional court having jurisdiction.

(2) Where an accused is referred in terms of subsection (1) to a divisional court for trial, the record of the proceedings in the district court must, upon proof thereof in the divisional court, be received by the divisional court and forms part of the record of that court.

130. Committal of accused for sentence by divisional court after trial in district court

(1) If a district court, after conviction following on a plea of not guilty but before sentence, is of the opinion -

(a) that the offence in respect of which the accused has been convicted is of such a nature or magnitude that it merits punishment in excess of the jurisdiction of a district court; or

(b) that the previous convictions of the accused are such that the offence in respect of which the accused has been convicted merits punishment in excess of the jurisdiction of a district court,

the court must stop the proceedings and commit the accused for sentence by a divisional court having jurisdiction.

(2) Where an accused is committed in terms of subsection (1) for sentence by a divisional court, the record of the proceedings in the district court must, upon proof thereof in the divisional court, be received by the divisional court and forms part of the record of that court.

(3) (a) The divisional court must, after considering the record of the proceedings in the district court but subject to paragraph (b), sentence the accused, and the judgment of the district court stands for this purpose and is sufficient for the divisional court to pass any competent sentence.

(b) If the divisional magistrate, after considering the record of the proceedings in the district court, is of the opinion that the proceedings are not in accordance with justice or that doubt exists whether the proceedings are in accordance with justice, that magistrate must, without sentencing the accused, record the reasons for his or her opinion and transmit those reasons, together with the record of the proceedings in the district court, to the registrar, and the registrar must, as soon as practicable, lay the same in chambers before a judge who has the same powers in respect of such proceedings as if the record thereof had been laid before the judge under section 329.

(c) If a divisional magistrate acts under paragraph (b), the divisional magistrate must inform the accused accordingly and postpone the case to some future date pending the outcome of the review proceedings, and, if the accused is in custody, the divisional magistrate may make such order with regard to the detention or release of the accused as that magistrate may consider fit.

131. Committal to High Court in special case

Where an accused in a magistrate's court pleads not guilty to the offence charged against him or her and a ground of his or her defence is the alleged invalidity of any law on which the charge against him or her is founded and upon the validity of which a district court is in terms of the Magistrates' Courts Act not competent to pronounce, the accused must, notwithstanding anything to the contrary in that Act contained, be committed for a summary trial before the High Court.

132. Non-availability of judge or magistrate after plea of not guilty

(1) If the judge or magistrate before whom an accused at a summary trial -

(a) has pleaded not guilty; or

(b) has pleaded guilty, but the court has recorded a plea of not guilty in terms of section 126(1),

is for any reason not available, whether temporarily or permanently, to continue with the trial and no evidence has been adduced yet, the trial may, subject to subsection (2), continue before any other judge or magistrate of the same court.

(2) Where evidence has in the circumstances contemplated in subsection (1) been adduced, the trial must start anew.

Chapter 23
COMMITTAL OF ACCUSED FOR SENTENCE BY HIGH COURT AFTER CONVICTION IN DIVISIONAL COURT

133. Committal of accused for sentence by High Court after conviction in divisional court

(1) If a divisional court, following on -

(a) a plea of guilty; or

(b) a plea of not guilty,

has convicted an accused of an offence and that court is of the opinion that the offence in respect of which the accused has been convicted merits punishment in excess of the jurisdiction of a divisional court, the court must stop the proceedings and commit the accused for sentence by the High Court.

(2) (a) Where an accused is committed in terms of subsection (1)(a) for sentence by the High Court, the record of the proceedings in the divisional court must, upon proof thereof in the High Court, be received by the High Court and forms part of the record of that Court, and the plea of guilty and any admission by the accused stand unless the accused satisfies the High Court that such plea or such admission was incorrectly recorded.

(b) Unless the High Court -

(i) is satisfied that a plea of guilty or an admission by the accused which is material to his or her guilt was incorrectly recorded; or

(ii) is not satisfied that the accused is guilty of the offence of which he or she has been convicted and in respect of which he or she has been committed for sentence,

the High Court must make a formal finding of guilty and sentence the accused.

(c) If the High Court -

(i) is satisfied that a plea of guilty or an admission by the accused which is material to his or her guilt was incorrectly recorded; or

(ii) is not satisfied that the accused is guilty of the offence of which he or she has been convicted and in respect of which he or she has been committed for sentence or that he or she has no valid defence to the charge,

the High Court must enter a plea of not guilty and proceed with the trial as a summary trial in that Court, but any admission by the accused, the recording of which is not disputed by the accused, stands as proof of the fact so admitted.

(d) Section 125(3) applies in respect of the proceedings under this subsection.

(3) (a) Where an accused is committed in terms of subsection (1)(b) for sentence by the High Court, the record of the proceedings in the divisional court must, upon proof thereof in the High Court, be received by the High Court and forms part of the record of that Court.

(b) The High Court must, after considering the record of the proceedings in the divisional court but subject to paragraph (c), sentence the accused, and the judgment of the divisional court stands for this purpose and is sufficient for the High Court to pass that sentence.

(c) If the judge, after considering the record of the proceedings in the divisional court, is of the opinion that the proceedings are not in accordance with justice or that doubt exists whether the proceedings are in accordance with justice, the judge must, without sentencing the accused, obtain from the divisional magistrate who presided at the trial a statement setting out his or her reasons for convicting the accused.

(d) If a judge acts under paragraph (c), the judge must inform the accused accordingly and postpone the case for judgment, and, if the accused is in custody, the judge may make such order with regard to the detention or release of the accused as the judge may consider fit.

(e) The High Court may at any sitting thereof hear any evidence and for that purpose subpoena any person to appear to give evidence or to produce any document or other article.

(f) The High Court, whether or not it has heard evidence and after it has obtained and considered a statement referred to in paragraph (c), may -

(i) confirm the conviction and thereupon impose a sentence;

(ii) alter the conviction to a conviction of an offence of which the accused may be convicted on the charge, and thereupon impose the sentence the High Court may consider fit;

(iii) set aside the conviction;

(iv) remit the case to the divisional court with instructions to deal with any matter in such manner as the High Court may consider fit; or

(v) make any such order in regard to any matter or thing connected with the accused or the proceedings in regard to the accused as the High Court considers likely to promote the ends of justice.

Chapter 24
PLEA IN DISTRICT COURT ON CHARGE JUSTICIABLE IN HIGH COURT

134. Accused to plead in district court on charge to be tried in High Court

When an accused appears in a district court and the alleged offence may be tried by the High Court only or is of such a nature or magnitude that it merits punishment in excess of the jurisdiction of a district court, the prosecutor may, notwithstanding section 82, on the directions of the Prosecutor-General, whether in general or in any particular case, put the relevant charge, as well as any other charge that must in terms of section 89 be disposed of in the High Court, to the accused in the district court, and the accused must, subject to sections 84 and 92, be required by the magistrate to plead thereto immediately.

135. Charge sheet and proof of record

The proceedings are commenced by the lodging of a charge sheet with the clerk of the court in question, and section 83(2) and (3) applies with the necessary changes in respect of the charge sheet and the record of the proceedings.

136. Plea of guilty

(1) Where an accused under section 134 pleads guilty to the offence charged, the magistrate must question the accused in terms of paragraph (b) of section 125(1).

(2) (a) If the magistrate is satisfied that the accused admits the allegations stated in the charge, the magistrate must stop the proceedings and adjourn the case pending the decision of the Prosecutor-General.

(b) If the magistrate is not satisfied as provided in paragraph (a), the magistrate must record in what respect he or she is not satisfied and enter a plea of not guilty and deal with the matter in terms of section 137(1), but an allegation with reference to which the magistrate is so satisfied and which has been recorded as an admission, stands at the trial of the accused as proof of that allegation.

(3) Where the proceedings have been adjourned in terms of subsection (2)(a), the Prosecutor-General may -

(a) arraign the accused for sentence before the High Court or any other court having jurisdiction, including the district court in which the proceedings were adjourned in terms of subsection (2)(a);

(b) decline to arraign the accused for sentence before any court, but arraign the accused for trial on any charge at a summary trial before the High Court or any other court having jurisdiction, including the district court in which the proceedings were adjourned in terms of subsection (2)(a);

(c) institute a preparatory examination against the accused.

(4) The magistrate, who need not be the magistrate before whom the proceedings under section 134 or subsection (1) of this section were conducted, must inform the accused of the decision of the Prosecutor-General and, if the decision is that the accused be arraigned for sentence -

(a) in the district court in question, dispose of the case on the charge on which the accused is arraigned; or

(b) in a divisional court or the High Court, adjourn the case for sentence by the divisional court or the High Court.

(5) (a) The record of the proceedings in the district court must, upon proof thereof in the court in which the accused is arraigned for sentence, be received as part of the record of that court or, if the accused is arraigned in the district court in which the proceedings were adjourned in terms of subsection (2)(a), the record of such proceedings stands as the record of that court, and the plea of guilty and any admission by the accused stand and form part of the record of that court unless the accused satisfies the court that such plea or such admission was incorrectly recorded.

(b) The record of the proceedings in the district court must, upon proof thereof in the court in which the accused is arraigned for summary trial, be received as part of the record of that court, and any admission by the accused stands and forms part of the record of that court unless the accused satisfies the court that such admission was incorrectly recorded.

(c) Unless the accused satisfies the court that a plea of guilty or an admission was incorrectly recorded or unless the court is not satisfied that the accused is guilty of the offence to which he or she has pleaded guilty or that the accused has no valid defence to the charge, the court may convict the accused on his or her plea of guilty of the offence to which he or she has pleaded guilty and impose any competent sentence.

(6) If the accused satisfies the court that the plea of guilty or an admission that is material to his or her guilt was incorrectly recorded, or if the court is not satisfied that the accused is guilty of the offence to which he or she has pleaded guilty or that the accused has no valid defence to the charge, the court must record a plea of not guilty and proceed with the trial as a summary trial in that court, but an admission by the accused, the recording of which is not disputed by the accused, stands as proof of the fact so admitted.

(7) Nothing in this section contained is to be construed as preventing the prosecutor from presenting evidence on any aspect of the charge, or the court from hearing evidence, including evidence or a statement by or on behalf of the accused, with regard to sentence, or from questioning the accused on any aspect of the case for the purposes of determining an appropriate sentence.

137. Plea of not guilty

(1) Where an accused under section 134 pleads not guilty to the offence charged, the court must act in terms of section 128 and when that section has been complied with, the magistrate must stop the proceedings and adjourn the case pending the decision of the Prosecutor-General.

(2) Where the proceedings have been adjourned in terms of subsection (1), the Prosecutor-General may -

(a) arraign the accused on any charge at a summary trial before the High Court or any other court having jurisdiction, including the district court in which the proceedings were adjourned in terms of subsection (1); or

(b) institute a preparatory examination against the accused,

and the Prosecutor-General must inform the district court in question of his or her decision.

(3) The magistrate, who need not be the magistrate before whom the proceedings under section 134 or subsection (1) of this section were conducted, must inform the accused of the decision of the Prosecutor-General and, if the decision is that the accused be arraigned -

(a) in the district court in question, proceed with the trial from the stage at which the proceedings were adjourned in terms of subsection (1) or, if the accused is arraigned on a charge that is different from the charge to which he or she has pleaded, require the accused to plead to that charge, and, if the plea to that charge is one of guilty or the plea in respect of an offence of which the accused may on that charge be convicted is one of guilty and the prosecutor accepts the plea, deal with the matter in accordance with section 125, in which event section 127(1) does not apply, or, if the plea is one of not guilty, deal with the matter in accordance with section 128 and proceed with the trial;

(b) in a divisional court or the High Court, commit the accused for a summary trial before the divisional court or the High Court.

(4) The record of the proceedings in the district court must, upon proof thereof in the court in which the accused is arraigned for a summary trial, be received as part of the record of that court, and any admission by the accused stands at the trial of the accused as proof of such admission.

Chapter 25
PLEA IN DISTRICT COURT ON CHARGE TO BE TRIED IN DIVISIONAL COURT

138. Accused to plead in district court on charge to be tried in divisional court

When an accused appears in a district court and the alleged offence may be tried by a divisional court but not by a district court, or the prosecutor informs the court that he or she is of the opinion that the alleged offence is of such a nature or magnitude that it merits punishment in excess of the jurisdiction of a district court but not of the jurisdiction of a divisional court, the prosecutor may, notwithstanding section 82, put the relevant charge, as well as any other charge that must in terms of section 89 be disposed of by a divisional court, to the accused, who must, subject to sections 84 and 92, be required by the magistrate to plead thereto immediately.

139. Charge sheet and proof of record

Section 135 applies with the necessary changes in respect of the proceedings under section 138 and the record of the proceedings.

140. Plea of guilty

(1) Where an accused under section 138 pleads guilty to the offence charged, the magistrate must question the accused in terms of paragraph (b) of section 125(1).

(2) (a) If the magistrate is satisfied that the accused admits the allegations stated in the charge, the magistrate must adjourn the case for sentence by the divisional court in question.

(b) If the magistrate is not satisfied as provided in paragraph (a), the magistrate must record in what respect he or she is not satisfied and enter a plea of not guilty and deal with the matter

in terms of section 141(1), but an allegation with reference to which the magistrate is so satisfied and which has been recorded as an admission, stands at the trial of the accused as proof of that allegation.

(3) (a) The record of the proceedings in the district court must, upon proof thereof in the divisional court in which the accused is arraigned for sentence, be received as part of the record of that court, and the plea of guilty and any admission by the accused stand and form part of the record of that court unless the accused satisfies the court that such plea or such admission was incorrectly recorded.

(b) Unless the accused satisfies the court that the plea of guilty or an admission was incorrectly recorded or unless the court is not satisfied that the accused is guilty of the offence to which he or she has pleaded guilty or that the accused has no valid defence to the charge, the court may convict the accused on his or her plea of guilty of the offence to which he or she has pleaded guilty and impose any competent sentence.

(4) If the accused satisfies the court that the plea of guilty or an admission that is material to his or her guilt was incorrectly recorded, or if the court is not satisfied that the accused is guilty of the offence to which he or she has pleaded guilty or that the accused has no valid defence to the charge, the court must record a plea of not guilty and proceed with the trial as a summary trial in that court, but an admission by the accused, the recording of which is not disputed by the accused, stands as proof of the fact so admitted.

(5) Nothing in this section contained is to be construed as preventing the prosecutor from presenting evidence on any aspect of the charge, or the court from hearing evidence, including evidence or a statement by or on behalf of the accused, with regard to sentence, or from questioning the accused on any aspect of the case for the purpose of determining an appropriate sentence.

141. Plea of not guilty

(1) Where an accused under section 138 pleads not guilty to the offence charged, the court must act in terms of section 128 and when that section has been complied with, the magistrate must commit the accused for a summary trial in the divisional court in question on the charge to which he or she has pleaded not guilty or on a charge in respect of which a plea of not guilty has been entered under section 140(2)(b).

(2) The divisional court may try the accused on the charge in respect of which he or she has been committed for a summary trial in terms of subsection (1) or on any other or further charge which the prosecutor may prefer against the accused and which that court is competent to try.

(3) The record of proceedings in the district court must, upon proof thereof in the divisional court in which the accused is arraigned for a summary trial, be received as part of the record of that court, and any admission by the accused stands at the trial of the accused as proof of such admission.

Chapter 26
PREPARATORY EXAMINATION

142. Prosecutor-General may direct that preparatory examination be held

If the Prosecutor-General is of the opinion that it is necessary for the more effective administration of justice -

(a) that a trial in the High Court be preceded by a preparatory examination in a district court into the allegations against the accused, the Prosecutor-General may, where he or she does not follow the procedure under section 134, or, where he or she does follow that procedure and the proceedings are adjourned in terms of section 136(2)(a) or 137(1) pending the decision of the Prosecutor-General, direct that a preparatory examination be instituted against the accused;

(b) that a trial in a district court or a divisional court be converted into a preparatory examination, the Prosecutor-General may at any stage of the proceedings, but before conviction, direct that the trial be converted into a preparatory examination.

143. Proceedings preceding holding of preparatory examination to form part of preparatory examination record

Where the Prosecutor-General acts under paragraph (a) or (b) of section 142 -

(a) the record of any proceedings under section 136(1) or 137(1) or of any proceedings in the district court or divisional court before the trial was converted into a preparatory examination, forms part of the preparatory examination record;

(b) and the accused has pleaded to the charge, the preparatory examination must continue on the charge to which the accused has pleaded, but, where evidence is led at the preparatory examination which relates to an offence, other than the offence contained in the charge to which the accused has pleaded, allegedly committed by the accused, such evidence may not be excluded on the ground only that the evidence does not relate to the offence to which the accused has pleaded.

144. Prosecutor-General may direct that preparatory examination be conducted at a specified place

(1) Where the Prosecutor-General directs that a preparatory examination be instituted or that a trial be converted into a preparatory examination, the Prosecutor-General may, if it appears to him or her expedient on account of the number of accused involved or of excessive inconvenience or of possible disturbance of the public order, that the preparatory examination be held in a court other than the court in which the relevant proceedings were commenced, direct that the preparatory examination be instituted in that other court or, where a trial has been converted into a preparatory examination, be continued in that other court.

(2) The presiding magistrate must inform the accused of the decision of the Prosecutor-General under subsection (1) and adjourn the proceedings to that other court, and thereafter forward a copy of the record of the proceedings, certified as correct by the clerk of the court, to the court to which the proceedings have been adjourned.

(3) The court to which the proceedings are adjourned under subsection (2), must receive the copy of the record referred to in that subsection, which then forms part of the proceedings of that court, and must proceed to conduct the preparatory examination as if it were a preparatory examination instituted in that court.

145. Procedure to be followed by magistrate at preparatory examination

Where the Prosecutor-General directs that a preparatory examination be held against an accused, the presiding magistrate must inform the accused of the decision of the Prosecutor-General and proceed in the manner hereinafter provided to enquire into the charge against the accused.

146. Recalling of witnesses after conversion of trial into preparatory examination

(1) Where the Prosecutor-General directs that a trial be converted into a preparatory examination, it is, subject to subsection (2), not necessary for the presiding magistrate to recall any witness who has already given evidence at the trial, but the record of the evidence so given, certified as correct by that magistrate, or, if such evidence was recorded in shorthand or by mechanical means, any document purporting to be a transcription of the original record of such evidence and purporting to be certified as correct under the hand of the person who transcribed it, has the same legal force and effect and is admissible in evidence in the same circumstances as the evidence given in the course of a preparatory examination.

(2) If it appears to the presiding magistrate that it may be in the interests of justice to have a witness already examined recalled for further examination, then that witness must be recalled and further examined, and the evidence given by that witness must be recorded in the same manner as other evidence given at a preparatory examination.

147. Examination of prosecution witnesses at preparatory examination

The prosecutor may, at a preparatory examination, call any witness in support of the charge to which the accused has pleaded or to testify in relation to any other offence allegedly committed by the accused.

148. Recording of evidence at preparatory examination and proof of record

(1) The evidence given at a preparatory examination must be recorded, and if such evidence is recorded in shorthand or by mechanical means, a document purporting to be a transcription of the original record of such evidence and purporting to be certified as correct under the hand of the person who transcribed such evidence, has the same legal force and effect as the original record.

(2) The record of a preparatory examination may be proved in a court by the mere production thereof or of a copy thereof in terms of section 266.

149. Charge to be put at conclusion of evidence for prosecution

The prosecutor must, at the conclusion of evidence in support of the charge, put to the accused such charge or charges as may arise from the evidence and which the prosecutor may prefer against the accused.

150. Accused to plead to charge

The presiding magistrate must, subject to sections 84 and 92, require an accused to whom a charge is put under section 149 immediately to plead to the charge.

151. Procedure after plea

(1) (a) Where an accused who has been required under section 150 to plead to a charge to which he or she has not pleaded before, pleads guilty to the offence charged, the presiding magistrate must question the accused in accordance with paragraph (b) of section 125(1).

(b) If the presiding magistrate is not satisfied that the accused admits all the allegations in the charge, that magistrate must record in what respect he or she is not so satisfied and enter a plea of not guilty, but an allegation with reference to which that magistrate is so satisfied and which has been recorded as an admission, stands at the trial of the accused as proof of that allegation.

(2) Where an accused who has been required under section 150 to plead to a charge to which he or she has not pleaded before, pleads not guilty to the offence charged, the presiding magistrate must act in accordance with section 128.

152. Accused may testify at preparatory examination

An accused may, after section 151 has been complied with but subject to section 169(1)(b) that applies with the necessary changes, give evidence or make an unsworn statement in relation to a charge put to him or her under section 149, and the record of such evidence or statement must be received in evidence before any court in criminal proceedings against the accused on its mere production without further proof.

153. Accused may call witnesses at preparatory examination

An accused may call any competent witness on behalf of the defence.

154. Discharge of accused at conclusion of preparatory examination

As soon as a preparatory examination is concluded and the presiding magistrate is on the whole of the evidence of the opinion that no sufficient case has been made out to put the accused on trial on any charge put to the accused under section 149 or on any charge in respect of an offence of which the accused may on such charge be convicted, that magistrate may discharge the accused in respect of the charge.

155. Procedure with regard to exhibits at preparatory examination

The presiding magistrate must cause every document and every article produced or identified as an exhibit by any witness at a preparatory examination to be inventoried and labelled or otherwise marked, and must cause those documents and articles to be kept in safe custody pending any trial following on the preparatory examination.

156. Magistrate to transmit record of preparatory examination to Prosecutor-General

The presiding magistrate must, at the conclusion of a preparatory examination and whether or not the accused is under section 154 discharged in respect of any charge, send a copy of the record of the preparatory examination to the Prosecutor-General and, where the accused is not discharged in respect of all the charges put to him or her under section 149, adjourn the proceedings pending the decision of the Prosecutor-General.

157. Preparatory examination may be continued before different magistrate

A preparatory examination may at any stage be continued by a magistrate other than the magistrate before whom the proceedings were commenced, and, if necessary, again be continued by the magistrate before whom the proceedings were commenced.

158. Prosecutor-General may arraign accused for sentence or trial

After considering the record of a preparatory examination transmitted to the Prosecutor-General under section 156, the Prosecutor-General may -

(a) in respect of any charge to which the accused has under section 150 pleaded guilty, arraign the accused for sentence before any court having jurisdiction;

(b) arraign the accused for trial before any court having jurisdiction, whether the accused has under section 150 pleaded guilty or not guilty to any charge and whether or not the accused has been discharged under section 154;

(c) decline to prosecute the accused,

and the Prosecutor-General must inform the magistrate's court in question of his or her decision.

159. Procedure where accused arraigned for sentence

(1) Where an accused is under section 158(a) arraigned for sentence, a magistrate of the court in which the preparatory examination was held must inform the accused of the decision of the Prosecutor-General and, if the decision is that the accused be arraigned -

(a) in the court in question, dispose of the case on the charge on which the accused is arraigned; or

(b) in a court other than the court in question, adjourn the case for sentence by that other court.

(2) (a) The record of the preparatory examination must, upon proof thereof in the court in which the accused is arraigned for sentence, be received as part of the record of that court or, if the accused is arraigned in the court in which the preparatory examination was held, the record of the preparatory examination stands as the record of that court, and the plea of guilty

and any admission by the accused stand and form part of the record of that court unless the accused satisfies the court that such plea or such admission was incorrectly recorded.

(b) Unless the accused satisfies the court that the plea of guilty or an admission was incorrectly recorded or unless the court is not satisfied that the accused is guilty of the offence to which he or she has pleaded guilty or that the accused has no valid defence to the charge, the court may convict the accused on his or her plea of guilty of the offence to which he or she has pleaded guilty and impose any competent sentence.

(3) If the accused satisfies the court that the plea of guilty or an admission that is material to his or her guilt was incorrectly recorded, or if the court is not satisfied that the accused is guilty of the offence to which he or she has pleaded guilty or that the accused has no valid defence to the charge, the court must record a plea of not guilty and proceed with the trial as a summary trial in that court, but an admission by the accused, the recording of which is not disputed by the accused, stands as proof of the fact so admitted.

(4) Nothing in this section contained is to be construed as preventing the prosecutor from presenting evidence on any aspect of the charge, or the court from hearing evidence, including evidence or a statement by or on behalf of the accused, with regard to sentence, or from questioning the accused on any aspect of the case for the purposes of determining an appropriate sentence.

160. Procedure where accused arraigned for trial

(1) Where an accused is under section 158(b) arraigned for trial, a magistrate of the court in which the preparatory examination was held must inform the accused of the decision of the Prosecutor-General and, if the accused is to be arraigned in a court other than the court in question, commit the accused for trial by that other court.

(2) Where an accused is arraigned for trial after a preparatory examination, the case must be dealt with in all respects as with a summary trial.

(3) The record of the preparatory examination must, upon proof thereof in the court in which the accused is arraigned for trial, be received as part of the record of that court, and any admission by the accused stands at the trial of the accused as proof of such admission, but the evidence adduced at the preparatory examination does not form part of the record of the trial of the accused unless -

(a) the accused pleads guilty at his or her trial to the offence charged, or to an offence of which he or she may be convicted on the charge and the prosecutor accepts that plea; or

(b) the parties to the proceedings agree that any part of such evidence be admitted at the proceedings.

(4) (a) Where an accused who has been discharged under section 154 is arraigned for trial under section 158(b), the clerk of the court where the preparatory examination was held must issue to the accused a written notice to that effect and stating the place, date and time for the appearance of the accused in that court for committal for trial, or, if the accused is to be arraigned in that court, to plead to the charge on which he or she is to be arraigned.

(b) The notice referred to in paragraph (a) must be served on the accused in the manner provided in section 56(2) and (3) for the service of a summons in a magistrate's court, and section 57(1), (2) and (3) applies with the necessary changes in respect of such a notice.

(c) If the accused is committed for trial by another court, the court committing the accused may direct that the accused be detained in custody, whereupon Chapter 11 applies in respect of the release of the accused on bail.

161. Procedure where Prosecutor-General declines to prosecute

Where the Prosecutor-General under section 158(c) declines to prosecute an accused, the Prosecutor-General must inform the magistrate of the district in which the preparatory examination was held of the decision, and that magistrate must immediately have the accused released from custody or, if the accused

is not in custody, inform the accused in writing of the decision of the Prosecutor-General, whereupon no criminal proceedings may again be instituted against the accused in respect of the charge in question.

162. Accused may inspect preparatory examination record and is entitled to copy thereof

(1) An accused who is arraigned for sentence or for trial under section 158 may, without payment, inspect the record of the preparatory examination at the time of his or her arraignment before the court.

(2) (a) An accused who is arraigned for sentence or for trial under section 158 is entitled to a copy of the record of the preparatory examination on payment, except where a legal practitioner under the Legal Aid Act, 1990 (Act No. 29 of 1990), or pro Deo counsel is appointed to defend the accused or where the accused is not legally represented, of the fee determined by the Minister.

(b) The clerk of the court in question must as soon as practicable provide the accused or his or her legal practitioner with a copy of the preparatory examination record in accordance with paragraph (a).

Chapter 27
TRIAL BEFORE HIGH COURT

163. Charge in High Court to be laid in an indictment

(1) Where the Prosecutor-General arraigns an accused for sentence or for trial by the High Court, the charge must be contained in a document called an indictment, which must be issued in the name of the Prosecutor-General.

(2) The indictment must, in addition to the charge against the accused, include the name and, where known and where applicable, the address, sex, nationality and age of the accused.

(3) (a) Where the Prosecutor-General under section 82, 136(3)(b) or 137(2)(a) arraigns an accused for a summary trial in the High Court, the indictment must be accompanied by a summary of the substantial facts of the case that, in the opinion of the Prosecutor-General, are necessary to inform the accused of the allegations against him or her and that will not be prejudicial to the administration of justice or the security of the State, as well as a list of the names and addresses of witnesses the Prosecutor-General intends calling at the summary trial on behalf of the State, but -

(i) this paragraph is not to be so construed that the State is bound by the contents of the summary of the substantial facts;

(ii) the Prosecutor-General may withhold the name and address of a witness if the Prosecutor-General is of the opinion that the witness may be tampered with or be intimidated or that it would be in the interests of the security of the State that the name and address of the witness be withheld;

(iii) the omission of the name or address of a witness from such list does not in any way affect the validity of the trial.

(b) Where the evidence for the State at the trial of the accused differs in a material respect from the summary referred to in paragraph (a), the trial court may, at the request of the accused and if it appears to the court that the accused might be prejudiced in his or her defence by reason of such difference, adjourn the trial for such period as the court may consider adequate to enable the accused to prepare for his or her defence.

(4) (a) An indictment, together with a notice of trial referred to in the rules of court, must, unless an accused agrees to a shorter period, be served on an accused at least 10 days (Saturdays, Sundays and public holidays excluded) before the date appointed for the trial -

(i) in accordance with the procedure and manner laid down by the rules of court, by handing it to the accused personally, or, if the accused cannot be found, by delivering it at his or her place of residence or place of employment or business to a person apparently over the age of 16 years and apparently residing or employed there, or, if the accused has been released on bail, by leaving it at the place determined under section 65(1)(d) for the service of any document on him or her; or

(ii) by the magistrate committing him or her to the High Court, by handing it to him or her.

(b) A return of the mode of service by the person who served the indictment and the notice of trial, or, if those documents were served in court on the accused by a magistrate, an endorsement to that effect on the record of proceedings, may, on the failure of the accused to attend the proceedings in the High Court, be handed in at the proceedings and is prima facie proof of the service.

(c) Section 57(1), (2) and (3) applies with the necessary changes in respect of a notice of trial served on an accused in terms of this subsection.

164. Trial in High Court by judge sitting with or without assessors

(1) An accused arraigned before the High Court must be tried by a judge of that Court sitting with or without assessors as hereinafter provided.

(2) Where the Prosecutor-General arraigns an accused before the High Court -

(a) for trial and the accused pleads not guilty; or

(b) for sentence, or for trial and the accused pleads guilty, and a plea of not guilty is entered at the direction of the presiding judge,

the presiding judge may summon not more than two assessors to assist him or her at the trial.

(3) No assessor may hear any evidence unless the assessor first takes an oath or makes an affirmation, administered by the presiding judge, that he or she will, on the evidence placed before him or her, give a true verdict on the issues to be tried.

(4) (a) An assessor who takes an oath or makes an affirmation in terms of subsection (3) is, subject to paragraphs (b), (c) and (d), a member of the court.

(b) The decision or finding of the majority of the members of the court on any question of fact or on the question referred to in paragraph (c) is, subject to paragraphs (c) and (d) and section 246(3)(b), the decision or finding of the court, except when the presiding judge sits with only one assessor, in which case the decision or finding of the judge is, in the case of a difference of opinion, the decision or finding of the court.

(c) If the presiding judge is of the opinion that it would be in the interests of the administration of justice that the assessor or the assessors assisting him or her do not take part in any decision on the question whether evidence of any confession or other statement made by an accused is admissible as evidence against the accused, the judge alone must decide on such a question, and the judge may for this purpose sit alone.

(d) The presiding judge alone must decide on any other question of law or on any question whether any matter constitutes a question of law or a question of fact, and the judge may for this purpose sit alone.

(5) If an assessor is not in the full-time employment of the State, the assessor is entitled to such compensation as the Minister, in consultation with the Minister responsible for finance, may

determine in respect of expenses incurred by the assessor in connection with his or her attendance at the trial, and in respect of his or her services as assessor.

165. Reasons for decision by High Court in criminal trial

A judge presiding at a criminal trial in the High Court must -

(a) where the judge decides any question of law, including any question under section 164(4)(d) whether any matter constitutes a question of law or a question of fact, give the reasons for his or her decision;

(b) whether the judge sits with or without assessors, give the reasons for the decision or finding of the court on any question of fact;

(c) where the judge sits with assessors, give the reasons for the decision or finding of the court on the question referred to in section 164(4)(c);

(d) where the judge sits with assessors and there is a difference of opinion on any question of fact or on the question referred to in section 164(4)(c), give the reasons for the decision or finding of the member of the court who is in the minority or, where the presiding judge sits with only one assessor, of that assessor.

166. Death or incapacity of assessor

(1) If an assessor dies or, in the opinion of the presiding judge, becomes unable to act as assessor at any time during the trial, the presiding judge may direct -

(a) that the trial proceed before the remaining member or members of the court; or

(b) that the trial start anew, and for that purpose summon an assessor in the place of the assessor who has died or has become unable to act as assessor.

(2) Where the presiding judge acts under subsection (1)(b), the plea already recorded stands.

167. Change of venue for trial in High Court after indictment has been lodged

(1) The High Court may, at any time after an indictment has been lodged with the registrar and before the date of trial, on application by the prosecution and after notice to the accused, or on application by the accused after notice to the prosecution, order that the trial be held at a place within Namibia other than the place determined for the trial, and that it be held on a date and at a time other than the date and time determined for the trial.

(2) If the accused is not present or represented at an application under subsection (1) by the prosecution or if the prosecution is not represented at such an application by the accused, the court must direct that a copy of the order be served -

(a) in the case of an application by the prosecution, on the accused; or

(b) in the case of an application by the accused, on the prosecution,

and on service of the copy of the order, the venue and date and time as changed are deemed to be the venue and date and time, respectively, that were originally appointed for the trial.

Chapter 28
CONDUCT OF PROCEEDINGS

168. Prosecutor may address court and adduce evidence

(1) The prosecutor may at any trial, before any evidence is adduced, address the court for the purpose of explaining the charge and indicating, without comment, to the court what evidence he or she intends adducing in support of the charge.

(2) (a) The prosecutor may then examine the witnesses for the prosecution and adduce such evidence as may be admissible to prove that the accused committed the offence referred to in the charge or that the accused committed an offence of which he or she may be convicted on the charge.

(b) Where any document may be received in evidence before any court on its mere production, the prosecutor must read out that document in court.

169. Accused may address court and adduce evidence

(1) (a) If an accused is not under section 197 discharged at the close of the case for the prosecution, the court must ask the accused whether he or she intends adducing any evidence on behalf of the defence, and if the accused answers in the affirmative, the accused may address the court for the purpose of indicating to the court, without comment, what evidence he or she intends adducing on behalf of the defence.

(b) The court must also ask the accused whether the accused himself or herself intends giving evidence on behalf of the defence, and -

(i) if the accused answers in the affirmative, the accused must, except where the court on good cause shown allows otherwise, be called as a witness before any other witness for the defence; or

(ii) if the accused answers in the negative but decides, after other evidence has been given on behalf of the defence, to give evidence himself or herself, the court may draw such inference from the accused's conduct as may be reasonable in the circumstances.

(2) (a) The accused may then examine any other witness for the defence and adduce such other evidence on behalf of the defence as may be admissible.

(b) Where any document may be received in evidence before any court on its mere production and the accused wishes to place such evidence before the court, the accused must read out that document in court.

170. Notice of alibi

(1) In this section "evidence in support of an alibi" means evidence tending to show that, by reason of the presence of the accused at a particular place or in a particular area at a particular time, the accused was not, or was unlikely to have been, at the place where the offence is alleged to have been committed at the time of its alleged commission.

(2) An accused or his or her legal practitioner may not, without the leave of the court, adduce evidence in support of a defence, commonly called an alibi, unless, at any time before plea proceedings or during plea proceedings, the accused or his or her legal practitioner gives notice of particulars of the alibi.

(3) Without detracting from the generality of subsection (2), the accused or his or her legal practitioner may not, without the leave of the court, call any other person to give evidence in support of an alibi unless -

(a) the notice under that subsection includes the other person's name and address or, if the other person's name or address is not known to the accused at the time the accused or his or her legal practitioner gives notice, any information in the accused's possession that might be of material assistance in finding the other person; or

(b) if the other person's name or address is not included in the notice under that subsection -

(i) the court is satisfied that the accused, before giving notice, took and thereafter continued to take all reasonable steps to ensure that the other person's name and address would be ascertained; and

(ii) the accused, when he or she subsequently ascertains the other person's name and address or receives information that might be of material assistance in finding that other person, immediately gives notice of that name, address or other information.

(4) (a) The court may not refuse leave under this section if it appears to the court that the accused was not informed -

(i) in the notice contemplated in section 163(4)(a)(i);

(ii) by the magistrate committing the accused to the High Court in terms of section 163(4)(a)(ii); or

(iii) by the presiding judge or magistrate during plea proceedings,

whichever may be applicable, of the requirements of subsections (2), (3) and (7).

(b) For the purposes of paragraph (a), an endorsement on the notice referred to in subparagraph (i) of that paragraph, or an endorsement by the magistrate on the record of the committal proceedings, or an endorsement by the presiding judge or magistrate on the record of the plea proceedings that the accused was informed of the requirements of subsections (2), (3) and (7), is sufficient evidence that the accused was so informed.

(5) Any evidence to disprove an alibi may, subject to any direction by the court, be given before or after evidence is given in support of the alibi.

(6) A notice purporting to be given under this section on behalf of the accused by his or her legal practitioner is, in the absence of evidence to the contrary, deemed to have been given on the authority of the accused.

(7) A notice under subsection (2) before plea proceedings, must be given in writing to the prosecution.

171. Notice of allegation that accused is by reason of mental illness or mental defect not criminally responsible for the offence charged

(1) (a) An accused or his or her legal practitioner may not, without the leave of the court, allege at criminal proceedings that the accused is by reason of mental illness or mental defect not criminally responsible for the offence charged unless, at any time before plea proceedings or during plea proceedings, the accused or his or her legal practitioner gives notice of that allegation.

(b) Where the accused or his or her legal practitioner gives notice or if the court grants leave under paragraph (a), the court must act in terms of section 85(2).

(2) (a) The court may not refuse leave under this section if it appears to the court that the accused was not informed -

(i) in the notice contemplated in section 163(4)(a)(i);

(ii) by the magistrate committing the accused to the High Court in terms of section 163(4)(a)(ii); or

(iii) by the presiding judge or magistrate during plea proceedings,

whichever may be applicable, of the requirements of subsections (1) and (5).

(b) For the purposes of paragraph (a), an endorsement on the notice referred to in subparagraph (i) of that paragraph, or an endorsement by the magistrate on the record of the committal proceedings, or an endorsement by the presiding judge or magistrate on the record of the plea proceedings that the accused was informed of the requirements of subsections (1) and (5), is sufficient evidence that the accused was so informed.

(3) Any evidence to disprove an allegation contemplated in subsection (1)(a), may, subject to any direction by the court, be given before or after evidence is given in support of that allegation.

(4) A notice purporting to be given under this section on behalf of the accused by his or her legal practitioner is, in the absence of evidence to the contrary, deemed to have been given on the authority of the accused.

(5) A notice under subsection (1)(a) before plea proceedings, must be given in writing to the prosecution.

172. Notice of intention to raise certain defences

(1) An accused or his or her legal practitioner may not, without the leave of the court, raise -

(a) a statutory or any other ground of justification; or

(b) a defence that excludes wrongful intent,

unless, at any time before plea proceedings or during plea proceedings, the accused or his or her legal practitioner gives notice of such ground of justification or defence.

(2) (a) The court may not refuse leave under this section if it appears to the court that the accused was not informed -

(i) in the notice contemplated in section 163(4)(a)(i);

(ii) by the magistrate committing the accused to the High Court in terms of section 163(4)(a)(ii); or

(iii) by the presiding judge or magistrate during plea proceedings,

whichever may be applicable, of the requirements of subsections (1) and (5).

(b) For the purposes of paragraph (a), an endorsement on the notice referred to in subparagraph (i) of that paragraph, or an endorsement by the magistrate on the record of the committal proceedings, or an endorsement by the presiding judge or magistrate on the record of the plea proceedings that the accused was informed of the requirements of subsections (1) and (5), is sufficient evidence that the accused was so informed.

(3) Any evidence to disprove a ground of justification or defence contemplated in subsection (1), may, subject to any direction by the court, be given before or after evidence is given in support of that ground of justification or defence.

(4) A notice purporting to be given under this section on behalf of the accused by his or her legal practitioner is, in the absence of evidence to the contrary, deemed to have been given on the authority of the accused.

(5) A notice under subsection (1) before plea proceedings, must be given in writing to the prosecution.

173. Notice to call expert witness

(1) An accused or his or her legal practitioner may not, without the leave of the court, call an expert witness unless, at any time before plea proceedings or during plea proceedings, the accused or his or her legal practitioner gives notice of the intention to call an expert witness and discloses the name and address of that witness and the nature of the expert evidence to be given.

(2) (a) The court may not refuse leave under this section if it appears to the court that the accused was not informed -

(i) in the notice contemplated in section 163(4)(a)(i);

(ii) by the magistrate committing the accused to the High Court in terms of section 163(4)(a)(ii); or

(iii) by the presiding judge or magistrate during plea proceedings,

whichever may be applicable, of the requirements of subsections (1) and (5).

(b) For the purposes of paragraph (a), an endorsement on the notice referred to in subparagraph (i) of that paragraph, or an endorsement by the magistrate on the record of the committal proceedings, or an endorsement by the presiding judge or magistrate on the record of the plea proceedings that the accused was informed of the requirements of subsections (1) and (5), is sufficient evidence that the accused was so informed.

(3) Any evidence to disprove the evidence given or statements made by an expert witness, may, subject to any direction by the court, be given before or after evidence is given by the expert witness.

(4) A notice purporting to be given under this section on behalf of the accused by his or her legal practitioner is, in the absence of evidence to the contrary, deemed to have been given on the authority of the accused.

(5) A notice under subsection (1) before plea proceedings, must be given in writing to the prosecution.

174. Criminal proceedings to be conducted in open court

Except where otherwise expressly provided by this Act or any other law, criminal proceedings in any court must take place in open court.

175. Circumstances in which criminal proceedings not to take place in open court

(1) If it appears to a court that it would, in criminal proceedings pending before that court, be in the interests of the security of the State or of good order or of public morals that such proceedings be held behind closed doors, the court may direct that the public or any category thereof may not be present at such proceedings or any part thereof.

(2) If it appears to a court at criminal proceedings that there is a likelihood that harm might result to a person, other than the accused, if that person testifies at such proceedings, the court may direct that -

(a) that person testifies behind closed doors and that no other person may be present when such evidence is given, unless that other person's presence is necessary in connection with such proceedings or is authorized by the court;

(b) the identity of that person may not be revealed or that it may not be revealed for a period specified by the court.

(3) In criminal proceedings relating to a charge that the accused committed or attempted to commit extortion or any statutory offence of demanding from any other person some advantage that was not due to him or her and, by inspiring fear in the mind of that other person, compelling him or her to render such advantage, the court before which such proceedings are pending may, at the request

of that other person or, if he or she is a minor, at the request of his or her parent or guardian, direct that any person whose presence is not necessary at such proceedings or any person or category of persons mentioned in the request, may not be present at the proceedings, but judgment must be delivered and sentence must be passed in open court if the court is of the opinion that the identity of the person concerned would not be revealed thereby.

(4) Notwithstanding subsections (1), (2), (7) and (8) but subject to subsection (5), in criminal proceedings relating to a charge that the accused committed or attempted to commit -

(a) any sexual or indecent act towards or in connection with any other person;

(b) any act for the purpose of procuring or furthering the commission of a sexual or indecent act towards or in connection with any other person; or

(c) any domestic violence offence,

the court before which such proceedings are pending must, to the extent authorized thereto by the provisos to Article 12(1)(a) and (c) of the Namibian Constitution, direct that any person whose presence is not necessary at such proceedings, may not be present at such proceedings, unless the complainant in such proceedings, or, if he or she is a minor, his or her parent or guardian, otherwise requests.

(5) A person whose presence is not necessary at criminal proceedings relating to an offence referred to in paragraph (a), (b) or (c) of subsection (4), may not be present at such proceedings while the complainant in such proceedings is giving evidence, unless the complainant, or, if he or she is a minor, his or her parent or guardian, otherwise requests.

(6) (a) Where an accused at criminal proceedings before a court is under the age of 18 years, no person, other than that accused, his or her legal practitioner and parent or guardian, may be present at such proceedings, unless that other person's presence is necessary in connection with such proceedings or is authorized by the court.

(b) Paragraph (a) also applies to an accused referred to in that paragraph who is charged jointly with any other accused.

(7) Where a witness at criminal proceedings before a court is under the age of 18 years, the court may direct that no person, other than that witness and his or her parent or guardian, may be present at such proceedings, unless that person's presence is necessary in connection with such proceedings or is authorized by the court.

(8) The court may direct that no person under the age of 18 years may be present at criminal proceedings before the court, unless that person is a witness referred to in subsection (7) and is actually giving evidence at such proceedings or that person's presence is authorized by the court.

(9) To the extent that this section provides for a limitation of the fundamental right to a public hearing and to the giving of judgment in criminal proceedings in public contemplated in paragraphs (a) and (c), respectively, of Article 12(1) of the Namibian Constitution, in that it authorizes the exclusion of the public from criminal proceedings or any part thereof, such limitation is enacted on the authority of those paragraphs.

176. Prohibition of publication of certain information relating to criminal proceedings

(1) (a) Where a court under section 175(1) on any of the grounds mentioned in that section directs that the public or any category thereof may not be present at criminal proceedings or any part thereof, the court may direct that no information relating to such proceedings or any part thereof held behind closed doors may be published in any manner whatever.

(b) Notwithstanding paragraph (a), a direction by the court under that paragraph does not prevent the publication of information to the name and personal particulars of the accused, the charge against him or her, the plea, the verdict and the sentence, unless the court is of the opinion that the publication of any part of such information might defeat the object of

its direction under section 175(1), in which event the court may direct that such part may not be published.

(2) (a) Where a court under section 175(3) directs that any person or category of persons may not be present at criminal proceedings, no person may publish in any manner whatever any information that might reveal the identity of any complainant in such proceedings, but -

(i) the presiding judge or magistrate may authorize the publication of such information if he or she is of the opinion that such publication would be just and equitable;

(ii) such information may be published with regard to any complainant in such proceedings if that complainant is 18 years of age or older and has authorized the publication of such information.

(b) Where a court in terms of section 175(4) directs that any person may not be present at criminal proceedings or where any person is in terms of section 175(5) not permitted to be present at criminal proceedings, no person may publish in any manner whatever any information that might reveal the identity of any complainant in such proceedings, but -

(i) the presiding judge or magistrate may authorize the publication of such information if he or she is of the opinion that such publication would be just and equitable;

(ii) such information may be published with regard to any complainant in such proceedings if that complainant is 18 years of age or older and has authorized the publication of such information.

(c) No person may at any stage before the appearance of an accused in a court on a charge referred to in section 175(3) or (4), or at any stage after such appearance but before the accused has pleaded to the charge, publish in any manner whatever any information that might reveal the identity of the person towards or in connection with whom the offence was committed or allegedly committed.

(3) (a) Subject to paragraph (b), no person may publish in any manner whatever any information that reveals or may reveal the identity of an accused under the age of 18 years or of a witness at criminal proceedings who is under the age of 18 years.

(b) The presiding judge or magistrate may authorize the publication of so much of the information referred to in paragraph (a) as he or she may consider fit if the publication thereof would in his or her opinion be just and equitable in the interest of any particular person.

(4) No prohibition or direction under this section applies to the publication in a bona fide law report of -

(a) information for the purpose of reporting any question of law relating to the proceedings in question; or

(b) any decision or ruling given by a court on a question referred to in paragraph (a),

if such report does not mention the name of the person charged or of the person against whom or in connection with whom the offence in question was alleged to have been committed or of any witness at such proceedings, and does not mention the place where the offence in question was alleged to have been committed.

(5) A person who publishes any information in contravention of this section or contrary to any direction or authority under this section or who in any manner whatever reveals the identity of a witness in contravention of a direction under section 175(2), commits an offence and is liable on conviction to a fine not exceeding N$10 000 or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment;

(6) To the extent that this section provides for a limitation of the fundamental right contemplated in paragraph (a) of Article 21(1) of the Namibian Constitution, in that it authorizes interference

with a person's freedom to publish information relating to criminal proceedings, such limitation is enacted on the authority of Article 21(2) of the said Constitution.

177. Persons implicated in same offence may be tried together

(1) Any number of participants in the same offence may be tried together and any number of accessories after the same fact may be tried together or any number of participants in the same offence and any number of accessories after that fact may be tried together, and each such participant and each such accessory may be charged at such trial with the relevant substantive offence alleged against him or her.

(2) A receiver of property obtained by means of an offence is for purposes of this section deemed to be a participant in the offence in question.

178. Persons committing separate offences at same time and place may be tried together

Any number of persons charged in respect of separate offences committed at the same place and at the same time or at about the same time, may be charged and tried together in respect of such offences if the prosecutor informs the court that evidence admissible at the trial of one of such persons will, in his or her opinion, also be admissible as evidence at the trial of any other such person or such persons.

179. Joinder of accused and separation of trials

(1) An accused may be joined with any other accused in the same criminal proceedings at any time before evidence has been led in respect of the charge in question.

(2) Where two or more persons are charged jointly, whether with the same offence or with different offences, the court may at any time during the trial, on the application of the prosecutor or of any of the accused, direct that the trial of any one or more of the accused must be held separately from the trial of the other accused, and the court may abstain from giving judgment in respect of any of the accused.

180. Criminal proceedings to take place in presence of accused

(1) Except where otherwise expressly provided by this Act or any other law, all criminal proceedings in any court must take place in the presence of the accused.

(2) (a) A court may, subject to section 175, of its own motion or on the application of the prosecutor, order that a witness or an accused, if the witness or accused consents thereto, may give evidence by means of closed circuit television or similar electronic media.

(b) A court may make a similar order on the application of an accused or a witness.

(3) A court may make an order contemplated in subsection (2) only if facilities therefor are readily available or obtainable and if it appears to the court that to do so would -

(a) prevent unreasonable delay;

(b) save costs;

(c) be convenient;

(d) be in the interests of the security of the State or of public safety or in the interests of justice or the public; or

(e) prevent the likelihood that prejudice or harm might result to any person if that person testifies or is present at such proceedings.

(4) (a) The court may, to ensure a fair trial, make the giving of evidence under subsection (2) subject to such conditions as it may consider necessary.

(b) Notwithstanding any conditions under paragraph (a), the prosecutor and the accused have the right, by means of that procedure, to question a witness and to observe the reaction of that witness.

181. Circumstances in which criminal proceedings may take place in absence of accused

(1) If an accused at criminal proceedings conducts himself or herself in a manner which makes the continuance of the proceedings in his or her presence impracticable, the court may direct that the accused be removed and that the proceedings continue in his or her absence.

(2) If two or more accused appear jointly at criminal proceedings and -

(a) the court is at any time after the commencement of the proceedings satisfied, on application made to it by an accused in person or by his or her legal practitioner, that the physical condition of that accused is such that he or she is unable to attend the proceedings or that it is undesirable that he or she should attend the proceedings; or

(b) any of the accused is absent from the proceedings, whether under subsection (1) or without leave of the court,

the court, if it is of the opinion that the proceedings cannot be adjourned without undue prejudice, embarrassment or inconvenience to the prosecution or any co-accused or any witness in attendance or subpoenaed to attend, may -

(i) in the case of paragraph (a), authorize the absence of the accused concerned from the proceedings for a period determined by the court and on the conditions which the court may consider fit to impose; and

(ii) direct that the proceedings be proceeded with in the absence of the accused concerned.

(3) Where an accused becomes absent from the proceedings in the circumstances contemplated in subsection (2), the court may, instead of directing that the proceedings be proceeded with in the absence of the accused concerned, on the application of the prosecutor direct that the proceedings in respect of the absent accused be separated from the proceedings in respect of the accused who are present, and thereafter, when that absent accused is again in attendance, the proceedings against him or her must continue from the stage at which he or she became absent, and the court is not required to be differently constituted only by reason of that separation.

182. Procedure at criminal proceedings where accused is absent

(1) If an accused referred to in section 181(1) or (2) again attends the criminal proceedings in question, that accused may, unless he or she was legally represented during his or her absence, examine any witness who testified during his or her absence, and inspect the record of the proceedings or require the court to have that record read over to him or her.

(2) If the examination of a witness under subsection (1) takes place after the evidence on behalf of the prosecution or any co-accused has been concluded, the prosecution or that co-accused may in respect of any issue raised by the examination, lead evidence in rebuttal of evidence relating to the issue so raised.

(3) (a) When the evidence on behalf of all the accused, other than an accused who is absent from the proceedings, is concluded, the court must, subject to paragraph (b), adjourn the proceedings until that absent accused is in attendance and, if necessary, further adjourn the proceedings until the evidence, if any, on behalf of that accused has been led.

(b) If it appears to the court that the presence of an absent accused cannot reasonably be obtained, the court may direct that the proceedings in respect of the accused who are present be concluded as if such proceedings had been separated from the proceedings at the stage at which the accused concerned became absent from the proceedings, and when that absent accused is again in attendance, the proceedings against him or her must continue from

the stage at which he or she became absent, and the court is not required to be differently constituted only by reason of that separation.

(c) When, in the case of a trial, the evidence on behalf of all the accused has been concluded and any accused is absent when the verdict is to be delivered, the verdict may be delivered in respect of all the accused or be withheld until all the accused are present or be delivered in respect of any accused present and withheld in respect of the absent accused until he or she is again in attendance.

183. Witness to testify orally

(1) A witness at criminal proceedings must, except where this Act or any other law expressly provides otherwise, give his or her evidence orally.

(2) In this section the expression "orally" is, in the case of a deaf and dumb witness, deemed to include sign language and, in the case of a witness under the age of 18 years, deemed to include demonstrations, gestures or any other form of non-verbal expression.

184. Witness to be examined under oath or affirmation

(1) Subject to section 185, no person may be examined as a witness in criminal proceedings unless that person is under oath or affirmation, which must be administered by the presiding magistrate or, in the case of the High Court, by the presiding judge or the registrar, and which must -

(a) in the case of an oath, be in the following form:

"I swear that the evidence that I shall give, shall be the truth, the whole truth and nothing but the truth, so help me God.";

(b) in the case of an affirmation, be in the following form:

"I solemnly affirm that the evidence that I shall give, shall be the truth, the whole truth and nothing but the truth.".

(2) An affirmation has the same legal force and effect as if the person making it had taken the oath.

185. When unsworn or unaffirmed evidence admissible

(1) A person -

(a) who is under the age of 14 years may give evidence in criminal proceedings without taking the oath or making the affirmation;

(b) other than a person referred to in paragraph (a), who, from ignorance arising from lack of education or other cause, is found not to understand the nature and import of the oath or the affirmation, may be admitted to give evidence in criminal proceedings without taking the oath or making the affirmation,

but that person must, instead of the oath or affirmation, be admonished by the presiding judge or magistrate to speak the truth, the whole truth and nothing but the truth.

(2) Notwithstanding anything to the contrary in this Act or any other law contained, the evidence of a witness required to be admonished in terms of subsection (1) must be received unless it appears to the presiding judge or magistrate that that witness is incapable of giving intelligible testimony.

(3) If a person referred to in subsection (1) willfully and falsely states anything which, if sworn, would have amounted to the offence of perjury or any statutory offence punishable as perjury, that person commits an offence and is liable on conviction to a fine not exceeding N$4 000 or to imprisonment for a period not exceeding one year.

186. Oath, affirmation or admonition may be administered by or through an interpreter or intermediary

Where the person concerned is to give his or her evidence through an interpreter or an intermediary appointed under section 193(1), the oath, affirmation or admonition under section 184 or 185 must be administered by the presiding magistrate or, in the case of the High Court, by the presiding judge or the registrar through the interpreter or intermediary or by the interpreter in the presence or under the eyes of the presiding magistrate or, in the case of the High Court, the presiding judge.

187. Cross-examination and re-examination of witnesses

(1) An accused may cross-examine any witness called on behalf of the prosecution at criminal proceedings or any co-accused who testifies at criminal proceedings or any witness called on behalf of that co-accused at criminal proceedings, and the prosecutor may cross-examine any witness, including an accused, called on behalf of the defence at criminal proceedings, and a witness called at such proceedings on behalf of the prosecution may be re-examined by the prosecutor on any matter raised during the cross-examination of that witness, and a witness called on behalf of the defence at such proceedings may likewise be re-examined by the accused.

(2) The prosecutor and the accused may, with the leave of the court, examine or cross-examine any witness called by the court at criminal proceedings.

(3) (a) If it appears to the court that any cross-examination contemplated in this section is being protracted unreasonably and thereby causing the proceedings to be delayed unreasonably, the court may request the cross-examiner to disclose the relevancy of any particular line of examination and may impose reasonable limits on that cross-examination regarding the length thereof or regarding any particular line of examination.

(b) The court may order that any submission regarding the relevancy of the cross-examination be heard in the absence of the witness.

(4) Notwithstanding subsections (1) and (2) or anything to the contrary in any other law contained but subject to section 193, the presiding judge or magistrate may, during the cross-examination of a witness under the age of 14 years, either restate the questions put to that witness or, in his or her discretion, simplify or rephrase those questions.

188. Court may examine witness or person in attendance

The court may at any stage of criminal proceedings examine any person, other than an accused, who has been subpoenaed as a witness to attend such proceedings or who is in attendance at such proceedings, and may recall and re-examine any person, including an accused, already examined at the proceedings, and the court must examine, or recall and re-examine, the person concerned if his or her evidence appears to the court essential to the just decision of the case.

189. Special arrangements for vulnerable witnesses

(1) In this section "vulnerable witness" means a person other than an accused -

(a) who is under the age of 18 years; or

(b) against whom an offence of a sexual or indecent nature or a domestic violence offence has been committed; or

(c) who as a result of some mental or physical disability, the possibility of intimidation by the accused or any other person, or for any other reason will suffer undue stress while giving evidence, or who as a result of such disability, possibility or other reason will be unable to give complete and undistorted evidence.

(2) A court before which a vulnerable witness gives evidence in criminal proceedings may, of its own motion or on the application of the prosecutor, the accused or that witness, order that special arrangements be made for the giving of the evidence of that witness.

(3) Special arrangements under subsection (2) may consist of one or more of the following steps:

(a) The issuing, subject to section 175 and notwithstanding section 180(2), of a direction that the vulnerable witness gives his or her evidence -

(i) at any place, whether within or outside the courtroom -

(aa) which is informally arranged to set that witness at ease;

(bb) which is so situated that any person whose presence may upset that witness, is outside the sight of that witness; and

(cc) which enables the court and any person whose presence is necessary at the proceedings in question to see and hear, either directly or through the medium of closed circuit television or similar electronic media or a one-way mirror or otherwise, that witness during his or her testimony and, if the witness is accompanied by a support person, to also see and hear the support person in like manner; or

(ii) behind a screen in the courtroom in the same manner and subject to the same requirements prescribed in item (cc) of subparagraph (i);

(b) the rearrangement of the furniture in the courtroom, or the removal from or addition to the courtroom of certain furniture or objects, to set the vulnerable witness at ease, or the issuing of a direction that any person whose presence may upset that witness sits or stands at a certain location in the courtroom;

(c) notwithstanding section 175, the granting of permission to a person (in this section referred to as a support person) who is a fit person for that purpose to accompany the vulnerable witness while he or she is giving evidence;

(d) the adjournment under section 191 of the proceedings in question to any place other than the one where the court is sitting to hear the evidence of the vulnerable witness;

(e) the taking of any other steps that in the opinion of the court are expedient and desirable to facilitate the giving of evidence by the vulnerable witness.

(4) The support person is entitled to -

(a) sit or stand near the vulnerable witness and to give such physical comfort to that witness as may be desirable;

(b) interrupt the proceedings to alert the presiding judge or magistrate to the fact that the vulnerable witness is experiencing undue distress,

but, subject to subsection (5), the support person is not entitled to assist that witness with the answering of a question or to instruct that witness in the giving of evidence.

(5) The court may give directions to the support person prohibiting the support person from communicating with the vulnerable witness or from taking certain actions, or may direct the support person to take such actions as the court may consider desirable.

(6) When considering whether an order under subsection (2) should be made, the court must take into account the following matters:

(a) The interests of the State in adducing the complete and undistorted evidence of the vulnerable witness concerned;

(b) the interests and well-being of the vulnerable witness concerned;

(c) the availability of necessary equipment and facilities;

(d) the interests of justice in general.

190. Court may adjourn proceedings to any date

A court before which criminal proceedings are pending may from time to time during such proceedings, if the court considers it necessary or expedient, adjourn the proceedings to any date on the terms which to the court may seem proper and which are not inconsistent with this Act.

191. Court may adjourn proceedings to any place

A court before which criminal proceedings are pending may from time to time during such proceedings, if the court considers it necessary or expedient that the proceedings be continued at any place within its area of jurisdiction other than the one where the court is sitting, adjourn the proceedings to such other place, or, if the court with reference to any circumstance relevant to the proceedings considers it necessary or expedient that the proceedings be adjourned to a place other than the place at which the court is sitting, adjourn the proceedings, on the terms which to the court may seem proper, to any such place, whether within or outside the area of jurisdiction of that court, for the purpose of performing at such place any function of the court relevant to such circumstance.

192. Failure of accused to appear after adjournment or to remain in attendance

(1) An accused at criminal proceedings who is not in custody and who has not been released on bail, and who fails to appear at the place and on the date and at the time to which such proceedings may be adjourned or who fails to remain in attendance at such proceedings as so adjourned, commits an offence and is liable on conviction to the punishment prescribed by subsection (2).

(2) The court may, if satisfied that an accused referred to in subsection (1) has failed to appear at the place and on the date and at the time to which the proceedings in question were adjourned or has failed to remain in attendance at such proceedings as so adjourned, issue a warrant for the arrest of that accused, and must, when he or she is brought before the court, in a summary manner enquire into his or her failure so to appear or so to remain in attendance and, unless that accused satisfies the court that there is a reasonable possibility that his or her failure was not due to fault on his or her part, convict the accused of the offence referred to in subsection (1) and sentence him or her to a fine not exceeding N$4 000 or to imprisonment for a period not exceeding one year.

193. Evidence through intermediaries

(1) When criminal proceedings are pending before a court and it appears to the court that it would expose a witness under the age of 18 years to undue mental stress or suffering if that witness testifies at such proceedings, the court may, subject to subsection (4), appoint a competent person as an intermediary to enable that witness to give his or her evidence through that intermediary.

(2) (a) Notwithstanding section 187(1) and (2) or anything to the contrary in any other law contained, no examination, cross-examination or re-examination of a witness in respect of whom a court has appointed an intermediary under subsection (1), except examination by the court, may take place in any manner other than through that intermediary.

(b) The intermediary so appointed may, unless the court directs otherwise, convey the general purport of any question to the witness concerned.

(3) If a court appoints an intermediary under subsection (1), the court may direct that the witness concerned gives his or her evidence at any place -

(a) which is informally arranged to set that witness at ease;

(b) which is so situated that any person whose presence may upset that witness, is outside the sight and hearing of that witness; and

(c) which enables the court and any person whose presence is necessary at the proceedings in question to see and hear, either directly or through the medium of any electronic or other devices, that intermediary as well as that witness during his or her testimony.

(4) (a) The Minister may by notice in the Gazette determine the persons or the category or class of persons who are competent to be appointed as intermediaries.

(b) An intermediary who is not in the full-time employment of the State must be paid such travelling and subsistence and other allowances in respect of the services rendered by him or her as the Minister, in consultation with the Minister responsible for finance, may determine.

(5) (a) No oath, affirmation or admonition that has been administered through an intermediary in terms of section 186 is invalid and no evidence that has been presented through an intermediary is inadmissible solely on account of the fact that the intermediary was not competent to be appointed as an intermediary in terms of a notice under subsection (4)(a) at the time when that oath, affirmation or admonition was administered or that evidence was presented.

(b) If in any criminal proceedings it appears to a court that an oath, affirmation or admonition was administered or that evidence has been presented through an intermediary who was appointed in good faith but, at the time of the appointment, was not competent to be appointed as an intermediary in terms of a notice under subsection (4)(a), the court must make a finding as to the validity of that oath, affirmation or admonition or the admissibility of that evidence with due regard to -

(i) the reason why the intermediary was not competent to be appointed as an intermediary, and the likelihood that that reason will affect the reliability of the evidence so presented adversely;

(ii) the mental stress or suffering which the witness in respect of whom that intermediary was appointed will be exposed to if that evidence is to be presented anew, whether by the witness in person or through another intermediary; and

(iii) the likelihood that real and substantial justice will be impaired if that evidence is admitted.

(6) Nothing in subsection (5) contained is to be construed as preventing the prosecution from presenting anew any evidence that was presented through an intermediary referred to in that subsection.

194. Evidence on commission

(1) (a) When criminal proceedings are pending before a court and it appears to the court on application made to it that the examination of a witness who is resident in Namibia is necessary in the interests of justice and that the attendance of that witness cannot be obtained without undue delay, expense or inconvenience, the court may dispense with such attendance and issue a commission to any magistrate.

(b) The specific matter with regard to which the evidence of the witness is required must be set out in the relevant application, and the court may confine the examination of the witness to that matter.

(c) Where the application is made by the State, the court may, as a condition of the commission, direct that the costs of legal representation for the accused at the examination be paid by the State.

(2) (a) The magistrate to whom the commission is issued must proceed to the place where the witness is, or must summon the witness before him or her, and take down the evidence in the manner provided in paragraph (b).

(b) The witness must give his or her evidence on oath or affirmation, and such evidence must -

(i) be recorded and read over to the witness; or

(ii) be video-taped and shown to the witness,

and, if the witness adheres thereto, be subscribed, or, where the evidence is on videotape, be confirmed on the video recording, by the witness and the magistrate concerned.

195. Parties may examine witness

Any party to proceedings in which a commission is issued under section 194, may -

(a) transmit interrogatories in writing which the court issuing the commission may consider relevant to the issue, and the magistrate to whom the commission is issued, must examine the witness on such interrogatories; or

(b) appear before the magistrate to whom the commission is issued, either by a legal practitioner or, in the case of an accused who is not in custody or in the case of a private prosecutor, in person, and examine the witness.

196. Evidence on commission part of court record

The magistrate must return the evidence in question to the court that issued the commission, and such evidence must be open to the inspection of the parties to the proceedings and forms, in so far as it is admissible as evidence in such proceedings, part of the record of that court.

197. Accused may be discharged at close of case for prosecution

If, at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which the accused may be convicted on the charge, it may return a verdict of not guilty.

198. Prosecution and defence may address court at conclusion of evidence

(1) After all the evidence has been adduced, the prosecutor may address the court, and thereafter the accused may address the court.

(2) The prosecutor may reply on any matter of law raised by the accused in his or her address, and may, with the leave of the court, reply on any matter of fact raised by the accused in his or her address.

199. Judgment may be corrected

(1) When by mistake a wrong judgment is delivered, the court may, before or immediately after it is recorded, correct the judgment subject to subsection (2).

(2) A wrong judgment may be corrected under subsection (1) only where it is delivered in consequence of a mistake inherent in the judgment that does not relate to the merits of the particular case.

200. Court may defer final decision

The court may at criminal proceedings defer its reasons for any decision on any question raised at such proceedings, and the reasons so deferred are, when given, deemed to have been given at the time of the proceedings.

201. Arrest of person committing offence in court and removal from court of person disturbing proceedings

(1) Where an offence is committed in the presence of the court, the presiding judge or magistrate may order the arrest of the offender.

(2) If any person, other than an accused, who is present at criminal proceedings, disturbs the peace or order of the court, the court may order that that person be removed from the court and that he or she be detained in custody until the rising of the court.

Chapter 29
WITNESSES

202. Process for securing attendance of witness

(1) In this section "prescribed officer of the court" means the registrar, clerk of the court or any other officer prescribed by the rules of court.

(2) (a) The prosecutor or an accused may compel the attendance of a person to give evidence or to produce any book, paper or document in criminal proceedings by issuing or taking out process for that purpose in accordance with procedures prescribed by the rules of court.

(b) If a member of the police has reasonable grounds for believing that the attendance of a person is or will be necessary to give evidence or to produce any book, paper or document in criminal proceedings in a magistrate's court, and hands to that person a written notice calling upon him or her to attend such proceedings on the date and at the time and place specified in the notice, to give evidence or to produce any book, paper or document, likewise specified, that person is for the purposes of this Act deemed to have been duly subpoenaed so to attend such proceedings.

(3) Where an accused desires to have a witness subpoenaed, a sum of money sufficient to cover the costs of serving the subpoena must be deposited with the prescribed officer of the court, and that officer must then subpoena the witness.

(4) (a) Where an accused desires to have a witness subpoenaed and the accused satisfies the prescribed officer of the court -

(i) that he or she is unable to pay the necessary costs and fees; and

(ii) that the evidence of the witness is reasonably necessary and material for his or her defence,

that officer must subpoena the witness at the expense of the State.

(b) In any case where the prescribed officer of the court is not so satisfied, that officer must, at the request of the accused, refer the relevant application to the judge or magistrate presiding over the court, who may grant or refuse the application or defer his or her decision until he or she has heard other evidence in the case.

203. Service of subpoena

(1) A subpoena in criminal proceedings must be served in the manner provided by the rules of court by a person empowered to serve a subpoena in criminal proceedings.

(2) A return by the person empowered to serve a subpoena in criminal proceedings that the service thereof has been duly effected, may, on the failure of a witness to attend the relevant proceedings, be handed in at such proceedings and is prima facie proof of such service.

204. Pre-payment of witness expenses

Where a subpoena is served on a witness at a place outside the magisterial district from which the subpoena is issued, or, in the case of the High Court, at a place outside the magisterial district in which the proceedings at which the witness is to appear are to take place, and the witness is required to travel from that place to the court in question, the necessary expenses to travel to and from that court and of sojourn at the court in question must, on demand, be paid to the witness at the time of service of the subpoena.

205. Witness from prison

A prisoner who is in a prison may be subpoenaed as a witness only if the court before which the prisoner is to appear as a witness authorizes that the prisoner be subpoenaed as a witness, and the court may give such authority only if it is satisfied that the evidence in question is reasonably necessary and material and that the public safety or order will not be endangered by the calling of the witness.

206. Witness to keep police informed of whereabouts

(1) A person who is informed in writing by a member of the police that he or she will be required as a witness in criminal proceedings, must, until such proceedings have been finally disposed of or until he or she is officially informed that he or she will no longer be required as a witness, keep the member of the police informed at all times of his or her full residential address or any other address where he or she may be found.

(2) A person who fails to comply with subsection (1) commits an offence and is liable on conviction to a fine not exceeding N$1 000 or to imprisonment for a period not exceeding three months.

207. Witness about to abscond and witness evading service of subpoena

(1) When a person is likely to give material evidence in criminal proceedings with reference to any offence, a magistrate or judge of the court before which the proceedings in question are pending may, on information in writing and on oath that that person is about to abscond, issue a warrant for the arrest of that person.

(2) If a person referred to in subsection (1) is arrested, that person must as soon as practicable be brought before the magistrate or judge concerned who may warn that person to appear at the proceedings in question at a stated place and on a stated date and at a stated time and release that person on any condition referred to in paragraph (a), (b) or (e) of section 65, in which event subsections (1), (3) and (4) of section 70 apply with the necessary changes in respect of any such condition.

(3) (a) A person who fails to comply with a warning under subsection (2) commits an offence and is liable on conviction to the punishment contemplated in paragraph (b).

(b) Section 192(2) applies with the necessary changes to a person who commits an offence under paragraph (a).

(4) When a person is likely to give material evidence in criminal proceedings, a magistrate or judge of the court before which the proceedings in question are pending may, on information in writing and on oath that that person is evading service of the relevant subpoena, issue a warrant for the arrest of that person, whereupon subsections (2) and (3) apply with the necessary changes to that person.

208. Protection of witness

(1) (a) When a person is in the opinion of the Prosecutor-General likely to give evidence on behalf of the State at criminal proceedings in any court, and the Prosecutor-General, from information placed before him or her by any person -

(i) is of the opinion that the personal safety of the person who is likely to give such evidence is in danger or that he or she may be prevented from giving evidence or that he or she may be intimidated; or

(ii) considers it to be in the interests of the person who is likely to give such evidence or of the administration of justice that that person be placed under protection,

the Prosecutor-General may by way of affidavit place such information before a judge in chambers and apply to that judge for an order that the person who is likely to give such evidence be placed under protection pending the proceedings in question.

(b) The Prosecutor-General may, in any case in which he or she is of the opinion that the object of obtaining an order under paragraph (a) may be defeated if the person concerned is not placed under protection without delay, direct that that person be placed under protection immediately, but such a direction does not endure for longer than 72 hours unless the Prosecutor-General within that time by way of affidavit places before a judge in chambers the information on which he or she ordered the placement under protection of the person concerned and such further information as might become available to the Prosecutor-General, and applies to that judge for an order that that person be placed under protection pending the proceedings in question.

(c) The Prosecutor-General must, as soon as he or she applies to a judge under paragraph (b) for an order for the placement under protection of the person concerned, in writing inform the person in charge of the place where the person concerned is being protected, that he or she has so applied for an order, and must, where the judge under subsection (2)(a) refuses to issue an order for the placement under protection of the person concerned, immediately inform the person so in charge of the refusal, whereupon the person so in charge must without delay discontinue the protection of the person concerned.

(2) (a) The judge hearing an application under subsection (1) may, if it appears to the judge from the information placed before him or her by the Prosecutor-General -

(i) that there is a danger that the personal safety of the person concerned may be threatened or that he or she may be prevented from giving evidence or that he or she may be intimidated; or

(ii) that it would be in the interests of the person concerned or of the administration of justice that that person be placed under protection,

issue an order for the placement under protection of that person.

(b) Where a judge refuses an application under paragraph (a) and further information becomes available to the Prosecutor-General concerning the person in respect of whom the application was refused, the Prosecutor-General may again apply under subsection (1)(a) for the placement under protection of that person.

(3) A person in respect of whom an order is issued under subsection (2)(a), must be taken to the place mentioned in the order and, in accordance with regulations which the Minister is hereby authorized to make, be protected there or at any other place determined by a judge from time to time, or, where the person concerned is placed under protection in terms of a direction by the Prosecutor-General under subsection (1)(b), that person must, pending the decision of the judge under subsection (2)(a), be taken to a place determined by the Prosecutor-General and protected there in accordance with those regulations.

(4) A person placed under protection in terms of an order under subsection (2)(a) must be protected for the period terminating on the day on which the criminal proceedings in question are concluded, unless -

(a) the Prosecutor-General directs that the protection of that person be discontinued earlier; or

(b) such proceedings have not commenced within six months of the date of the placement under protection of that person, in which event the protection of that person must be discontinued after the expiration of that period.

(5) No person, other than a person employed in the Public Service acting in the performance of his or her official duties and the legal practitioner of a person placed under protection in terms of an order under subsection (2)(a), has access to the person so placed under protection, except with the consent of and subject to the conditions determined by the Prosecutor-General or a person employed in the Public Service delegated by the Prosecutor-General.

(6) For the purposes of section 214, a person placed under protection in terms of an order under subsection (2)(a) is deemed to have attended the criminal proceedings in question as a witness for the State during the whole of the period of his or her placement under protection.

(7) No information relating to the proceedings under subsection (1) or (2) may be published or be made public in any manner whatever.

(8) To the extent that this section authorizes the deprivation of the personal liberty of a person who is likely to give evidence at criminal proceedings, such deprivation is authorized only on the grounds of the procedures established under this section pursuant to Article 7 of the Namibian Constitution.

209. Court may subpoena witness

The court may at any stage of criminal proceedings subpoena or cause to be subpoenaed any person as a witness at such proceedings, and the court must so subpoena a witness or so cause a witness to be subpoenaed if the evidence of the witness appears to the court essential to the just decision of the case.

210. Witness to attend proceedings and to remain in attendance

(1) A witness who is subpoenaed to attend criminal proceedings must attend such proceedings and remain in attendance at the proceedings, and a person who is in attendance at criminal proceedings, though not subpoenaed as a witness, and who is warned by the court to remain in attendance at the proceedings, must remain in attendance at the proceedings unless that witness or that person is excused by the court.

(2) Notwithstanding subsection (1), the court may, at any time during the criminal proceedings in question, order that any person, other than the accused, who is to be called as a witness, must leave the court and remain absent from the proceedings until that person is called, and that that person must remain in court after he or she has given evidence.

211. Failure by witness to attend or to remain in attendance

(1) A person who is subpoenaed to attend criminal proceedings and who fails to attend or to remain in attendance at such proceedings, and a person who is warned by the court to remain in attendance at criminal proceedings and who fails to remain in attendance at such proceedings, and a person so subpoenaed or so warned who fails to appear at the place and on the date and at the time to which the proceedings in question may be adjourned or who fails to remain in attendance at such proceedings as so adjourned, commits an offence and is liable on conviction to the punishment contemplated in subsection (2).

(2) Section 192(2) applies with the necessary changes to a person referred to in subsection (1).

212. Powers of court with regard to recalcitrant witness

(1) If a person present at criminal proceedings is required to give evidence at such proceedings and refuses to be sworn or to make an affirmation as a witness, or, having been sworn or having made an affirmation as a witness, refuses to answer any question put to him or her or refuses or fails to produce any book, paper or document required to be produced by him or her, the court may in a summary manner enquire into such refusal or failure and, unless the person so refusing or failing has a just excuse for his or her refusal or failure, sentence that person to imprisonment for a period not exceeding five years.

(2) After the expiration of any sentence imposed under subsection (1), the person concerned may from time to time again be dealt with under that subsection with regard to any further refusal or failure.

(3) A court may at any time on good cause shown remit any punishment or part thereof imposed by it under subsection (1).

(4) Any sentence imposed by a court under subsection (1) must be executed and be subject to appeal in the same manner as a sentence imposed in any criminal case by that court, and must be served before any other sentence of imprisonment imposed on the person concerned.

(5) The court may, notwithstanding any action taken under this section, at any time conclude the criminal proceedings referred to in subsection (1).

(6) No person is bound to produce any book, paper or document not specified in a subpoena served on him or her, unless that person has that book, paper or document in court.

213. Impeachment or support of credibility of witness

(1) Any party may in criminal proceedings impeach or support the credibility of a witness called against or on behalf of that party in any manner in which and by any evidence by which the credibility of that witness might in terms of the law in force immediately before 21 March 1990 have been impeached or supported by that party.

(2) Any party who has called a witness who has given evidence in criminal proceedings (whether that witness is or is not, in the opinion of the court, adverse to the party calling him or her) may, after that party or the court has asked the witness whether he or she did or did not previously make a statement with which his or her evidence in the proceedings in question is inconsistent, and after sufficient particulars of the alleged previous statement to designate the occasion when it was made have been given to the witness, prove that the witness previously made a statement with which such evidence is inconsistent.

214. Payment of expenses of witness

(1) In this section "witness" includes any person necessarily required to accompany a witness for the State on account of his or her youth, old age or infirmity.

(2) A person who attends criminal proceedings as a witness for the State is entitled to such allowance as may be prescribed under subsection (3), but the magistrate or judge presiding at such proceedings may, if he or she thinks fit, direct that no such allowance or that only a part of such allowance is to be paid to that witness.

(3) The Minister may, in consultation with the Minister responsible for finance, by regulation prescribe a tariff of allowances which may be paid out of public moneys to witnesses in criminal proceedings, and may by regulation prescribe different tariffs for witnesses according to their respective professions, callings or occupations, and according also to the distances to be travelled by that witnesses to reach the place where the proceedings in question are to take place.

(4) The Minister may under subsection (3) empower any person employed in the Public Service to authorize, in any case in which the payment of an allowance in accordance with the tariff prescribed

may cause undue hardship or in the case of a person resident outside Namibia, the payment of an allowance in accordance with a higher tariff than the tariff prescribed.

215. Witness services

(1) The Minister may determine services to be provided to a witness who is required to give evidence in a court of law.

(2) The Minister may make regulations relating to -

(a) the assistance of, and support to, witnesses at courts;

(b) the establishment of reception centres for witnesses at courts;

(c) the counselling of witnesses; and

(d) any other matter that the Minister considers expedient to prescribe to provide services to witnesses at courts.

(3) A regulation made under this section which may result in financial expenditure for the State must be made in consultation with the Minister responsible for finance.

216. Every witness competent and compellable unless expressly excluded

Every person not expressly excluded by this Act from giving evidence is, subject to Article 12(1)(f) of the Namibian Constitution and section 231 of this Act, competent and compellable to give evidence in criminal proceedings.

217. Court to decide on competency of witness

The court in which criminal proceedings are conducted must decide any question concerning the competency or compellability of a witness to give evidence.

218. Incompetency due to state of mind

No person appearing or proved to be afflicted with mental illness or to be labouring under any imbecility of mind due to intoxication or drugs or the like, and who is thereby deprived of the proper use of his or her reason, is competent to give evidence while so afflicted or disabled.

219. Evidence for prosecution by spouse of accused

The spouse of an accused is competent but not compellable to give evidence for the prosecution in criminal proceedings.

220. Evidence for defence by accused and spouse of accused

(1) Every accused and spouse of an accused is a competent witness for the defence at every stage of criminal proceedings, whether or not the accused is charged jointly with any other person, but -

(a) an accused may not be called as a witness except on his or her own application;

(b) the spouse of an accused is not a compellable witness where a co-accused calls that spouse as a witness for the defence.

(2) The evidence that an accused may, on his or her own application, give in his or her own defence at joint criminal proceedings, is not inadmissible against a co-accused at such proceedings by reason only that the accused is for any reason not a competent witness for the prosecution against that co-accused.

221. Accused to give evidence on oath or affirmation

An accused may not make an unsworn statement at his or her trial in place of evidence but must, if he or she wishes to give evidence, do so on oath or affirmation.

222. Privileges of accused when giving evidence

An accused who gives evidence at criminal proceedings may not be asked or required to answer any question tending to show that the accused has committed or has been convicted of or has been charged with any offence other than the offence with which he or she is charged, or that the accused is of bad character, unless -

(a) the accused or his or her legal practitioner asks any question of any witness with a view to establishing his or her own good character or the accused himself or herself gives evidence of his or her own good character, or the nature or conduct of the defence is such as to involve imputation of the character of the complainant or any other witness for the prosecution;

(b) the accused gives evidence against any other person charged with the same offence or an offence in respect of the same facts; or

(c) the proof that the accused has committed or has been convicted of such other offence is admissible evidence to show that the accused has committed the offence with which he or she is charged.

223. Privilege arising out of marital status

(1) A husband is not at criminal proceedings compelled to disclose any communication that his wife made to him during the marriage, and a wife is not at criminal proceedings compelled to disclose any communication that her husband made to her during the marriage.

(2) Subsection (1) also applies to a communication made during the subsistence of a marriage or a putative marriage that has been dissolved or annulled by a competent court.

224. No witness compelled to answer question that the witness's spouse may decline

No person is at criminal proceedings compelled to answer any question or to give any evidence, if the question or evidence is such that under the circumstances the spouse of that person, if under examination as a witness, may lawfully refuse and cannot be compelled to answer or to give it.

225. Witness not excused from answer establishing civil liability on the witness's part

Notwithstanding section 228, a witness in criminal proceedings may not refuse to answer any question relevant to the issue by reason only that the answer establishes or may establish a civil liability on his or her part.

226. Privilege of legal practitioner

No legal practitioner is competent, without the consent of the person concerned, to give evidence at criminal proceedings against a person by whom he or she is professionally engaged or consulted as to any fact, matter or thing with regard to which the legal practitioner would not in terms of the law in force immediately before 21 March 1990, by reason of such engagement or consultation, have been competent to give evidence without such consent, but the legal practitioner is competent and compellable to give evidence as to any fact, matter or thing that relates to or is connected with the commission of any offence with which the person by whom the legal practitioner is professionally engaged or consulted, is charged, if such fact, matter or thing came to the knowledge of the legal practitioner before he or she was professionally engaged or consulted with reference to the defence of the person concerned.

227. Privilege from disclosure on ground of public policy or public interest

Except as provided by this Act and subject to any other law, no witness in criminal proceedings is compellable or permitted to give evidence as to any fact, matter or thing or as to any communication made to or by that witness, if that witness would in terms of the law in force immediately before 21 March 1990 not have been compellable or permitted to give evidence with regard to such fact, matter or thing or communication by reason that it should not, on account of public policy or having regard to public interest, be disclosed, and that it is privileged from disclosure, but a person may in criminal proceedings adduce evidence of any communication alleging the commission of an offence, if the making of that communication prima facie constitutes an offence, and the judge or magistrate presiding at the criminal proceedings may determine whether the making of such communication prima facie does or does not constitute an offence.

228. Witness excused from answering incriminating question

No witness in criminal proceedings is compelled to answer any question that the witness is pursuant to Article 12(1)(f) of the Namibian Constitution not compelled to answer.

229. Incriminating evidence by witness for prosecution

(1) Notwithstanding section 228, when the prosecutor at criminal proceedings informs the court that a person called as a witness on behalf of the prosecution will be required by the prosecution to answer questions that may incriminate that witness with regard to an offence specified by the prosecutor -

(a) the court, if satisfied that that witness is otherwise a competent witness for the prosecution, must -

(i) enquire from that witness whether he or she, notwithstanding his or her right not to be compelled to give self-incriminating evidence, wishes to give evidence under this section; and

(ii) if that witness wishes so to give evidence, inform that witness -

(aa) that he or she is obliged to give evidence at the proceedings in question;

(bb) that questions may be put to him or her that may incriminate him or her with regard to the offence specified by the prosecutor;

(cc) that he or she will be obliged to answer any question put to him or her, whether by the prosecution, the accused or the court, notwithstanding that the answer may incriminate him or her with regard to the offence specified by the prosecutor or with regard to any offence in respect of which a verdict of guilty would be competent on a charge relating to the offence so specified; and

(dd) that if he or she answers frankly and honestly all questions put to him or her, he or she will be indemnified against prosecution with regard to the offence specified by the prosecutor and with regard to any offence in respect of which a verdict of guilty would be competent on a charge relating to the offence so specified; and

(b) that witness must thereupon give evidence and answer any question put to him or her whether by the prosecution, the accused or the court, notwithstanding that the reply thereto may incriminate him or her with regard to the offence specified by the prosecutor or with regard to any offence in respect of which a verdict of guilty would be competent on a charge relating to the offence so specified.

(2) If a witness referred to in subsection (1), in the opinion of the court, answers frankly and honestly all questions put to him or her -

(a) that witness is, subject to subsection (3), indemnified against prosecution for the offence specified by the prosecutor and for any offence in respect of which a verdict of guilty would be competent on a charge relating to the offence so specified; and

(b) the court must cause such indemnity against prosecution to be entered on the record of the proceedings in question.

(3) An indemnity referred to in subsection (2) has no legal force or effect if it is given at preparatory examination proceedings and the witness concerned does not at any trial arising from such preparatory examination answer, in the opinion of the court, frankly and honestly all questions put to him or her at that trial, whether by the prosecution, the accused or the court.

(4) (a) Where a witness gives evidence under this section and is not indemnified against prosecution in respect of the offence in question, such evidence is not admissible in evidence against that witness at any trial in respect of that offence or any other offence in respect of which a verdict of guilty is competent on a charge relating to that offence.

(b) Paragraph (a) does not apply to a witness who is prosecuted for perjury arising from the giving of the evidence in question, or for a contravention of section 368 arising likewise.

230. Judge or magistrate may take evidence as to alleged offence

(1) A judge of the High Court or a magistrate may, subject to Article 12(1)(f) of the Namibian Constitution and subsection (4) of this section, at the request of the Prosecutor-General or a public prosecutor authorized thereto in writing by the Prosecutor-General, require the attendance before him or her or, in the case of a judge, any other judge or, in the case of a magistrate, any other magistrate, for examination by the Prosecutor-General or the public prosecutor authorized thereto in writing by the Prosecutor-General, of any person who is likely to give material or relevant information as to any alleged offence, whether or not it is known by whom the offence was committed, but if that person furnishes such information to the satisfaction of the Prosecutor-General or that public prosecutor before the date on which he or she is required to appear before the judge or magistrate, that person is under no further obligation so to appear.

(2) Sections 184 to 186 inclusive, 202 to 204 inclusive, 210 to 212 inclusive, 214 and 229 apply with the necessary changes in respect of the proceedings under subsection (1).

(3) The examination of any person under subsection (1) may be conducted in private at any place designated by the judge or magistrate concerned.

(4) A person required in terms of subsection (1) to appear before a judge or magistrate for examination, and who refuses or fails to give the information contemplated in that subsection, may not be sentenced to imprisonment as contemplated in section 212 unless the judge or magistrate is of the opinion that the furnishing of such information is necessary for the administration of justice or the maintenance of law and order.

231. The law in cases not provided for

The law as to the competency, compellability or privilege of witnesses that was in force in respect of criminal proceedings immediately before 21 March 1990 applies, to the extent that such law does not conflict with the Namibian Constitution, in any case not expressly provided for by this Act or any other law.

232. Saving of special provisions in other laws

Nothing in this Chapter contained is to be construed as modifying any provision of any other law whereby in any criminal proceedings referred to in such other law a person is deemed a competent witness.

Chapter 30
EVIDENCE

233. Conviction may follow on evidence of single witness

(1) An accused may be convicted of any offence on the evidence of a single competent witness.

(2) No court may regard the evidence of a child as inherently unreliable and treat such evidence with special caution only because that witness is a child.

234. Conviction may follow on confession by accused

An accused may be convicted of any offence on the single evidence of a confession by that accused that he or she committed the offence in question, if such confession is confirmed in a material respect or, where the confession is not so confirmed, if the offence is proved by evidence, other than such confession, to have been actually committed.

235. Irrelevant evidence inadmissible

No evidence as to any fact, matter or thing is admissible which is irrelevant or immaterial and which cannot conduce to prove or disprove any point or fact at issue in criminal proceedings.

236. Evidence during criminal proceedings of previous convictions

Except where otherwise expressly provided by this Act or any other law or except where the fact of a previous conviction is an element of an offence with which an accused is charged, evidence is not admissible at criminal proceedings in respect of an offence to prove that an accused at such proceedings had previously been convicted of an offence, whether in Namibia or elsewhere, and no accused, if called as a witness, may be asked whether he or she has been so convicted.

237. Evidence during criminal proceedings of similar offences by accused

(1) Subject to subsection (2), in criminal proceedings at which an accused is charged with rape or an offence of an indecent nature, evidence of the commission of other similar offences by the accused must, on application by the prosecutor, be admitted by the court at such proceedings and may be considered on any matter to which it is relevant, but such evidence must only be so admitted if the court is satisfied that it has significant probative value that is not substantially outweighed by its potential for unfair prejudice to the accused.

(2) Evidence of previous similar offences by an accused is not admissible only to prove the character of the accused.

(3) The court's reasons for its decision to admit or refuse to admit evidence of previous similar offences must be recorded, and those reasons form part of the record of the proceedings.

238. Proof of certain facts by affidavit or certificate

(1) In this section -

"Namibia Institute of Pathology" means the Namibia Institute of Pathology Limited established by section 2 of the Namibia Institute of Pathology Act, 1999 (Act No. 15 of 1999);

"National Transport Services" means the Holding Company and any subsidiary company thereof providing transport services under and in accordance with the National Transport Services Holding Company Act, 1998 (Act No. 28 of 1998);

"office", "ministry" and "agency" means respectively an office, ministry and agency as defined in section 1(1) of the Public Service Act, 1995 (Act No. 13 of 1995).

(2) When in criminal proceedings the question arises whether any particular act, transaction or occurrence did or did not take place in any particular office, ministry or agency, or in any department of such office, ministry or agency, or in any particular court of law or in any particular banking institution, or the question arises in such proceedings whether any particular functionary in any such office, ministry, agency or department did or did not perform any particular act or did or did not take part in any particular transaction, a document purporting to be an affidavit made by a person who in that affidavit alleges -

(a) that he or she is in the employment of the State or of the banking institution in question, and that he or she is employed in the particular office, ministry or agency or the particular department thereof or in the particular court or banking institution;

(b) that -

(i) if the act, transaction or occurrence in question had taken place in such office, ministry, agency or department or in such court or banking institution; or

(ii) if such functionary had performed such particular act or had taken part in such particular transaction,

it would in the ordinary course of events have come to his or her, the deponent's, knowledge and a record thereof, available to him or her, would have been kept; and

(c) that it has not come to his or her knowledge -

(i) that such act, transaction or occurrence took place; or

(ii) that such functionary performed such act or took part in such transaction,

and that there is no record thereof,

is, on its mere production at such proceedings, prima facie proof that the act, transaction or occurrence in question did not take place or that the functionary concerned did not perform the act in question or did not take part in the transaction in question.

(3) When in criminal proceedings the question arises whether a person bearing a particular name did or did not furnish a particular official in the employment of the State with any particular information or document, a document purporting to be an affidavit made by a person who in that affidavit alleges that he or she is that official and that no person bearing that name furnished him or her with such information or document, is, on its mere production at such proceedings, prima facie proof that that person did not furnish that official with any such information or document.

(4) When in criminal proceedings the question arises whether any matter has been registered under any law or whether any fact or transaction has been recorded thereunder or whether anything connected therewith has been done thereunder, a document purporting to be an affidavit made by a person who in that affidavit alleges that he or she is the person on whom the law in question confers the power or imposes the duty to register such matter or to record such fact or transaction or to do such thing connected therewith and that he or she has registered the matter in question or that he or she has recorded the fact or transaction in question or that he or she has done the thing connected therewith or that he or she has satisfied himself or herself that the matter in question was registered or that the fact or transaction in question was recorded or that the thing connected therewith was done, is, on its mere production at such proceedings, prima facie proof that such matter was registered or that such fact or transaction was recorded or that the thing connected therewith was done.

(5) (a) When any fact established by any examination or process requiring any skill -

(i) in biology, chemistry, physics, astronomy, geography or geology;

(ii) in mathematics, applied mathematics or mathematical statistics or in the analysis of statistics;

(iii) in computer science or in any discipline of engineering;

(iv) in anatomy or in human behavioural sciences;

(v) in DNA technology;

(vi) in biochemistry, metallurgy or microscopy or in any branch of pathology or in toxicology; or

(vii) in ballistics, in the identification of fingerprints or palm-prints or in the examination of disputed documents,

is or may become relevant to the issue at criminal proceedings, a document purporting to be an affidavit made by a person who in that affidavit alleges that he or she is in the employment of the State or is in the employment of or is attached to the Namibia Institute of Pathology or any university in Namibia or any other body designated by the Minister for the purposes of this subsection by notice in the Gazette, and that he or she has established such fact by means of such an examination or process, is, on its mere production at such proceedings, prima facie proof of such fact, but the person who may make such affidavit may, in any case in which skill is required in chemistry, anatomy or pathology, issue a certificate instead of such affidavit, in which event this paragraph applies with the necessary changes in respect of that certificate.

(b) A person who issues a certificate under paragraph (a) and who in that certificate willfully states anything that is false, commits an offence and is liable on conviction to a fine not exceeding N$4 000 or to imprisonment for a period not exceeding one year.

(6) When the question as to the existence and nature of a precious metal or a precious stone is or may become relevant to the issue in criminal proceedings, a document purporting to be an affidavit made by a person who in that affidavit alleges that he or she is an appraiser of precious metals or precious stones, that he or she is in the employment of the State, that the precious metal or precious stone in question is indeed a precious metal or a precious stone, that it is a precious metal or a precious stone of a particular kind and appearance and that the mass or value of that precious metal or that precious stone is as specified in the affidavit, is, on its mere production at such proceedings, prima facie proof that it is a precious metal or a precious stone of a particular kind and appearance and the mass or value of that precious metal or precious stone is as so specified.

(7) In criminal proceedings in which the finding of or action taken in connection with any particular fingerprint or palm-print is relevant to the issue, a document purporting to be an affidavit made by a person who in that affidavit alleges that he or she is in the employment of the State and that he or she in the performance of his or her official duties -

(a) found such fingerprint or palm-print at or in the place or on or in the article or in the position or circumstances stated in the affidavit; or

(b) dealt with such fingerprint or palm-print in the manner stated in the affidavit,

is, on the mere production thereof at such proceedings, prima facie proof that such fingerprint or palm-print was so found or was so dealt with.

(8) In criminal proceedings in which the physical condition or the identity, in or at any hospital, nursing home, ambulance or mortuary, of any deceased person or of any dead body is relevant to the issue, a document purporting to be an affidavit made by a person who in that affidavit alleges -

(a) that he or she is employed at or in connection with the hospital, nursing home, ambulance or mortuary in question; and

(b) that he or she during the performance of his or her official duties observed the physical characteristics or condition of the deceased person or of the dead body in question; and

(c) that while the deceased person or the dead body in question was under his or her care, that deceased person or that dead body had or sustained the injuries or wounds described in the affidavit, or sustained no injuries or wounds; or

(d) that he or she pointed out or handed over the deceased person or the dead body in question to a specified person or that he or she left the deceased person or the dead body in question in the care of a specified person or that the deceased person or the dead body in question was pointed out or handed over to him or her or left in his or her care by a specified person,

is, on the mere production thereof at such proceedings, prima facie proof of the matter so alleged.

(9) (a) In criminal proceedings in which the injuries suffered by a person towards or in connection with whom an offence prescribed by regulation under paragraph (c) was committed or allegedly committed are relevant to the issue, a medical record containing the information likewise prescribed and accompanied by a document purporting to be an affidavit made by a registered medical practitioner who in that affidavit alleges -

(i) that, on a date and at a time specified in the affidavit, he or she examined and treated the person named in the affidavit; and

(ii) that the person named in the affidavit suffered the injuries set out in the medical record that is attached to the affidavit,

is, on the mere production thereof at such proceedings, prima facie proof that the person concerned suffered the injuries set out in that medical record, but the medical practitioner who may make such affidavit may issue a certificate instead of such affidavit, in which event this paragraph applies with the necessary changes in respect of that certificate.

(b) A person who issues a certificate under paragraph (a) and who in that certificate willfully states anything that is false, commits an offence and is liable on conviction to a fine not exceeding N$4 000 or to imprisonment for a period not exceeding one year.

(c) (i) The Minister may, in consultation with the Minister responsible for health, make regulations requiring every registered medical practitioner to record such information as may be prescribed in those regulations when treating a person whom that medical practitioner has reason to believe is a victim of any such offence as may be prescribed in those regulations.

(ii) Regulations made under subparagraph (i) may prescribe the manner in which registered medical practitioners must deal with medical records kept in compliance with any duty imposed in terms of those regulations and may also impose a duty on such medical practitioners to make those records available when becoming aware of criminal investigations or proceedings in respect of which those records may be relevant.

(10) (a) In criminal proceedings in which the receipt, custody, packing, marking, delivery or dispatch of any fingerprint or palm-print, article of clothing, specimen, tissue (as defined in section 1 of the Anatomical Donations and Post-Mortem Examinations Ordinance, 1977 (Ordinance No. 12 of 1977), or any object of whatever nature is relevant to the issue, a document purporting to be an affidavit made by a person who in that affidavit alleges -

(i) that he or she is in the employment of the State or is in the employment of or is attached to the Namibia Institute of Pathology or any university in Namibia or any other body designated by the Minister under subsection (4); and

(ii) that he or she in the performance of his or her official duties -

(aa) received from any person, institute, or office, ministry or agency, or body specified in the affidavit, a fingerprint or palm-print, article of clothing, specimen, tissue or object described in the affidavit, which was packed or

marked or which he or she packed or marked in the manner described in the affidavit;

(bb) delivered or dispatched to any person, institute, or office, ministry or agency, or body specified in the affidavit, a fingerprint or palm-print, article of clothing, specimen, tissue or object described in the affidavit, which was packed or marked or which he or she packed or marked in the manner described in the affidavit;

(cc) during a period specified in the affidavit, had a fingerprint or palm-print, article of clothing, specimen, tissue or object described in the affidavit in his or her custody in the manner described in the affidavit, which was packed or marked in the manner described in the affidavit,

is, on the mere production thereof at such proceedings, prima facie proof of the matter so alleged, but the person who may make such affidavit may, in any case relating to any article of clothing, specimen or tissue, issue a certificate instead of such affidavit, in which event this paragraph applies with the necessary changes in respect of that certificate.

(b) A person who issues a certificate under paragraph (a) and who in that certificate willfully states anything that is false, commits an offence and is liable on conviction to a fine not exceeding N$4 000 or to imprisonment for a period not exceeding one year.

(11) In criminal proceedings in which it is relevant to prove -

(a) the details of any consignment of goods delivered to the National Transport Services for conveyance to a specific consignee, a document purporting to be an affidavit made by a person who in that affidavit alleges -

(i) that he or she consigned the goods set out in the affidavit to a consignee specified in the affidavit; and

(ii) that, on a date specified in the affidavit, he or she delivered such goods or caused such goods to be delivered to the National Transport Services for conveyance to such consignee, and that the consignment note referred to in that affidavit relates to such goods,

is, on the mere production thereof at such proceedings, prima facie proof of the matter so alleged; or

(b) that the goods referred to in paragraph (a) was received by the National Transport Services for conveyance to a specified consignee or that such goods were handled or transhipped en route by the National Transport Services, a document purporting to be an affidavit made by a person who in that affidavit alleges -

(i) that he or she at all relevant times was in the service of the National Transport Services in the stated capacity; and

(ii) that he or she in the performance of his or her official duties received or handled or transhipped the goods referred to in the consignment note referred to in paragraph (a),

is, on the mere production thereof at such proceedings, prima facie proof of the matter so alleged.

(12) (a) The Minister may in respect of any measuring instrument as defined in section 1 of the Trade Metrology Act, 1973 (Act No. 77 of 1973), by notice in the Gazette prescribe the conditions and requirements that must be complied with before any reading by such measuring instrument may be accepted in criminal proceedings as proof of the fact that it purports to prove, and if the Minister has so prescribed such conditions and requirements and on proof that such conditions and requirements have been complied with in respect of any particular measuring instrument, the measuring instrument in question must, for the purposes of

proving the fact that it purports to prove, in the absence of evidence to the contrary be accepted at criminal proceedings as proving the fact recorded by it.

(b) An affidavit in which the deponent declares that the conditions and requirements referred to in paragraph (a) have been complied with in respect of the measuring instrument in question is, on the mere production thereof at the criminal proceedings in question, prima facie proof that such conditions and requirements have been complied with.

(13) (a) The Minister may in respect of any syringe intended for the drawing of blood or any receptacle intended for the storing of blood, by notice in the Gazette prescribe the conditions and requirements relating to the cleanliness and sealing or manner of sealing thereof that must be complied with before any such syringe or receptacle may be used in connection with the analysing of the blood of a person for the purposes of criminal proceedings, and if -

(i) any such syringe or receptacle is immediately before being used for that purpose, in a sealed condition, or contained in a holder that is sealed with a seal or in a manner prescribed by the Minister; and

(ii) any such syringe, receptacle or holder bears an endorsement that the conditions and requirements prescribed by the Minister have been complied with in respect of such syringe or receptacle,

proof at criminal proceedings that the seal, as so prescribed, of such syringe or receptacle was immediately before the use of such syringe or receptacle for that purpose intact, is deemed to constitute prima facie proof that the syringe or receptacle in question was then free from any substance or contamination that could materially affect the result of the analysis in question.

(b) An affidavit in which the deponent declares that he or she had satisfied himself or herself before using the syringe or receptacle in question for the purpose contemplated in paragraph (a) -

(i) that the syringe or receptacle was sealed as provided in paragraph (a)(i) and that the seal was intact immediately before the syringe or receptacle was used for that purpose; and

(ii) that the syringe, receptacle or holder contained the endorsement referred to in paragraph (a)(ii),

is, on the mere production thereof at the proceedings in question, prima facie proof that the syringe or receptacle was so sealed, that the seal was so intact and that the syringe, receptacle or holder was so endorsed.

(c) A person who for the purposes of this subsection makes or causes to be made a false endorsement on any syringe, receptacle or holder, knowing it to be false, commits an offence and is liable on conviction to a fine not exceeding N$4 000 or to imprisonment for a period not exceeding one year.

(14) The court before which an affidavit or certificate is under any of the preceding subsections produced as prima facie proof of the relevant contents thereof, may cause the person who made the affidavit or issued the certificate to be subpoenaed to give oral evidence in the proceedings in question, or may cause written interrogatories to be submitted to that person for reply, and such interrogatories and any reply thereto purporting to be a reply from that person, are likewise admissible in evidence at such proceedings.

(15) Nothing in this section contained is to be construed as affecting any other law under which any certificate or other document is admissible in evidence, and the provisions of this section are deemed to be additional to and not in substitution of any such law.

239. Proof of certain facts by affidavit from person in foreign country

(1) When in criminal proceedings the question arises whether any particular act, transaction or occurrence did or did not take place -

(a) in any particular department or subdepartment of a state or territory outside Namibia;

(b) in any branch or office of a department or subdepartment contemplated in paragraph (a);

(c) in any particular court of law in a state or territory outside Namibia; or

(d) in any particular institution in a state or territory outside Namibia which is similar to a banking institution in Namibia,

or when the question arises in such proceedings whether any particular functionary in any such department, subdepartment, branch, office, court or institution did or did not perform any particular act or did or did not take part in any particular transaction, section 238(2), (3) and (4) applies with the necessary changes, but, for the purposes of this section, a document purporting to be an affidavit has no effect unless -

(i) it is obtained in terms of an order of a competent court or on the authority of a competent government institution of the state or territory concerned;

(ii) it is authenticated in the manner prescribed in the rules of court for the authentication of documents executed outside Namibia; or

(iii) it is authenticated by a person, and in the manner, contemplated in section 8 of the Justices of the Peace and Commissioners of Oaths Act, 1963 (Act No. 16 of 1963).

(2) The admissibility and evidentiary value of an affidavit contemplated in subsection (1) are not affected by the fact that the form of the oath, confirmation or attestation thereof differs from the form of the oath, confirmation or attestation prescribed in Namibia.

(3) A court before which an affidavit contemplated in subsection (1) is placed, may, to clarify obscurities in such affidavit, at the request of a party to the proceedings order that a supplementary affidavit be submitted or that oral evidence be heard, but oral evidence may only be heard if the court is of the opinion that it is in the interests of the administration of justice and that a party to the proceedings would be materially prejudiced should oral evidence not be heard.

240. Proof of undisputed facts

(1) If an accused has appointed a legal practitioner and, at any stage during the criminal proceedings in question, it appears to the prosecutor that a particular fact or facts which must be proved in a charge against the accused is or are not in issue or will not be placed in issue in such proceedings against the accused, the prosecutor may, notwithstanding section 250, send or hand a notice to the accused or his or her legal practitioner setting out such fact or facts and stating that such fact or facts will be deemed to have been proved at such proceedings unless notice is given that any such fact will be placed in issue.

(2) The notice to the accused or his or legal practitioner contemplated in subsection (1) must be sent by certified mail or handed to the accused or his or her legal practitioner personally at least 14 days before the commencement of the criminal proceedings in question or the date set for the continuation of such proceedings or within such shorter period as may be condoned by the court or agreed on by the accused or his or her legal practitioner and the prosecutor.

(3) If any fact set out in the notice sent or handed to the accused or his or her legal practitioner under subsection (1) is intended to be placed in issue at the criminal proceedings in question, the accused or his or her legal practitioner must, at least seven days before the commencement of such proceedings or the date set for the continuation of the proceedings or within such shorter period as may be condoned by the court or agreed on with the prosecutor, deliver a notice in writing to that effect to the registrar or the clerk of the court in question or orally notify the registrar or that clerk

of the court to that effect, in which event the registrar or that clerk of the court must record such notice.

(4) If, after receipt by the accused or his or her legal practitioner of the notice contemplated in subsection (1), any fact or facts set out in that notice is not placed in issue in accordance with subsection (3), the court may deem such fact or facts, subject to subsections (5) and (6), to have been sufficiently proved at the proceedings in question.

(5) If a notice was sent or handed to the accused or his or her legal practitioner under subsection (1), the prosecutor must inform the court at the commencement of the proceedings of that fact and of the reaction thereto, if any, by the accused or his or her legal practitioner, and the court must thereupon institute an investigation into those facts that are not disputed and enquire from the accused whether he or she confirms the information given by the prosecutor and whether he or she understands his or her rights and the implications of the procedure and, where the legal practitioner of the accused replies to any question by the court under this section, the accused must be required by the court to declare whether he or she confirms such reply or not.

(6) The court may, of its own motion or at the request of the accused, order oral evidence to be adduced regarding any fact contemplated in subsection (4).

241. Proof of written statement by consent

(1) In criminal proceedings a written statement by any person, other than an accused at such proceedings, is, subject to subsection (2), admissible as evidence to the same extent as oral evidence to the same effect by that person.

(2) (a) The written statement must purport to be signed by the person who made it, and must contain a declaration by that person to the effect that it is true to the best of his or her knowledge and belief and that he or she made the statement knowing that, if it were tendered in evidence, he or she would be liable to prosecution if he or she willfully stated in it anything which he or she knew to be false or which he or she did not believe to be true.

(b) If the person who makes the written statement cannot read it, it must be read to that person before he or she signs it, and an endorsement must be made thereon by the person who so read the statement to the effect that it was so read.

(c) A copy of the written statement, together with a copy of any document referred to in the statement as an exhibit, or with such information as may be necessary to enable the party on whom it is served to inspect that document or a copy thereof, must, before the date on which the document is to be tendered in evidence, be served on each of the other parties to the proceedings in question, and any such party may, at least two days before the commencement of such proceedings, object to the statement being tendered in evidence under this section.

(d) If a party objects under paragraph (c) that the written statement in question be tendered in evidence, that statement is, subject to paragraph (e), not admissible as evidence under this section.

(e) If a party does not object under paragraph (c) or if the parties agree before or during the proceedings in question that the written statement may be so tendered, that statement may, on the mere production thereof at such proceedings, be admitted as evidence in the proceedings.

(f) When the documents referred to in paragraph (c) are served on an accused, the documents must be accompanied by a written notification in which the accused is informed that the statement in question will be tendered in evidence at his or her trial instead of the State calling as a witness the person who made the statement, but that that statement will not without the consent of the accused be so tendered in evidence if the accused notifies the prosecutor concerned, at least two days before the commencement of the proceedings, that he or she objects to the statement so being tendered in evidence.

(3) The parties to criminal proceedings may, before or during such proceedings, agree that a written statement complying with the requirements of subsection (2)(a) and (b) which has not been served in terms of subsection (2)(c) be tendered in evidence at such proceedings, whereupon that statement may, on the mere production thereof at such proceedings, be admitted as evidence in the proceedings.

(4) Notwithstanding that a written statement made by any person may be admissible as evidence under this section -

(a) a party by whom or on whose behalf a copy of the statement was served, may call that person to give oral evidence;

(b) the court may of its own motion, and must on the application of any party to the proceedings in question, cause that person to be subpoenaed to give oral evidence before the court, or the court may, where that person is resident outside Namibia, issue a letter of request under and in accordance with section 2(1) of the International Co-operation in Criminal Matters Act, 2000 (Act No. 9 of 2000), for the obtaining of that person's evidence.

(5) Any document or object referred to as an exhibit and identified in a written statement tendered in evidence under this section, must be treated as if it had been produced as an exhibit and identified in court by the person who made the statement.

(6) A person who makes a written statement which is admitted as evidence under this section and who in that statement willfully and falsely states anything which, if sworn, would have amounted to the offence of perjury, commits an offence and is liable on conviction to a fine not exceeding N$4 000 or to imprisonment for a period not exceeding one year.

242. Evidence recorded at preparatory examination admissible at trial in certain circumstances

The evidence of a witness recorded at a preparatory examination -

(a) is admissible in evidence at the trial of the accused following on the preparatory examination, if it is proved to the satisfaction of the court -

(i) that the witness -

(aa) is dead;

(bb) is incapable of giving evidence;

(cc) is too ill to attend the trial; or

(dd) is being kept away from the trial by the means and contrivance of the accused; and

(ii) that the evidence tendered is the evidence recorded at the preparatory examination,

and if it appears from the preparatory examination record or it is proved to the satisfaction of the court that the accused or the State had a full opportunity of cross-examining that witness;

(b) may, if that witness cannot, after diligent search, be found for the purposes of the trial of the accused following on the preparatory examination, or cannot be compelled to attend the trial, in the discretion of the court but subject to paragraph (a)(ii), be read as evidence at that trial if it appears from the preparatory examination record or it is proved to the satisfaction of the court that the accused or the State had a full opportunity of cross-examining that witness.

243. Evidence recorded at former trial admissible at later trial in certain circumstances

The evidence of a witness given at a former trial may, in the circumstances referred to in section 242, with the necessary changes be admitted in evidence at any later trial of the same person on the same charge.

244. Hearsay evidence

(1) In this section -

"hearsay evidence" means evidence, whether oral or in writing, the probative value of which depends on the credibility of any person other than the person giving such evidence;

"party" means the accused or party against whom hearsay evidence is to be adduced, including the prosecution.

(2) Subject to this Act or any other law, hearsay evidence may not be admitted as evidence in criminal proceedings unless -

(a) each party against whom such evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;

(b) the person on whose credibility the probative value of such evidence depends, himself or herself testifies at such proceedings; or

(c) the court, having regard to -

(i) the nature of the proceedings;

(ii) the nature of the evidence;

(iii) the purpose for which the evidence is tendered;

(iv) the probative value of the evidence;

(v) the reason why the evidence is not given by the person on whose credibility the probative value of such evidence depends;

(vi) any prejudice to a party that the admission of such evidence might entail; and

(vii) any other factor that should in the opinion of the court be taken into account,

is of the opinion that such evidence should be admitted in the interests of justice.

(3) Subsection (2) does not render admissible any evidence that is inadmissible on any ground other than that such evidence is hearsay evidence.

(4) Hearsay evidence may be provisionally admitted under subsection (2)(b) as evidence at criminal proceedings if the court is informed that the person on whose credibility the probative value of such evidence depends, will himself or herself testify in such proceedings, but if that person does not later testify in such proceedings, the hearsay evidence must be left out of account unless the hearsay evidence is admitted under paragraph (a) of subsection (2) or is admitted by the court under paragraph (c) of that subsection.

245. Admissibility of certain statements made by young children

(1) Evidence of a statement made by a child under the age of 14 years is admissible at criminal proceedings as proof of any fact alleged in that statement if the court -

(a) is satisfied that -

(i) the child who made that statement is incapable of giving evidence relating to any matter contained in the statement; and

(ii) the statement, considered in the light of all the surrounding circumstances, contains indications of reliability; and

(b) having regard to any prejudice to a party to the proceedings that the admission of such evidence might entail, is of the opinion that such evidence should be admitted in the interests of justice.

(2) If a child under the age of 14 years gives evidence in criminal proceedings, evidence of a statement made by that child is admissible as proof of any fact alleged in that statement if that child gives evidence to the effect that he or she made that statement.

(3) Evidence of a statement contemplated in subsection (1) or (2) may in criminal proceedings be given in the form of -

(a) the playing in court of a videotape or audiotape of the making of that statement if the person to whom the statement was made gives evidence in such proceedings;

(b) a written record of that statement if the person to whom the statement was made gives evidence in such proceedings;

(c) oral evidence of that statement given by the person to whom the statement was made, but only if it is not possible to give evidence in the form contemplated in paragraph (a) or (b).

(4) This section does not render -

(a) admissible any evidence that is otherwise inadmissible;

(b) inadmissible any evidence that is otherwise admissible under section 244 as hearsay evidence.

246. Admissibility of confession by accused

(1) Evidence of a confession made by a person in relation to the commission of an offence is, if the confession is proved to have been freely and voluntarily made by that person in his or her sound and sober senses and without having been unduly influenced thereto, admissible in evidence against that person at criminal proceedings relating to that offence, but -

(a) a confession made to a peace officer, other than a magistrate or a justice of the peace who is not a member of the police involved in the investigation of the offence to which the confession relates, or, in the case of a peace officer referred to in section 358, a confession made to such peace officer that relates to an offence with reference to which such peace officer is authorized to exercise any power conferred on him or her under that section, is not admissible in evidence unless -

(i) confirmed and reduced to writing in the presence of a magistrate or justice of the peace, or confirmed and recorded on tape in the presence of a magistrate and a transcription is made of the confession so recorded; and

(ii) where the confession is confirmed and reduced to writing in the presence of a member of the police who by virtue of his or her rank is a justice of the peace -

(aa) that member of the police was not involved in the investigation of the offence to which the confession relates; and

(bb) a magistrate was not readily available;

(b) where the confession -

(i) is made to a magistrate and reduced to writing by that magistrate, or is made to a magistrate and recorded on tape by that magistrate and a transcription is made of the confession so recorded; or

(ii) is confirmed and reduced to writing in the presence of a magistrate, or is confirmed and recorded on tape in the presence of a magistrate and a transcription is made of the confession so recorded,

the confession is, on the mere production at the proceedings in question of the document in which the confession is contained or, where the confession was recorded on tape, of a document that purports to be a transcription of the original record of the confession -

(aa) admissible in evidence against that person if it appears from such document or transcription that the confession was made by a person whose name corresponds to that of that person and -

(A) in the case of a confession recorded on tape, if the transcription thereof purports to be certified as correct under the hand of the person who transcribed the confession; and

(B) in the case of a confession made to a magistrate or confirmed in the presence of a magistrate through an interpreter, if a certificate by the interpreter appears on such document or transcription to the effect that he or she interpreted truly and correctly and to the best of his or her ability with regard to the contents of the confession and any question put to that person by the magistrate; and

(bb) presumed, in the absence of evidence to the contrary, to have been freely and voluntarily made by that person in his or her sound and sober senses and without having been unduly influenced thereto, if it appears from the document or transcription in which the confession is contained that the confession was made freely and voluntarily by that person in his or her sound and sober senses and without having been unduly influenced thereto.

(2) The prosecution may lead evidence in rebuttal of evidence adduced by an accused in rebuttal of the presumption under subsection (1)(b)(bb).

(3) A confession that is under subsection (1) inadmissible in evidence against the person who made it, becomes admissible against that person -

(a) if that person adduces in the proceedings in question any evidence, either directly or in cross-examining a witness, of any oral or written statement made by him or her either as part of or in connection with the confession; and

(b) if such evidence is, in the opinion of the judge or magistrate presiding at such proceedings, favourable to that person.

247. Admissibility of facts discovered by means of inadmissible confession

(1) Evidence may be admitted at criminal proceedings of any fact otherwise admissible in evidence, notwithstanding that the witness who gives evidence of such fact, discovered such fact or obtained knowledge of such fact only in consequence of information given by an accused appearing at such proceedings in a confession or statement which by law is not admissible in evidence against that accused at such proceedings, and notwithstanding that the fact was discovered or came to the knowledge of that witness against the wish or will of that accused.

(2) The court may, if in its opinion it will be in the interests of justice to do so, admit evidence at criminal proceedings that anything was pointed out by an accused appearing at such proceedings or that any fact or thing was discovered in consequence of information given by that accused, notwithstanding that such pointing out or information forms part of a confession or statement which by law is not admissible in evidence against that accused at such proceedings.

248. Confession not admissible against another

No confession made by any person is admissible as evidence against another person.

249. Admissibility of admission by accused

(1) Evidence of an admission made extra-judicially by a person in relation to the commission of an offence is, if the admission does not constitute a confession of that offence and is proved to have

been voluntarily made by that person, admissible in evidence against that person at criminal proceedings relating to that offence, but where the admission -

(a) is made to a magistrate and reduced to writing by that magistrate, or is made to a magistrate and recorded on tape by that magistrate and a transcription is made of the admission so recorded; or

(b) is confirmed and reduced to writing in the presence of a magistrate, or is confirmed and recorded on tape in presence of a magistrate and a transcription is made of the admission so recorded,

the admission is, on the mere production at the proceedings in question of the document in which the admission is contained or, where the admission was recorded on tape, of a document that purports to be a transcription of the original record of the admission -

(i) admissible in evidence against that person if it appears from such document or transcription that the admission was made by a person whose name corresponds to that of that person and -

(aa) in the case of an admission recorded on tape, if the transcription thereof purports to be certified as correct under the hand of the person who transcribed the admission; and

(bb) in the case of an admission made to a magistrate or confirmed in the presence of a magistrate through an interpreter, if a certificate by the interpreter appears on such document or transcription to the effect that he or she interpreted truly and correctly and to the best of his or her ability with regard to the contents of the admission and any question put to that person by the magistrate; and

(ii) presumed, in the absence of evidence to the contrary, to have been voluntarily made by that person if it appears from the document or transcription in which the admission is contained that the admission was made voluntarily by that person.

(2) The prosecution may lead evidence in rebuttal of evidence adduced by an accused in rebuttal of the presumption under subsection (1)(ii).

250. Admissions in court

An accused or his or her legal practitioner or the prosecutor may in criminal proceedings admit any fact placed in issue at such proceedings, and any such admission is sufficient proof of that fact.

251. Admissibility of certain trade or business records

(1) In this section -

"business" includes any public transport, public utility or similar undertaking carried on by a local authority, and the activities of any State-owned enterprise;

"document" includes any device by means of which information is recorded or stored;

"statement" includes any representation of fact, whether made in words or otherwise.

(2) In criminal proceedings in which direct oral evidence of a fact would be admissible, a statement contained in a document and tending to establish that fact is, on production of the document, admissible as evidence of that fact if -

(a) the document is or forms part of a record relating to any trade or business and has been compiled in the course of that trade or business from information supplied, directly or indirectly, by persons who have or may reasonably be supposed to have personal knowledge of the matters dealt with in the information they supply; and

(b) the person who supplied the information recorded in the statement in question is dead or is outside Namibia or is unfit by reason of his or her physical or mental condition to attend as a witness or cannot with reasonable diligence be identified or found or cannot reasonably be expected, having regard to the time that has elapsed since that person supplied the information as well as all the circumstances, to have any recollection of the matters dealt with in the information he or she supplied.

(3) For the purpose of deciding whether or not a statement is admissible as evidence under this section, the court may draw any reasonable inference from the form or content of the document in which the statement is contained, and may, in deciding whether or not a person is fit to attend as a witness, act on a certificate purporting to be a certificate of a registered medical practitioner.

(4) In estimating the weight to be attached to a statement admissible as evidence under this section, regard must be had to all the circumstances from which any inference may reasonably be drawn as to the accuracy or otherwise of the statement, and, in particular, to the question whether or not the person who supplied the information recorded in the statement, did so contemporaneously with the occurrence or existence of the facts stated, and to the question whether or not that person or any person concerned with making or keeping the record containing the statement, had any incentive to conceal or misrepresent the facts.

(5) Nothing in this section contained is to be construed as prejudicing the admissibility of any evidence that would be admissible apart from this section.

252. Admissibility of, and weight to be attached to, documentary evidence as to facts in issue

(1) In this section -

"document" includes any book, map, plan, drawing or photograph;

"statement" includes any representation of fact, whether made in words or otherwise.

(2) (a) In criminal proceedings in which direct oral evidence of a fact would be admissible, a statement made by a person in a document and tending to establish that fact is, on production of the original document, admissible as evidence of that fact if -

(i) the person who made the statement either -

(aa) had personal knowledge of the matters dealt with in the statement; or

(bb) where the document is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with therein are not within that person's personal knowledge) in the performance of a duty to record information supplied, directly or indirectly, by persons who have or may reasonably be supposed to have personal knowledge of the matters dealt with in the information they supply; and

(ii) the person who made the statement is called as a witness in such proceedings unless that person is dead or is unfit by reason of his or her physical or mental condition to attend as a witness or is outside Namibia, and it is not reasonably practicable to secure that person's attendance or all reasonable efforts to find him or her have been made without success.

(b) The judge or magistrate presiding at criminal proceedings may, if having regard to all the circumstances of the case he or she is satisfied that undue delay or expense would otherwise be caused, admit a statement referred to in paragraph (a) as evidence in such proceedings -

(i) notwithstanding that the person who made the statement is available but is not called as a witness;

(ii) notwithstanding that the original document is not produced, if instead thereof there is produced a copy of the original document, or of the material part thereof, proved to be a true copy.

(c) A statement in a document is for the purposes of this subsection deemed not to have been made by a person unless the document or the material part thereof was written, made or produced by that person with his or her own hand, or was signed or initialled by that person or otherwise recognized by him or her in writing as one for the accuracy of which he or she is responsible.

(d) For the purpose of deciding whether or not a statement is admissible as evidence under this subsection, the court may draw any reasonable inference from the form or content of the document in which the statement is contained or from any other circumstances, and may, in deciding whether or not a person is fit to attend as a witness, act on a certificate purporting to be a certificate of a registered medical practitioner.

(e) Nothing in this subsection contained is to be construed as rendering admissible as evidence a statement made by a person interested at a time when criminal proceedings were pending or anticipated involving a dispute as to any fact that the statement might tend to establish.

(3) (a) In estimating the weight to be attached to a statement admissible as evidence under this section, regard must be had to all the circumstances from which any inference may reasonably be drawn as to the accuracy or otherwise of the statement, and, in particular, to the question whether or not the person who made the statement, did so contemporaneously with the occurrence or existence of the facts stated, and to the question whether or not that person had any incentive to conceal or misrepresent the facts.

(b) A statement admissible as evidence under this section must not, for the purpose of any rule of law or practice requiring evidence to be corroborated or regulating the manner in which uncorroborated evidence is to be treated, be treated as corroboration of evidence given by the person who made the statement.

(4) (a) In criminal proceedings an instrument to the validity of which attestation is requisite may, instead of being proved by an attesting witness, be proved in the manner in which it might be proved if no attesting witness were alive.

(b) Paragraph (a) does not apply to the proof of wills or other testamentary writings.

(5) (a) In criminal proceedings a document proved or purporting to be not less than 20 years old and coming from proper custody, is, in the absence of evidence to the contrary, presumed to have been duly executed.

(b) A document referred to in paragraph (a) is deemed to come from proper custody if it is proved that it comes from a place where it is, in the particular circumstances, ordinarily kept.

(6) Nothing in this section contained is to be construed as -

(a) prejudicing the admissibility of any evidence that would be admissible apart from this section; or

(b) rendering admissible documentary evidence as to any declaration relating to a matter of pedigree, if that declaration would not have been admissible as evidence if this section had not been enacted.

253. Admissibility of dying declaration

Without derogating from section 244(2)(c), the declaration made by a deceased person is admissible in evidence at criminal proceedings if such a declaration -

(a) was made by the deceased person when death was impending; and

(b) when so making that declaration, the deceased person had a settled and hopeless expectation of death.

254. Judicial notice of laws and other published matter

Judicial notice must in criminal proceedings be taken of any law or any matter published in a publication that purports to be the Gazette.

255. Evidence of prints or bodily appearance of accused

(1) When it is relevant at criminal proceedings to ascertain whether any fingerprint, palm-print or footprint of an accused at such proceedings corresponds to any other fingerprint, palm-print or footprint, or whether the body of that accused has or had any mark, characteristic or distinguishing feature or shows or showed any condition or appearance, evidence of the fingerprints, palm-prints or footprints of the accused or that the body of the accused has or had any mark, characteristic or distinguishing feature or shows or showed any condition or appearance, including evidence of the result of any blood test of the accused, is admissible at such proceedings.

(2) Evidence referred to in subsection (1) is not inadmissible by reason only thereof that the fingerprint, palm-print or footprint in question was not taken or that the mark, characteristic, feature, condition or appearance in question was not ascertained in accordance with section 38, or that it was taken or ascertained against the wish or the will of the accused concerned.

256. Evidence of no sexual intercourse between spouses admissible

For the purposes of rebutting the presumption that a child to whom a married woman has given birth is the offspring of her husband, that woman or her husband or both of them may in criminal proceedings give evidence that they had no sexual intercourse with one another during the period when the child was conceived.

257. Evidence of character

Evidence as to the character of an accused is admissible or inadmissible if such evidence would have been admissible or inadmissible in terms of the law in force immediately before 21 March 1990.

258. Evidence of sexual conduct or experience of complainant of rape or offence of an indecent nature

(1) No evidence as to any previous sexual conduct or experience of a complainant in criminal proceedings at which an accused is charged with rape or an offence of an indecent nature, may be adduced, and no question regarding such sexual conduct or experience may be put to the complainant or any other witness in such proceedings, unless the court has, on application made to it, granted leave to adduce such evidence or to put such question, which leave may only be granted if the court is satisfied -

(a) that such evidence or questioning -

(i) tends to rebut evidence that was previously adduced by the prosecution; or

(ii) tends to explain the presence of semen or the source of pregnancy or disease or any injury to the complainant, where it is relevant to the fact in issue; or

(iii) is so fundamental to the accused's defence that to exclude it would infringe the accused's rights contained in the Namibian Constitution; and

(b) that such evidence or questioning has significant probative value that is not substantially outweighed by its potential prejudice to the complainant's personal dignity and right of privacy.

(2) No evidence as to the sexual reputation of a complainant in criminal proceedings at which an accused is charged with rape or an offence of an indecent nature, is admissible in such proceedings.

(3) Before an application for leave contemplated in subsection (1) is heard, the court may direct that the complainant in respect of whom such evidence is to be adduced or to whom any such question is to be put, may not be present at such application proceedings.

(4) The court's reasons for its decision to grant or refuse leave under subsection (1) to adduce such evidence or to put such question must be recorded, and those reasons form part of the record of the proceedings.

259. Evidence of disputed writing

Comparison at criminal proceedings of a disputed writing with any writing proved to be genuine, may be made by a witness, and such writings and the evidence of any witness with respect thereto, may be submitted as proof of the genuineness or otherwise of the writing in dispute.

260. Evidence of times of sunrise and sunset

(1) The Minister may from time to time by notice in the Gazette approve of tables prepared at any official observatory in Namibia of the times of sunrise and sunset on particular days at particular places in Namibia or any portion thereof, and appearing in any publication specified in the notice, and thereupon such tables are, until the notice is withdrawn, on the mere production thereof in criminal proceedings admissible as proof of those times.

(2) Tables in force immediately before the commencement of this Act by virtue of section 229(2) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), are deemed to be tables approved under subsection (1) of this section.

261. Evidence and sufficiency of evidence of appointment to public office

Any evidence that in terms of the law in force immediately before 21 March 1990 -

(a) would have been admissible as proof of the appointment of a person to a public office or of the authority of a person to act as a public officer, is admissible in evidence at criminal proceedings;

(b) would have been deemed sufficient proof of the appointment of a person to a public office or of the authority of a person to act as a public officer, is at criminal proceedings deemed to be sufficient proof of that appointment or authority.

262. Evidence of signature of public officer

A document -

(a) that purports to bear the signature of a person holding a public office; and

(b) that bears a seal or stamp purporting to be a seal or stamp of the office, ministry, agency or institution to which that person is attached,

is, on the mere production thereof at criminal proceedings, prima facie proof that that person signed that document.

263. Article may be proved in evidence by means of photograph thereof

(1) A court may in respect of any article, other than a document, which a party to criminal proceedings may wish to produce to the court as admissible evidence at such proceedings, permit that party to produce as evidence, instead of that article, any photograph thereof, notwithstanding that that article is available and can be produced in evidence.

(2) The court may, notwithstanding the admission under subsection (1) of the photograph of any article, on good cause require the production of the article in question.

264. Proof of public documents

(1) When any book or other document is of such a public nature as to be admissible in evidence on its mere production from proper custody, a copy thereof or extract therefrom is admissible in evidence at criminal proceedings if it is proved to be an examined copy or extract, or if it purports to be signed and certified as a true copy or extract by the official to whose custody the original is entrusted.

(2) An official referred to in subsection (1) must furnish a certified copy or extract referred to in that subsection to any person applying therefor, on payment of an amount in accordance with the tariff of fees prescribed by or under any law or, if no such tariff has been so prescribed, an amount in accordance with a tariff determined by the Minister in consultation with the Minister responsible for finance.

265. Proof of official documents

(1) In this section -

"office", "ministry" and "agency" means respectively an office, ministry and agency as defined in section 1(1) of the Public Service Act, 1995 (Act No. 13 1995);

"official", when used as a noun, means an official in the employment of the State.

(2) It is at criminal proceedings sufficient to prove an original official document that is in the custody or under the control of an official by virtue of his or her office, if a copy thereof or an extract therefrom, certified as a true copy or extract by the head of the office, ministry or agency concerned or by an official authorized thereto by such head, is produced in evidence at such proceedings.

(3) (a) An original official document referred to in subsection (2), other than the record of judicial proceedings, may be produced at criminal proceedings only on the order of the court.

(b) It is not necessary for the head of the office, ministry or agency concerned to appear in person to produce an original document under paragraph (a), but that document may be produced by any person authorized thereto by such head.

(4) An official who, under subsection (2), certifies a copy or extract as a true copy of or extract from the original official document knowing that that copy or extract is false, commits an offence and is liable on conviction to a fine not exceeding N$8 000 or to imprisonment for a period not exceeding two years.

266. Proof of judicial proceedings

(1) It is at criminal proceedings sufficient to prove the original record of judicial proceedings if a copy of such record, certified or purporting to be certified by the registrar or the clerk of the court or any other official in the employment of the State having the custody of the record of the judicial proceedings or by the deputy of such registrar, clerk of the court or other official or, in the case where judicial proceedings are taken down in shorthand or by mechanical means, by the person who transcribed such proceedings, as a true copy of such record, is produced in evidence at such proceedings, and that copy is prima facie proof that any matter purporting to be recorded thereon was correctly recorded.

(2) A person who, under subsection (1), certifies a copy as a true copy of the original record of judicial proceedings knowing that that copy is false, commits an offence and is liable on conviction to a fine not exceeding N$8 000 or to imprisonment for a period not exceeding two years.

267. Proof of entries in accounting records and documentation of banking institutions

(1) In this section -

"document" includes a recording or transcribed computer print-out produced by any mechanical or electronic device or any device by means of which information is recorded or stored;

"entry" includes any notation in the accounting records of a banking institution by any means whatever.

(2) The entries in the accounting records of a banking institution, and any document which is in the possession of a banking institution and which refers to those entries or to any business transaction of the banking institution, are on the mere production at criminal proceedings of a document purporting to be an affidavit made by a person who in that affidavit alleges -

(a) that he or she is in the employment of the banking institution in question;

(b) that such accounting records or document is or was the ordinary records or document of that banking institution;

(c) that those entries have been made in the usual and ordinary course of the business of that banking institution or such document has been compiled, printed or obtained in the usual and ordinary course of the business of that banking institution; and

(d) that such accounting records or document is in the custody or under the control of that banking institution,

prima facie proof at such proceedings of the matters, transactions and accounts recorded in such accounting records or document.

(3) An entry in any accounting record referred to in subsection (2) or any document referred to in that subsection may be proved at criminal proceedings on the mere production at such proceedings of a document purporting to be an affidavit made by a person who in that affidavit alleges -

(a) that he or she is in the employment of the banking institution in question;

(b) that he or she has examined the entry, accounting record or document in question; and

(c) that a copy of that entry or document set out in the affidavit or in an annexure thereto is a correct copy of that entry or document.

(4) A party to the proceedings in question against whom evidence is adduced in terms of this section or against whom it is intended to adduce evidence in terms of this section, may, on the order of the court before which such proceedings are pending, inspect the original of the document or entry in question and any accounting record in which that entry appears or of which that entry forms part, and that party may make copies of that document or entry, and the court must, on the application of the party concerned, adjourn the proceedings for the purpose of the inspection or the making of the copies.

(5) No banking institution is compelled to produce any accounting record referred to in subsection (2) at criminal proceedings unless the court in question orders that any such record be produced.

268. Proof of entries in accounting records and documentation of banking institutions in countries outside Namibia

(1) In this section -

"document" includes a recording or transcribed computer print-out produced by any mechanical or electronic device or any device by means of which information is recorded or stored;

"entry" includes any notation, by any means whatever, in the accounting records of an institution referred to in subsection (2).

(2) The entries in the accounting records of an institution in a state or territory outside Namibia which is similar to a banking institution in Namibia, and any document which is in the possession of such an institution and which refers to those entries or to any business transaction of that institution, are, on the mere production at criminal proceedings of a document purporting to be an affidavit made by a person who in that affidavit alleges -

(a) that he or she is in the employment of the institution in question;

(b) that such accounting records or document is or was the ordinary records or document of that institution;

(c) that those entries have been made in the usual and ordinary course of the business of that institution; and

(d) that such accounting records or document is in the custody or under the control of that institution,

prima facie proof at such proceedings of the matters, transactions and accounts recorded in such accounting records or document.

(3) An entry in any accounting record referred to in subsection (2) or any document referred to in that subsection may be proved at criminal proceedings on the mere production at such proceedings of a document purporting to be an affidavit made by a person who in that affidavit alleges -

(a) that he or she is in the employment of the institution in question;

(b) that he or she has examined the entry, accounting record or document in question; and

(c) that a copy of that entry or document set out in the affidavit or in an annexure thereto is a correct copy of that entry or document.

(4) A document purporting to be an affidavit has for the purposes of this section no effect unless -

(a) it is obtained in terms of an order of a competent court or on the authority of a competent government institution of the state or territory concerned;

(b) it is authenticated in the manner prescribed in the rules of court for the authentication of documents executed outside Namibia; or

(c) it is authenticated by a person, and in the manner, contemplated in section 8 of the Justices of the Peace and Commissioners of Oaths Act, 1963 (Act No. 16 of 1963).

(5) The admissibility and evidentiary value of an affidavit contemplated in subsections (2) and (3) are not affected by the fact that the form of the oath, confirmation or attestation thereof differs from the form of the oath, confirmation or attestation prescribed in Namibia.

(6) A court before which an affidavit contemplated in subsections (2) and (3) is placed may, to clarify obscurities in such affidavit, at the request of a party to the proceedings order that a supplementary affidavit be submitted or that oral evidence be heard, but oral evidence may only be heard if the court is of the opinion that it is in the interests of the administration of justice and that a party to the proceedings would be materially prejudiced should oral evidence not be heard.

269. Evidence on charge of bigamy

(1) At criminal proceedings at which an accused is charged with bigamy, it is, as soon as it is proved that a marriage ceremony, other than the ceremony relating to the alleged bigamous marriage, took place within Namibia between the accused and another person, presumed, in the absence of evidence to the contrary, that the marriage was on the date of the solemnization thereof lawful and binding.

(2) At criminal proceedings at which an accused is charged with bigamy, it is presumed, in the absence of evidence to the contrary, that at the time of the solemnization of the alleged bigamous marriage there subsisted between the accused and another person a lawful and binding marriage -

(a) if there is produced at such proceedings, in any case in which the marriage is alleged to have been solemnized within Namibia, an extract from the marriage register that purports -

(i) to be a duplicate original or a copy of the marriage register relating to that marriage; and

(ii) to be certified as such a duplicate original or such a copy by the person having the custody of that marriage register or by a registrar of marriages;

(b) if there is produced at such proceedings, in any case in which the marriage is alleged to have been solemnized outside Namibia, a document that purports -

(i) to be an extract from a marriage register kept according to law in the country where the marriage is alleged to have been solemnized; and

(ii) to be certified as such an extract by the person having the custody of that register, if the signature of that person on the certificate is authenticated in accordance with any law of Namibia governing the authentication of documents executed outside Namibia.

(3) At criminal proceedings at which an accused is charged with bigamy, evidence -

(a) that shortly before the alleged bigamous marriage the accused had been cohabiting with the person to whom he or she is alleged to be lawfully married;

(b) that the accused had been treating and recognizing that person as a spouse; and

(c) of the performance of a marriage ceremony between the accused and that person,

is, as soon as the alleged bigamous marriage, wherever solemnized, has been proved, prima facie proof that there was a lawful and binding marriage subsisting between the accused and that person at the time of the solemnization of the alleged bigamous marriage.

270. Evidence of relationship on charge of incest

(1) At criminal proceedings at which an accused is charged with incest -

(a) it is sufficient to prove that the person on whom or by whom the offence is alleged to have been committed, is reputed to be the lineal ascendant or descendant or the brother, sister, step-parent or stepchild of the other party to the incest;

(b) the accused is presumed, in the absence of evidence to the contrary, to have had knowledge, at the time of the alleged offence, of the relationship existing between him or her and the other party to the incest.

(2) When the fact that any lawful and binding marriage was contracted is relevant to the issue at criminal proceedings at which an accused is charged with incest, that fact may be proved prima facie in the manner provided in section 269 for the proof of the existence of a lawful and binding marriage of a person charged with bigamy.

271. Evidence on charge of infanticide or concealment of birth

(1) At criminal proceedings at which an accused is charged with the killing of a newly born child, that child is deemed to have been borne alive if the child is proved to have breathed, whether or not the child had an independent circulation, and it is not necessary to prove that that child was, at the time of its death, entirely separated from the body of its mother.

(2) At criminal proceedings at which an accused is charged with the concealment of the birth of a child, it is not necessary to prove whether the child died before or after the birth.

272. Evidence on charge of receiving stolen property

(1) At criminal proceedings at which an accused is charged with receiving stolen property that he or she knew to be stolen property, evidence may be given at any stage of such proceedings that the accused was, within the period of 12 months immediately preceding the date on which the accused first appeared in a magistrate's court in respect of that charge, found in possession of other stolen property, but no such evidence may be given against the accused unless at least three days' notice in writing has been given to the accused that it is intended to adduce such evidence against him or her.

(2) The evidence referred to in subsection (1) may be taken into consideration for the purpose of proving that the accused knew that the property that forms the subject of the charge was stolen property.

(3) Where the accused is proved to have received the property that is the subject of the charge, from a person under the age of 18 years, the accused is presumed to have known at the time when he or she received such property that it was stolen property, unless it is proved -

(a) that the accused was at that time under the age of 21 years; or

(b) that the accused had sufficient cause, other than the mere statement of the person from whom he or she received such property, to believe, and that he or she did believe, that that person had the right to dispose of such property.

273. Evidence on charge of defamation

If at criminal proceedings at which an accused is charged with the unlawful publication of defamatory matter that is contained in a periodical, it is proved that such periodical or the part in which such defamatory matter is contained, was published by the accused, other writings or prints purporting to be other numbers or parts of the same periodical, previously or subsequently published, and containing a printed statement that they were published by or for the accused, are admissible in evidence without further proof of their publication.

274. Evidence of receipt of money or property and general deficiency on charge of theft

(1) At criminal proceedings at which an accused is charged with theft -

(a) while employed in any capacity in the service of the State, of money or of property that belonged to the State or that came into the possession of the accused by virtue of his or her employment;

(b) while a clerk, servant or agent, of money or of property that belonged to his or her employer or principal or that came into the possession of the accused on account of his or her employer or principal,

an entry in any book of account kept by the accused or kept under or subject to his or her charge or supervision, and that purports to be an entry of the receipt of money or of property, is proof that such money or such property was received by the accused.

(2) It is not necessary at proceedings referred to in subsection (1) to prove the theft by the accused of a specific sum of money or of specific goods if -

(a) on the examination of the books of account kept or the entries made by the accused or under or subject to his or her charge or supervision, there is proof of a general deficiency; and

(b) the court is satisfied that the accused stole the money or goods so deficient or any part thereof.

275. Evidence on charge of which false representation is an element

If at criminal proceedings at which an accused is charged with an offence of which a false representation is an element, it is proved that the false representation was made by the accused, the accused is deemed, in the absence of evidence to the contrary, to have made that representation knowing it to be false.

276. Presumptions relating to certain documents

Any document, including any book, pamphlet, letter, circular letter, list, record, placard or poster, which was at any time on premises occupied by any association of persons, incorporated or unincorporated, or in the possession or under the control of any office-bearer, officer or member of such association, and -

(a) on the face whereof a person of a name corresponding to that of an accused person appears to be a member or an office-bearer of such association, is, on the mere production thereof by the prosecution at criminal proceedings, prima facie proof that the accused is a member or an office-bearer of such association;

(b) on the face whereof a person of a name corresponding to that of an accused person who is or was a member of such association, appears to be the author of that document, is, on the mere production thereof by the prosecution at criminal proceedings, prima facie proof that the accused is the author thereof;

(c) which on the face thereof appears to be the minutes or a copy of or an extract from the minutes of a meeting of such association or of any committee thereof, is, on the mere production thereof by the prosecution at criminal proceedings, prima facie proof of the holding of that meeting and of the proceedings thereat;

(d) which on the face thereof discloses any object of such association, is, on the mere production thereof by the prosecution at criminal proceedings, prima facie proof that that object is an object of that association.

277. Presumptions relating to absence from Namibia of certain persons

Any document, including any newspaper, periodical, book, pamphlet, letter, circular letter, list, record placard or poster, on the face whereof it appears that a person of a name corresponding to that of an accused person has at any particular time been outside Namibia or has at any particular time made a statement outside Namibia, is, on the mere production thereof by the prosecution at criminal proceedings, prima facie proof that the accused was outside Namibia at such time or that the accused made such statement outside Namibia at such time, if such document is accompanied by a certificate purporting to have been signed by the Permanent Secretary: Foreign Affairs to the effect that he or she is satisfied that such document is of foreign origin.

278. Presumption that accused possessed particular qualification or acted in particular capacity

(1) If an act or an omission constitutes an offence only when committed by a person possessing a particular qualification or quality, or vested with a particular authority or acting in a particular capacity, an accused charged with such an offence on a charge alleging that the accused possessed such qualification or quality or was vested with such authority or was acting in such capacity, is at criminal proceedings deemed to have possessed such qualification or quality or to have been vested with such authority or to have been acting in such capacity at the time of the commission of the offence, unless such allegation is at any time during the criminal proceedings expressly denied by the accused or is disproved.

(2) If an allegation referred to in subsection (1) is denied or evidence is led to disprove it after the prosecution has closed its case, the prosecution may adduce any evidence and submit any argument in support of the allegation as if it had not closed its case.

279. Presumption of failure to pay tax or to furnish information relating to tax

When an accused is at criminal proceedings charged with any offence of which the failure to pay any tax or impost to the State, or of which the failure to furnish any official in the employment of the State with any information relating to any tax or impost that is or may be due to the State, is an element, the accused is deemed, in the absence of evidence to the contrary, to have failed to pay such tax or impost or to furnish such information.

280. Presumption of lack of authority

(1) If a person would commit an offence if that person -

(a) carried on any occupation or business;

(b) performed any act;

(c) owned or had in his or her possession or custody or used any article; or

(d) was present at or entered any place,

without being the holder of a licence, permit, permission or other authority or qualification (in this section referred to as the necessary authority), an accused at criminal proceedings on a charge that he or she committed such an offence, is deemed, in the absence of evidence to the contrary, not to have been the holder of the necessary authority.

(2) (a) A peace officer and, where any fee payable for the necessary authority would accrue to the State Revenue Fund, an official in the employment of the State authorized thereto in writing by the Permanent Secretary: Finance, may demand the production from a person referred to in subsection (1) of the necessary authority that is appropriate.

(b) A peace officer, other than a member of the police in uniform, and a person authorized under paragraph (a) must, when demanding the necessary authority from a person, produce at the request of that person, his or her authority to make the demand;

(3) A person who is the holder of the necessary authority and who fails without sufficient cause to produce immediately that authority to the person making the demand under subsection (2) for the production thereof, or who fails without sufficient cause to submit that authority to a person and at a place and within such reasonable time as the person making the demand may specify, commits an offence and is liable on conviction to a fine not exceeding N$2 000 or to imprisonment for a period not exceeding six months.

281. Unstamped instrument admissible in criminal proceedings

An instrument liable to stamp duty may not be held inadmissible at criminal proceedings on the ground only that it is not stamped as required by law.

282. Use of traps and undercover operations and admissibility of evidence so obtained

(1) A law enforcement officer may make use of a trap or engage in an undercover operation to detect, investigate or uncover the commission of an offence, or to prevent the commission of an offence, and the evidence so obtained is admissible if that conduct does not go beyond providing an opportunity to commit an offence, but where the conduct goes beyond providing an opportunity to commit an offence a court may admit evidence so obtained subject to subsection (3).

(2) In considering the question whether the conduct goes beyond providing an opportunity to commit an offence, the court must have regard to the following factors:

(a) The nature of the offence under investigation, including -

(i) whether the security of the State, the safety of the public, the maintenance of public order or the national economy is seriously threatened thereby;

(ii) the prevalence of the offence in the area in question; and

(iii) the seriousness of the offence;

(b) the availability of other techniques for the detection, investigation or uncovering of the commission of the offence or the prevention thereof in the particular circumstances of the case and in the area in question;

(c) whether an average person who was in the position of the accused, would have been induced into the commission of an offence by the kind of conduct employed by the law enforcement officer concerned;

(d) the degree of persistence and number of attempts made by the law enforcement officer before the accused succumbed and committed the offence;

(e) the type of inducement used, including the degree of deceit, trickery, misrepresentation or reward;

(f) the timing of the conduct, in particular whether the law enforcement officer instigated the commission of the offence or became involved in an existing unlawful activity;

(g) whether the conduct involved an exploitation of human characteristics such as emotions, sympathy or friendship or an exploitation of the accused's personal, professional or economic circumstances to increase the probability of the commission of the offence;

(h) whether the law enforcement officer has exploited a particular vulnerability of the accused such as a mental handicap or a substance addiction;

(i) the proportionality between the involvement of the law enforcement officer as compared to that of the accused, including an assessment of the extent of the harm caused or risked by such officer as compared to that of the accused, and the commission of any illegal acts by such officer;

(j) any threats, implied or expressed, by the law enforcement officer against the accused;

(k) whether, before the trap was set or the undercover operation was used, there existed any suspicion, entertained on reasonable grounds, that the accused had committed an offence similar to that to which the charge relates;

(l) whether the law enforcement officer acted in good or bad faith;

(m) any other factor that in the opinion of the court has a bearing on the question.

(3) (a) If a court in criminal proceedings finds that in the setting of a trap or the engaging in an undercover operation the conduct goes beyond providing an opportunity to commit an offence, the court may refuse to allow such evidence to be tendered or may refuse to allow such evidence already tendered, to stand, if the evidence was obtained in an improper or unfair manner and the admission of such evidence would render the trial unfair or would otherwise be detrimental to the administration of justice.

(b) When considering the admissibility of the evidence, the court must weigh up the public interest against the personal interest of the accused, having regard, where applicable, to the following factors:

(i) The nature and seriousness of the offence, including -

(aa) whether it is of such a nature and of such an extent that the security of the State, the safety of the public, the maintenance of public order or the national economy is seriously threatened thereby;

(bb) whether, in the absence of the use of a trap or an undercover operation, it would be difficult to detect, investigate, uncover or prevent its commission;

(cc) whether it is so frequently committed that special measures are required to detect, investigate or uncover it or to prevent its commission; and

(dd) whether it is so indecent or serious that the setting of a trap or the engaging of an undercover operation was justified;

(ii) the extent of the effect of the trap or undercover operation on the interests of the accused, if regard is had to -

(aa) the deliberate disregard, if at all, of the accused's rights or any applicable legal and statutory requirements;

(bb) the ease, or otherwise, with which the requirements contemplated in item (aa) could have been complied with, having regard to the circumstances in which the offence was committed; and

(cc) the prejudice to the accused resulting from any improper or unfair conduct;

(iii) the nature and seriousness of any infringement of any fundamental right contained in the Namibian Constitution;

(iv) whether in the setting of the trap or the engagement of an undercover operation the means used was proportional to the seriousness of the offence;

(v) any other factor that in the opinion of the court ought to be taken into account.

(4) (a) A law enforcement officer who sets or participates in a trap or an undercover operation to detect, investigate or uncover or to obtain evidence of or to prevent the commission of an offence, is not criminally liable in respect of any act that constitutes an offence and that relates to the trap or undercover operation if it was performed in good faith.

(b) No prosecution for an offence contemplated in paragraph (a) may be instituted against a law enforcement officer without the written consent of the Prosecutor-General.

(5) If at any stage of the proceedings the question is raised whether evidence should be excluded under subsection (3), the burden of proof to show, on a balance of probabilities, that the evidence is admissible, lies with the prosecution, but -

(a) the accused must furnish the grounds on which the admissibility of the evidence is challenged;

(b) if the accused is not represented, the court must raise the question of the admissibility of the evidence.

(6) The question whether evidence should be excluded under subsection (3) may, on application by the prosecutor or the accused or by order of the court of its own motion, be adjudicated as a separate issue in dispute.

283. The law in cases not provided for

The law as to the admissibility of evidence that was in force in respect of criminal proceedings immediately before 21 March 1990 applies, to the extent that such law does not conflict with the Namibian Constitution, in any case not expressly provided for by this Act or any other law.

284. Saving of special provisions in other laws

Nothing in this Chapter contained is to be construed as modifying any provision of any other law whereby in any criminal proceedings referred to in such other law certain specified facts and circumstances are deemed to be evidence or a particular fact or circumstance may be proved in a manner specified therein.

Chapter 31
CONVERSION OF TRIAL INTO ENQUIRY

285. Court may refer juvenile accused to children's court

(1) If it appears to the court at the trial on any charge of an accused under the age of 18 years that the accused is a child in need of care as defined in section 1(1) of the Children's Act, 1960 (Act No. 33 of 1960), and that it is desirable to deal with the accused under and in accordance with sections 30 and 31 of that Act, it may stop the trial and order that the accused be brought before a children's court mentioned in section 4 or 5 of that Act and that the accused be dealt with under and in accordance with the said sections 30 and 31.

(2) If the order under subsection (1) is made after conviction, the verdict is of no force in relation to the person in respect of whom the order is made and is deemed not to have been returned.

Chapter 32
COMPETENT VERDICTS

286. Attempt

If the evidence in criminal proceedings does not prove the commission of the offence charged but proves an attempt to commit that offence or an attempt to commit any other offence of which an accused may be convicted on the offence charged, the accused may be found guilty of an attempt to commit that offence or such other offence.

287. Accessory after the fact

If the evidence in criminal proceedings does not prove the commission of the offence charged but proves that the accused is guilty as an accessory after that offence or any other offence of which the accused may be convicted on the offence charged, the accused may be found guilty as an accessory after that offence or such other offence, and is, in the absence of any punishment expressly provided by law, liable to punishment at the discretion of the court, but such punishment may not exceed the punishment that may be imposed in respect of the offence with reference to which the accused is convicted as an accessory.

288. Murder and attempted murder

If the evidence on a charge of murder or attempted murder does not prove the offence of murder or attempted murder but -

(a) the offence of culpable homicide;

(b) the offence of assault with intent to do grievous bodily harm;

(c) the offence of robbery;

(d) in a case relating to a child, the offence of exposing an infant, whether under a statute or at common law, or the offence of disposing of the body of a child in contravention of section 7 of the General Law Amendment Ordinance, 1962 (Ordinance No. 13 of 1962), with intent to conceal the fact of its birth;

(e) the offence of common assault;

(f) the offence of public violence; or

(g) the offence of pointing a firearm, air gun or air pistol in contravention of any law,

the accused may be found guilty of the offence so proved.

289. Culpable homicide

If the evidence on a charge of culpable homicide does not prove the offence of culpable homicide but -

(a) the offence of assault with intent to do grievous bodily harm;

(b) the offence of robbery;

(c) in a case relating to a child, the offence of exposing an infant, whether under a statute or at common law, or the offence of disposing of the body of a child in contravention of section 7 of the General Law Amendment Ordinance, 1962 (Ordinance No. 13 of 1962), with intent to conceal the fact of its birth;

(d) the offence of common assault;

(e) the offence of public violence; or

(f) the offence of pointing a firearm, air gun or air pistol in contravention of any law,

the accused may be found guilty of the offence so proved.

290. Robbery

If the evidence on a charge of robbery or attempted robbery does not prove the offence of robbery or attempted robbery but -

(a) the offence of assault with intent to do grievous bodily harm;

(b) the offence of common assault;

(c) the offence of pointing a firearm, air gun or air pistol in contravention of any law;

(d) the offence of theft;

(e) the offence of receiving stolen property knowing it to have been stolen; or

(f) an offence under section 6 or 7 of the General Law Amendment Ordinance, 1956 (Ordinance No. 12 of 1956),

the accused may be found guilty of the offence so proved, or, where the offence of assault with intent to do grievous bodily harm or the offence of common assault and the offence of theft are proved, of both such offences.

291. Rape and indecent assault

(1) If the evidence on a charge of rape or attempted rape, whether the charge is brought under a statute or at common law, does not prove the offence of rape or attempted rape but -

(a) the offence of assault with intent to do grievous bodily harm;

(b) the offence of indecent assault;

(c) the offence of common assault;

(d) the offence of incest;

(e) the statutory offence of -

(i) committing a sexual act with a child under a specified age;

(ii) committing an immoral or indecent act with such a child; or

(iii) soliciting or enticing such a child to the commission of a sexual act or an immoral or indecent act; or

(f) the statutory offence of -

(i) unlawful carnal intercourse with a female idiot or imbecile;

(ii) committing an immoral or indecent act with such a female; or

(iii) soliciting or enticing such a female to the commission of an immoral or indecent act,

the accused may be found guilty of the offence so proved.

(2) If the evidence on a charge of indecent assault does not prove the offence of indecent assault but -

(a) the offence of common assault;

(b) the statutory offence of -

(i) committing an immoral or indecent act with a child under a specific age; or

(ii) soliciting or enticing such a child to the commission of a sexual act or an immoral or indecent act; or

(c) the statutory offence of -

(i) attempting to have unlawful carnal intercourse with a female idiot or imbecile; or

(ii) committing an immoral or indecent act with such a female,

the accused may be found guilty of the offence so proved.

292. Housebreaking with intent to commit an offence

(1) If the evidence on a charge of housebreaking with intent to commit an offence specified in the charge, whether the charge is brought under a statute or at common law, does not prove the offence of housebreaking with intent to commit the offence so specified but the offence of housebreaking with intent to commit an offence other than the offence so specified or the offence of housebreaking with intent to commit an offence unknown or the offence of malicious injury to property, the accused may be found guilty of the offence so proved.

(2) If the evidence on a charge of housebreaking with intent to commit an offence to the prosecutor unknown, whether the charge is brought under a statute or at common law, does not prove the offence of housebreaking with intent to commit an offence to the prosecutor unknown but the offence of housebreaking with intent to commit a specific offence or the offence of malicious injury to property, the accused may be found guilty of the offence so proved.

(3) If the evidence on a charge of attempted housebreaking with intent to commit an offence specified in the charge or of attempted housebreaking with intent to commit an offence to the prosecutor unknown, whether the charge is brought under a statute or at common law, does not prove the offence of attempted housebreaking with intent to commit the offence so specified or of attempted housebreaking with intent to commit an offence to the prosecutor unknown but the offence of malicious injury to property, the accused may be found guilty of the offence so proved.

293. Statutory offence of breaking and entering or of entering premises

(1) If the evidence on a charge for the statutory offence of breaking and entering or of the entering of any premises with intent to commit an offence specified in the charge, does not prove the offence of breaking and entering or of entering the premises with intent to commit the offence so specified but the offence of breaking and entering or of entering the premises with intent to commit an offence other than the offence so specified or of breaking and entering or of entering the premises with intent to commit an offence unknown, the accused may be found guilty -

(a) of the offence so proved; or

(b) where it is a statutory offence to be in or on any dwelling, premises or enclosed area between sunset and sunrise without lawful excuse, of such offence, if such be the facts proved.

(2) If the evidence on a charge for the statutory offence of breaking and entering or of the entering of any premises with intent to commit an offence to the prosecutor unknown, does not prove the offence of breaking and entering or of entering the premises with intent to commit an offence to the prosecutor unknown but the offence of breaking and entering or of entering the premises with intent to commit a specific offence, the accused may be found guilty of the offence so proved.

294. Theft

(1) If the evidence on a charge of theft does not prove the offence of theft but -

(a) the offence of receiving stolen property knowing it to have been stolen; or

(b) an offence under section 6, 7 or 8 of the General Law Amendment Ordinance, 1956 (Ordinance No. 12 of 1956),

the accused may be found guilty of the offence so proved.

(2) If a charge of theft alleges that the property referred to therein was stolen on one occasion and the evidence proves that the property was stolen on different occasions, the accused may be convicted of the theft of such property as if it had been stolen on that one occasion.

295. Receiving stolen property knowing it to have been stolen

If the evidence on a charge of receiving stolen property knowing it to have been stolen does not prove that offence but -

(a) the offence of theft; or

(b) an offence under section 7 of the General Law Amendment Ordinance, 1956 (Ordinance No. 12 of 1956),

the accused may be found guilty of the offence so proved.

296. Assault with intent to do grievous bodily harm

If the evidence on a charge of assault with intent to do grievous bodily harm does not prove the offence of assault with intent to do grievous bodily harm but the offence of -

(a) common assault;

(b) indecent assault; or

(c) pointing a firearm, air gun or air pistol in contravention of any law,

the accused may be found guilty of the offence so proved.

297. Common assault

If the evidence on a charge of common assault proves the offence of indecent assault, the accused may be found guilty of indecent assault, or, if the evidence on such a charge does not prove the offence of common assault but the offence of pointing a firearm, air gun or air pistol in contravention of any law, the accused may be found guilty of that offence.

298. Statutory offence of committing a sexual act or of unlawful carnal intercourse

If the evidence on a charge of committing a sexual act or attempting to commit a sexual act, other than rape under a statute, or of unlawful carnal intercourse or attempted unlawful carnal intercourse with another person in contravention of any statute does not prove that offence but -

(a) the offence of indecent assault;

(b) the offence of common assault; or

(c) the statutory offence of -

(i) committing an immoral or indecent act with that other person;

(ii) soliciting, enticing or importuning that other person to commit a sexual act or to have unlawful carnal intercourse;

(iii) soliciting, enticing or importuning that other person to commit an immoral or indecent act; or

(iv) conspiring with that other person to commit a sexual act or to have unlawful carnal intercourse,

the accused may be found guilty of the offence so proved.

299. Sodomy

If the evidence on a charge of sodomy or attempted sodomy does not prove the offence of sodomy or attempted sodomy but the offence of indecent assault or common assault, the accused may be found guilty of the offence so proved.

300. Offences not specified in this Chapter

If the evidence on a charge for an offence not mentioned in the preceding sections of this Chapter does not prove the commission of the offence so charged but proves the commission of an offence which by reason of the essential elements of that offence is included in the offence so charged, the accused may be found guilty of the offence so proved.

301. Acts committed under influence of certain substances

(1) A person who voluntarily consumes or uses any substance that impairs his or her faculties to appreciate the wrongfulness of his or her acts or to act in accordance with that appreciation, while he or she knew or reasonably ought to have foreseen that such substance has that effect, and who while such faculties are thus impaired commits an act prohibited by law under any penalty, but is not criminally liable because his or her faculties were impaired as aforesaid, commits an offence and is liable on conviction to the penalty that may be imposed in respect of the commission of that act.

(2) If in any prosecution for an offence it is found that the accused is not criminally liable for the offence charged on account of the fact that the accused's faculties referred to in subsection (1) were impaired by the consumption or use of any substance, the accused may be found guilty of a contravention of subsection (1), if the evidence proves the commission of such contravention.

Chapter 33
PREVIOUS CONVICTIONS

302. Previous convictions may be proved

(1) The prosecution may, after an accused has been convicted but before sentence has been imposed on the accused, produce to the court for admission or denial by the accused a record of previous convictions alleged against the accused.

(2) The court must ask the accused whether he or she admits or denies any previous conviction referred to in subsection (1).

(3) If the accused denies any previous conviction referred to in subsection (1), the prosecution may tender evidence that the accused was so previously convicted.

(4) If the accused admits any previous conviction referred to in subsection (1) or such previous conviction is proved against the accused, the court must take such conviction into account when imposing a sentence in respect of the offence of which the accused has been convicted.

303. Fingerprint record prima facie evidence of previous conviction

When a previous conviction may be proved under this Act, a record, photograph or document that relates to a fingerprint and that purports to emanate from the officer commanding the Criminal Record Centre or, in the case of any other country, from an officer having charge of the criminal records of the country concerned, is, whether or not such record, photograph or document was obtained under any law or against the wish or the will of the person concerned, admissible in evidence at criminal proceedings on production thereof by a member of the police having the custody thereof, and is prima facie proof of the facts contained therein.

304. Evidence of further particulars relating to previous conviction

When a court in criminal proceedings requires particulars or further particulars or clarification of any previous conviction admitted by or proved against an accused at such proceedings -

(a) a telegram or facsimile or electronic mail print-out purporting to have been sent by the officer commanding the Criminal Record Centre or by a court in Namibia; or

(b) any document purporting to be certified as correct by the officer referred to in paragraph (a) or by the registrar or the clerk of the court in question in Namibia or by any officer in charge of a prison in Namibia,

and which purports to furnish such particulars or such clarification, is, on the mere production thereof at the proceedings in question, admissible as prima facie proof of the facts contained therein.

Chapter 34
SENTENCE

305. Evidence on sentence

(1) A court may, before passing sentence, receive such evidence as it thinks fit to inform itself as to the proper sentence to be passed.

(2) The accused may address the court on any evidence received under subsection (1), as well as on the matter of the sentence, and thereafter the prosecution may likewise address the court.

306. Sentence by magistrate or judge other than magistrate or judge who convicted accused

(1) If sentence is not passed on an accused immediately on conviction in a magistrate's court, or if, by reason of any decision or order of the High Court on appeal, review or otherwise, it is necessary to add to or vary any sentence passed in a magistrate's court or to pass sentence afresh in that court, any magistrate of that court may, in the absence of the magistrate who convicted the accused or passed the sentence and after consideration of the evidence recorded and in the presence of the accused, pass sentence on the accused or take such other steps as the magistrate who is absent could lawfully have taken in the proceedings in question if he or she had not been absent.

(2) When -

(a) a judge is required to sentence an accused convicted by him or her of any offence; or

(b) any matter is remitted on appeal or otherwise to the judge who presided at the trial of an accused,

and that judge is for any reason not available, any other judge of the High Court may, after consideration of the evidence recorded and in the presence of the accused, sentence the accused or take such other steps as the judge who is not available could lawfully have taken in the proceedings in question if he or she had been available.

307. Nature of punishments

(1) Subject to this Act or any other law, including the common law, the following sentences may be imposed on a person convicted of an offence:

(a) Imprisonment, including -

(i) life imprisonment; and

(ii) in the circumstances prescribed by section 309(3), life imprisonment with or without the prospect of parole or probation or remission of sentence;

(b) periodical imprisonment;

(c) notwithstanding anything to the contrary in any other law contained but subject to Article 8(2)(b) of the Namibian Constitution, imprisonment with any form of labour, whether or not in the form of hard labour, provided it is productive labour;

(d) correctional supervision;

(e) declaration of a person as habitual criminal in addition to the imposition of any other punishment for the offence or offences of which that person is convicted;

(f) committal to an institution established by law;

(g) a fine;

(h) an order of compensation or restitution under section 326, in addition to any other punishment prescribed in paragraphs (a) to (g).

(2) Except where otherwise expressly provided by this Act, nothing in this Act contained is to be construed as -

(a) authorizing a court to impose a sentence other than, or a sentence in excess of, the sentence which that court may impose in respect of an offence; or

(b) derogating from an authority specially conferred on a court by any law to impose any other punishment or to impose a forfeiture in addition to a punishment.

(3) Notwithstanding anything to the contrary in any law contained, nothing in subsection (1) contained is to be construed as prohibiting the court from imposing imprisonment together with correctional supervision.

308. Imposition and conversion of correctional supervision

(1) Punishment may only be imposed under section 307(1)(d) -

(a) after a report of a probation officer or a social worker has been placed before the court; and

(b) for a fixed period not exceeding three years.

(2) (a) A court, whether differently constituted or not, that has imposed a punishment referred to in subsection (1) on a person, may at any time, if it is found from a motivated recommendation by a probation officer or a social worker that that person is not fit to be subject to correctional supervision, reconsider that punishment and impose any other proper punishment.

(b) On receipt of the motivated recommendation referred to in paragraph (a), the registrar or the clerk of the court in question must, after consultation with the prosecutor, set the matter down for a specific date on the roll of the court in question.

(c) The registrar or the clerk of the court in question must for the purposes of the reconsideration of the sentence in accordance with this subsection -

(i) within a reasonable time before the date referred to in paragraph (b), submit the case record to the judge or magistrate who imposed the sentence or, if he or she is not available, any other judge or magistrate of the same court, together with the motivated recommendation received under that paragraph; and

(ii) inform the probation officer or social worker in writing of the date for which the matter has been set down for reconsideration of the sentence.

(d) When a court reconsiders a sentence under this subsection, it has the same powers as it would have had if it were considering sentence after conviction of a person, and the procedure adopted at such proceedings applies with the necessary changes during such reconsideration.

309. Minimum sentences for certain serious offences

(1) In this section "parole or probation or remission of sentence" means parole or probation or remission of sentence contemplated in Part XII of the Prisons Act, 1998 (Act No. 17 of 1998), but does not include a pardon or reprieve contemplated in section 93 of that Act.

[The Prisons Act 17 of 1998 has been replaced by the Correctional Service Act 9 of 2012.]

(2) A sentence of life imprisonment may be imposed by the High Court only and, except where otherwise expressly provided by any other law, only in the case of a conviction for an offence mentioned in, and in the circumstances prescribed by, subsection (3).

(3) Notwithstanding anything to the contrary in any other law contained but subject to subsections (5) and (7), the High Court, including where a matter has been referred under section 133(1) to the High Court for sentence, must in respect of a person who has been convicted of -

(a) treason -

(i) when committed in any of the circumstances contemplated in Part I of Schedule 5, sentence that person to life imprisonment without the prospect of parole or probation or remission of sentence; or

(ii) when committed in circumstances other than those contemplated in Part I of Schedule 5, sentence that person to life imprisonment with the prospect of parole or

probation or remission of sentence after having served a period of imprisonment of not less than 25 years;

(b) murder -

(i) when committed in any of the circumstances contemplated in Part I of Schedule 5, sentence that person to life imprisonment without the prospect of parole or probation or remission of sentence; or

(ii) when committed in circumstances other than those contemplated in Part I of Schedule 5, sentence that person to life imprisonment with the prospect of parole or probation or remission of sentence after having served a period of imprisonment of not less than 20 years;

(c) rape, other than rape under a statute -

(i) when committed in any of the circumstances contemplated in Part I of Schedule 5, sentence that person to life imprisonment without the prospect of parole or probation or remission of sentence; or

(ii) when committed in circumstances other than those contemplated in Part I of Schedule 5, sentence that person to life imprisonment with the prospect of parole or probation or remission of sentence after having served a period of imprisonment of not less than 15 years;

(d) robbery -

(i) when committed in any of the circumstances contemplated in Part I of Schedule 5, sentence that person to life imprisonment without the prospect of parole or probation or remission of sentence; or

(ii) when committed in circumstances other than those contemplated in Part I or II of Schedule 5, sentence that person to life imprisonment with the prospect of parole or probation or remission of sentence after having served a period of imprisonment of not less than 15 years.

(4) Notwithstanding anything to the contrary in any other law contained but subject to subsections (5) and (7), a divisional court or the High Court, including where a matter has been referred under section 133(1) to the High Court for sentence, must in respect of a person who has been convicted of an offence referred to in -

(a) Part II of Schedule 5, sentence that person, in the case of -

(i) a first offender, to imprisonment for a period of not less than 15 years;

(ii) a second offender of any such offence, to imprisonment for a period of not less than 20 years; and

(iii) a third or subsequent offender of any such offence, to imprisonment for a period of not less than 25 years;

(b) Part III of Schedule 5, sentence that person, in the case of -

(i) a first offender, to imprisonment for a period of not less than 10 years;

(ii) a second offender of any such offence, to imprisonment for a period of not less than 15 years; and

(iii) a third or subsequent offender of any such offence, to imprisonment for a period of not less than 20 years; and

(c) Part IV of Schedule 5, sentence that person, in the case of -

(i) a first offender, to imprisonment for a period of not less than 5 years;

(ii) a second offender of any such offence, to imprisonment for a period of not less than 7 years; and

(iii) a third or subsequent offender of any such offence, to imprisonment for a period of not less than 10 years,

but the maximum sentence that a divisional court may impose in terms of this subsection may not be more than five years longer than the minimum sentence that it may impose in terms of this subsection.

(5) (a) If a court imposing a sentence in terms of subsection (3) or (4) is satisfied that substantial and compelling circumstances exist that justify the imposition of a lesser sentence than the applicable sentence prescribed in those subsections, it must enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence.

(b) If a court imposing a sentence in terms of subsection (3) or (4) decides to impose a sentence prescribed in those subsections on a child who was 16 years of age or older, but under the age of 18 years, at the time of the commission of the offence in question, it must enter the reasons for its decision on the record of the proceedings.

(6) The operation of a minimum sentence imposed in terms of this section may, notwithstanding section 322(5), not be suspended as contemplated in that section, but, if the sentence imposed in terms of this section exceeds such minimum sentence, the operation of that part of the sentence so imposed that exceeds such minimum sentence may, either in whole or in part, be suspended as contemplated in section 322(5).

(7) This section does not apply to a child who was under the age of 16 years at the time of the commission of the offence in question.

(8) If in the application of this section the age of a child is placed in issue, the burden of proof lies with the State to prove the age of the child beyond reasonable doubt.

310. Cumulative or concurrent sentences

(1) When a person is at any trial convicted of two or more offences or when a person under sentence or undergoing sentence is convicted of another offence, the court may sentence that person to such several punishments for such offences or to the punishment for such other offence, as the court is competent to impose.

(2) Subject to section 86(2) of the Prisons Act, 1998 (Act No. 17 of 1998), punishments referred to in subsection (1), when consisting of imprisonment, commence the one after the expiration, setting aside or remission of the other, in such order as the court may direct, unless the court directs that such sentences of imprisonment must run concurrently.

[The Prisons Act 17 of 1998 has been replaced by the Correctional Service Act 9 of 2012.]

(3) Punishments referred to in subsection (1), when consisting of correctional supervision, commence the one after the expiration, setting aside or remission of the other, in such order as the court may direct, unless the court directs that such punishments of correctional supervision must run concurrently, but if such punishments in the aggregate exceed a period of three years, a period of not more than three years from the date on which the first of those punishments has commenced must be served, unless the court, when imposing sentence, otherwise directs.

311. Interpretation of certain provisions in laws relating to imprisonment and fines

In construing a provision of any law (not being an Act of Parliament passed on or after 21 March 1990, or anything enacted by virtue of powers conferred by such an Act), in so far as it prescribes or confers the powers to prescribe a punishment for any offence, any reference in that law -

(a) to imprisonment with or without any form of labour, is to be construed as a reference to imprisonment only;

(b) to a period of imprisonment of less than three months that may not be exceeded in imposing or prescribing a sentence of imprisonment, is to be construed as a reference to a period of imprisonment of three months;

(c) to any fine of less than N$50 that may not be exceeded in imposing or prescribing a fine, is to be construed as a reference to a fine of N$50.

312. Antedating sentence of imprisonment

When a sentence of imprisonment, imposed on a person on conviction for an offence, is set aside on appeal or review and any sentence of imprisonment or other sentence of imprisonment is thereafter imposed on that person in respect of that offence in place of the sentence of imprisonment imposed on conviction, or any other offence that is substituted for that offence on appeal or review, the sentence that was later imposed may, if the court imposing it is satisfied that the person concerned has served any part of the sentence of imprisonment imposed on conviction, be antedated by the court to a specified date, which may not be earlier than the date on which the sentence of imprisonment imposed on conviction was imposed, and thereupon the sentence that was later imposed is deemed to have been imposed on the date so specified.

313. Minimum period of imprisonment four days

No person may be sentenced by a court to imprisonment for a period of less than four days unless the sentence is that the person concerned be detained until the rising of the court.

314. Periodical imprisonment

(1) A court convicting a person of any offence, other than an offence in respect of which any law prescribes a minimum punishment, may, instead of any other punishment, sentence that person to undergo in accordance with the laws relating to prisons, periodical imprisonment for a period of not less than 100 hours and not more than 2 000 hours.

(2) (a) The court that imposes a sentence of periodical imprisonment on a person must cause to be served on that person a notice in writing directing that person to surrender himself or herself on a date and at a time specified in the notice or (if prevented from doing so by circumstances beyond his or her control) as soon as practicable thereafter, to the officer in charge of the place so specified, whether within or outside the area of jurisdiction of the court, for the purpose of undergoing such imprisonment.

(b) The court that tries a person on a charge of contravening subsection (4)(a) must, subject to subsection (5), cause a notice contemplated in paragraph (a) to be served on that person.

(3) A copy of the notice issued under subsection (2) serves as a warrant for the reception into custody of the convicted person by the officer referred to in paragraph (a) of that subsection.

(4) A person who -

(a) without sufficient cause fails to comply with a notice issued under subsection (2); or

(b) when surrendering himself or herself for the purpose of undergoing periodical imprisonment, is under the influence of intoxicating liquor or drugs or the like; or

(c) impersonates or falsely represents himself or herself to be a person who has been directed to surrender himself or herself for the purpose of undergoing periodical imprisonment,

commits an offence and is liable on conviction to imprisonment for a period not exceeding six months.

(5) If, before the expiration of a sentence of periodical imprisonment imposed on a person for an offence, that person is undergoing a punishment of any other form of detention imposed by a court, a magistrate before whom that person is brought, must set aside the unexpired portion of the

sentence of periodical imprisonment and, after considering the evidence recorded in respect of that offence, may impose instead of such unexpired portion any punishment within the limits of his or her jurisdiction and of any punishment prescribed by any law as a punishment for that offence.

315. Declaration of certain persons as habitual criminals

(1) Subject to subsection (2), the High Court or a divisional court that convicts a person of one or more offences, may, if it is satisfied that that person has previously been convicted and sentenced to imprisonment on more than five occasions for any offence, and that the community should be protected against that person, declare that person a habitual criminal in addition to the imposition of any other punishment for the offence or offences of which he or she is so convicted.

(2) No person may be declared a habitual criminal -

(a) if that person is under the age of 18 years; or

(b) if in the opinion of the court the offence warrants the imposition of a punishment that by itself or together with any punishment warranted or required in respect of any other offence of which the accused is simultaneously convicted, would entail imprisonment for a period exceeding 15 years.

(3) A person declared a habitual criminal must be dealt with in accordance with the laws relating to prisons.

316. Imprisonment in default of payment of fine

(1) When a court convicts a person of any offence punishable by a fine (whether with or without any other direct or alternative punishment), it may, in imposing a fine on that person, impose, as a punishment alternative to such fine, a sentence of imprisonment of any period within the limits of its jurisdiction, but the period of such alternative sentence of imprisonment may not, either alone or together with any period of imprisonment imposed as a direct punishment, exceed the longest period of imprisonment prescribed by any law as a punishment (whether direct or alternative) for such offence.

(2) When a court has imposed on a person a fine without an alternative sentence of imprisonment and the fine is not paid in full or is not recovered in full in accordance with section 317, the court that passed sentence on that person may issue a warrant directing that that person be arrested and brought before the court, which may thereupon sentence that person to such term of imprisonment as could have been imposed on him or her as an alternative punishment under subsection (1).

317. Recovery of fine

(1) (a) When a person is sentenced to pay a fine without an alternative period of imprisonment, the court passing the sentence may issue a warrant addressed to the sheriff or messenger of the court authorizing him or her to levy, in default of payment by that person of the fine, the amount of the fine by attachment and sale of any movable property belonging to that person.

(b) The amount that may be levied must be sufficient to cover, in addition to the fine, the costs and expenses of the warrant and of the attachment and sale thereunder.

(2) If the proceeds of the sale of the movable property are insufficient to satisfy the amount of the fine and the costs and expenses referred to in subsection (1), the High Court may issue a warrant, or, in the case of a sentence by a magistrate's court, authorize such magistrate's court to issue a warrant for the levy against the immovable property of that person of the amount unpaid.

(3) In any case in which an order for the payment of money is made on non-recovery whereof imprisonment may be ordered, and the money is not paid immediately, the court may require the person ordered to make such payment to enter into a bond, with or without sureties as the court considers fit, and in default of his or her doing so, at once pass sentence of imprisonment as if the money had not been recovered.

318. Court may enforce payment of fine

Where a person is sentenced to pay a fine without an alternative period of imprisonment, the court may, without prejudice to any other power under this Act relating to the payment of a fine, enforce payment of the fine, whether as to the whole or any part thereof -

(a) by the seizure of money on the person concerned, but only on proof that no other person has an interest in that money;

(b) if money is due or is to become due as salary or wages from an employer of the person concerned -

(i) by from time to time ordering that employer to deduct a specified amount from the salary or wages so due and to pay over that amount to the clerk of the court in question; or

(ii) by ordering that employer to deduct from time to time a specified amount from the salary or wages so due and to pay over that amount to the clerk of the court in question.

319. Manner of dealing with convicted juvenile

(1) A court in which a person under the age of 18 years is convicted of any offence may, instead of imposing punishment on that person for that offence -

(a) order that that person be placed under the supervision of a probation officer; or

(b) order that that person be placed in the custody of any suitable person designated in the order; or

(c) deal with that person in terms of paragraphs (a) and (b).

(2) A court that sentences a person under the age of 18 years to a fine may, in addition to imposing such punishment, deal with that person in terms of paragraph (a), (b) or (c) of subsection (1).

(3) A court in which a person of or over the age of 18 years, but under the age of 21 years, is convicted of any offence, other than murder with reference to which -

(a) the person concerned is not a woman convicted of the murder of her newly born child; or

(b) there are, in the opinion of the court, no mitigating factors,

may, instead of imposing punishment on that person for that offence, order that that person be placed under the supervision of a probation officer.

320. Period of supervision or custody of juveniles

A person who has been dealt with in terms of section 319 remains under the supervision under which or in the custody in which that person was placed -

(a) if at the time of the making of the order of the court that person was under the age of 16 years, until he or she attains the age of 18 years;

(b) if at the time of the making of the order of the court that person was 16 years of age or older, but under the age of 18 years, until he or she attains the age of 21 years;

(c) if at the time of the making of the order of the court that person was 18 years of age or older, until he or she attains the age of 23 years,

or, in any case, until that person is discharged or released on licence in accordance with the Children's Act, 1960 (Act No. 33 of 1960), before having attained the prescribed age.

321. Committal to rehabilitation centre

A court convicting a person of any offence may, in addition to or instead of any sentence in respect of that offence, order that that person be detained at a rehabilitation centre established by or under any law if the court is satisfied from the evidence or from any other information placed before it, which must include a report of a probation officer or a social worker, that that person is a person who is in need of treatment provided in that rehabilitation centre, but such an order may not be made in addition to any sentence of imprisonment (whether direct or as an alternative to a fine) unless the operation of the whole of such sentence is suspended.

322. Conditional or unconditional postponement or suspension of sentence, and caution or reprimand

(1) When a court convicts a person of any offence, other than an offence in respect of which this Act or any other law prescribes a minimum sentence, the court may -

(a) postpone for a period not exceeding five years the passing of sentence and release the person concerned -

(i) on one or more conditions whether as to -

(aa) compensation;

(bb) the rendering to the person aggrieved of some specific benefit or service instead of compensation for damage or pecuniary loss;

(cc) the performance without remuneration and outside a prison of some service for the benefit of the community under the supervision or control of an organization or institution which, or person who, in the opinion of the court, promotes the interests of the community (in this section referred to as community service);

(dd) submission to correctional supervision;

(ee) submission to instruction or treatment;

(ff) submission to the supervision or control (including control over the earnings or other income of the person concerned) of a probation officer;

(gg) the compulsory attendance or residence at some specified centre for a specified purpose;

(hh) good conduct;

(ii) any other matter,

and order that person to appear before the court at the expiration of the relevant period; or

(ii) unconditionally, and order that person to appear before the court if called upon before the expiration of the relevant period; or

(b) pass sentence but order the operation of the whole or a part thereof to be suspended for a period not exceeding five years on any condition referred to in paragraph (a)(i) which the court may specify in the order; or

(c) discharge the person concerned with a caution or reprimand, and such discharge has the effect of an acquittal, except that the conviction must be recorded as a previous conviction.

(2) A condition relating to the performance of community service may only be imposed -

(a) if the accused is 18 years of age or older; and

(b) for the performance of that service for a period of not less than 50 hours.

(3) Where a court has under paragraph (a)(i) of subsection (1) postponed the passing of sentence and the court, whether differently constituted or not, is at the expiration of the relevant period satisfied that the person concerned has observed the conditions imposed under that paragraph, the court must discharge that person without passing sentence, and such discharge has the effect of an acquittal, except that the conviction must be recorded as a previous conviction.

(4) Where a court has under paragraph (a)(ii) of subsection (1) unconditionally postponed the passing of sentence, and the person concerned has not at the expiration of the relevant period been called upon to appear before the court, that person is deemed to have been discharged with a caution under subsection (1)(c).

(5) Where a court convicts a person of an offence in respect of which any law prescribes a minimum punishment, the court may pass sentence but order the operation of a part thereof to be suspended for a period not exceeding five years on any condition referred to in paragraph (a)(i) of subsection (1).

(6) Where a court imposes a fine, the court may suspend the payment thereof -

(a) until the expiration of a period not exceeding five years; or

(b) on condition that the fine is paid over a period not exceeding five years in instalments and at intervals determined by the court.

(7) (a) A court that sentences a person to a period of imprisonment as an alternative to a fine or, if the court that has imposed that sentence was a divisional court or a district court, a magistrate may, where the fine is not paid, at any stage before the expiration of the period of imprisonment, suspend the operation of the sentence and order the release of the person concerned on such conditions relating to the payment of the fine or such portion thereof as may still be due, as to the court or, in the case of a sentence imposed by a divisional court or district court, the magistrate, may seem expedient, including a condition that the person concerned take up a specified employment and that the fine due be paid in instalments by that person or his or her employer, but the power conferred by this subsection may not be exercised by a magistrate where the court that has imposed the sentence has so ordered.

(b) A court that has suspended a sentence under paragraph (a), whether differently constituted or not, or any court of equal or superior jurisdiction, or a magistrate who has suspended a sentence under paragraph (a), may at any time -

(i) further suspend the operation of the sentence on any existing or additional conditions that to the court may seem expedient; or

(ii) cancel the order of suspension and recommit the person concerned to serve the balance of the sentence.

(8) A court that has -

(a) postponed the passing of sentence under paragraph (a)(i) of subsection (1);

(b) suspended the operation of a sentence under subsection (1)(b) or (5); or

(c) suspended the payment of a fine under subsection (6),

whether differently constituted or not, or any court of equal or superior jurisdiction may, if satisfied that the person concerned has through circumstances beyond his or her control been unable to comply with any relevant condition, or for any other good and sufficient reason, further postpone the passing of sentence or further suspend the operation of a sentence or the payment of a fine subject to any existing condition or such further conditions as could have been imposed at the time of such postponement or suspension.

(9) A court that has -

(a) postponed the passing of sentence under paragraph (a)(i) of subsection (1); or

(b) suspended the operation of a sentence under subsection (1)(b) or (5),

on condition that the person concerned must perform community service, or submit himself or herself to instruction or treatment or to the supervision or control of a probation officer, or attend or reside at a specified centre for a specified purpose, may, whether or not the court is constituted differently than it was at the time of such postponement or suspension, at any time during the period of postponement or suspension on good cause shown, amend any such condition or substitute any other competent condition for such condition, or cancel the order of postponement or suspension and impose a competent sentence or put the suspended sentence into operation.

(10) (a) A court that under this section has imposed a condition according to which the person concerned is required to perform community service or to undergo instruction or treatment or to attend or reside at a specified centre for a specified purpose, must cause to be served on the person concerned a notice in writing directing that person to report on a date and at a time specified in that notice or (if prevented from doing so by circumstances beyond his or her control) as soon as practicable thereafter, to the person specified in that notice, whether within or outside the area of jurisdiction of the court, in order to perform that community service or to undergo that instruction or treatment or to attend that centre or to reside thereat.

(b) A copy of the notice issued under paragraph (a) serves as authority to the person mentioned therein to have that community service performed by the person concerned or to provide that instruction or treatment to the person concerned or to allow the person concerned to attend that centre or to reside thereat.

(11) A person who -

(a) when reporting to perform community service or to undergo instruction or treatment or to attend or reside at a specified centre for a specified purpose, is under the influence of intoxicating liquor or drugs or the like; or

(b) impersonates or falsely represents himself or herself to be the person who has been directed to perform the community service in question or to undergo the instruction or treatment in question or to attend or reside at the specified centre for the specified purpose,

commits an offence and is liable on conviction to imprisonment for a period not exceeding six months.

(12) (a) If a condition imposed under this section is not complied with, the person concerned may on the order of any court, or, if it appears from information under oath or affirmation that the person concerned has failed to comply with such condition, on the order of a magistrate or judge, be arrested or detained and, where the condition in question -

(i) was imposed under paragraph (a)(i) of subsection (1), be brought before the court that postponed the passing of sentence or before any court of equal or superior jurisdiction; or

(ii) was imposed under subsection (1)(b), (5) or (6), be brought before the court that suspended the operation of the sentence or the payment of the fine, or any court of equal or superior jurisdiction,

and that court, whether or not it is, in the case of a court other than a court of equal or superior jurisdiction, constituted differently than it was at the time of such postponement or suspension, may then, in the case of subparagraph (i), impose any competent sentence, which may, where the person concerned is under the age of 21 years, include an order under section 319, or, in the case of subparagraph (ii), put into operation the sentence that was suspended.

(b) A person who has been called upon under paragraph (a)(ii) of subsection (1) to appear before the court may, on the order of the court in question, be arrested and brought before that court, and that court, whether or not constituted differently than it was at the time of the postponement of sentence, may impose on that person any competent sentence.

323. Agreement on operation of suspended sentences

(1) The Minister acting under a delegation in terms of Article 32(3)(e) of the Namibian Constitution may, on such conditions as the Minister may consider necessary, enter into an international agreement with any state, so as to provide, on a reciprocal basis, for the putting into operation of suspended sentences in respect of persons convicted, within the jurisdiction of Namibia or of such state, of any offence mentioned in the agreement.

(2) The Minister acting as contemplated in subsection (1) may, if the parties agree, amend an agreement referred to in that subsection to the extent that the Minister considers necessary.

(3) If an application is made for a suspended sentence imposed by a court of a state referred to in subsection (1), to be put into operation, the court at which the application is made must, subject to the terms of the agreement, proceed with that application as if the suspended sentence was imposed by a court in Namibia.

(4) (a) An agreement referred to in subsection (1), or any amendment thereof, comes into force only after it has been published by the Minister by notice in the Gazette.

(b) The Minister may at any time and in like manner withdraw any such agreement.

324. Sentence may be corrected

(1) When by mistake a wrong sentence is passed, the court may, before or immediately after it is recorded, correct the sentence subject to subsection (2).

(2) A wrong sentence may be corrected under subsection (1) only where it is passed in consequence of a mistake inherent in the sentence that does not relate to the merits of the particular case.

325. Warrant for execution of sentence

A warrant for the execution of a sentence may be issued by the judge or magistrate who passed the sentence or by any other judge or magistrate of the court in question, or, in the case of a divisional court, by any magistrate, and that warrant commits the person concerned to the prison for the magisterial district in which that person is sentenced.

Chapter 35
COMPENSATION AND RESTITUTION

326. Court may award compensation or order restitution where offence caused injury, damage or loss

(1) (a) Where a person is convicted by the High Court or a magistrate's court of an offence against the person or against property and it has been proved during the trial of that person that the act or omission constituting the offence caused injury, damage or loss, whether patrimonial or otherwise, to the victim of that offence, the court must, subject to section 24(2) of the Community Courts Act, 2003 (Act No. 10 of 2003), on the application of the victim or of the victim's legal practitioner or the prosecutor acting on the instructions of the victim, award

the victim compensation for that injury, damage or loss, or make an order of restitution in respect of the property involved in the offence, but -

(i) no court may make such an award or order unless the injury, damage or loss, including, where applicable, the quantum thereof, and the liability of the convicted person therefor, have been proved on a balance of probabilities;

(ii) a district court or divisional court may not make such an award if the amount of compensation applied for exceeds its civil jurisdiction, unless the convicted person against whom the award is to be made and the victim consent in writing thereto;

(iii) where a person is convicted under section 25(1) of the Children's Act, 1960 (Act No. 33 of 1960), of having conduced to the commission of an offence, the court may make such an award or order against that person notwithstanding that the victim has not applied for compensation.

(b) Subparagraph (ii) of paragraph (a) does not apply where the court makes an order for the restitution of property.

(2) The presiding judge or magistrate must inform the victim of an offence referred to in subsection (1)(a) of his or her right to apply under this section for compensation.

(3) For the purposes of determining the amount of the compensation or the liability of the convicted person therefor, the court may refer to the evidence and the proceedings at the trial or hear further evidence either on affidavit or orally.

(4) Where the High Court or a magistrate's court has made an award or an order under subsection (1)(a) or (7), respectively, that award or order has the effect of a civil judgment of the court that made the award or order.

(5) Where money belonging to the convicted person is taken from that person on his or her arrest, the court may order that payment be made immediately from such money in satisfaction or on account of the award.

(6) (a) A person in whose favour an award has been made under this section may, within 14 days of the date on which the award was made, in writing renounce the award by lodging with the registrar or the clerk of the court in question a document of renunciation and, where applicable, by making a repayment of any money paid under subsection (5).

(b) Where the person referred to in paragraph (a) does not renounce an award under that paragraph within the period of 14 days, no person against whom the award was made is liable at the suit of the first-mentioned person to any other civil proceedings in respect of the injury, damage or loss for which the award was made.

(7) Where the victim or convicted person is represented by a legal practitioner at the hearing of the application under subsection (1)(a) for compensation, the court may, if costs additional to that involved in the criminal trial were occasioned by that application, make an appropriate order as to costs.

327. Compensation to innocent purchaser of property unlawfully obtained

Where a person is convicted of theft or any other offence whereby that person has unlawfully obtained any property, and it appears to the court on the evidence that that person sold that property or part thereof to another person who had no knowledge that the property was stolen or unlawfully obtained, the court may, on the application of the purchaser and on restitution of that property to the owner thereof, order that, out of money belonging to the convicted person taken from him or her on his or her arrest, a sum not exceeding the amount paid by the purchaser be returned to the purchaser.

Chapter 36
REVIEWS AND APPEALS IN CASES OF CRIMINAL PROCEEDINGS IN MAGISTRATES' COURTS

328. Sentences subject to review in the ordinary course

(1) (a) A sentence imposed by a district court -

(i) which, in the case of imprisonment, exceeds a period of three months if imposed by a magistrate who has not held the substantive rank of magistrate or higher for a period of seven years, or which exceeds a period of six months if imposed by a magistrate who has held the substantive rank of magistrate or higher for a period of seven years or longer; or

(ii) which, in the case of a fine, exceeds the amount of N$3 000 if imposed by a magistrate who has not held the substantive rank of magistrate or higher for a period of seven years, or which exceeds the amount of N$6 000 if imposed by a magistrate who has held the substantive rank of magistrate or higher for a period of seven years or longer,

is subject in the ordinary course to review by a judge of the High Court.

(b) Paragraph (a) is suspended in respect of an accused who has appealed against a conviction or sentence and has not abandoned the appeal, and ceases to apply to such an accused when judgment on appeal is given.

(2) For the purposes of subsection (1), each sentence on a separate charge must be regarded as a separate sentence, and the fact that the aggregate of sentences imposed on an accused in respect of more than one charge in the same proceedings exceeds the periods or amounts referred to in that subsection, does not render those sentences subject to review in the ordinary course.

(3) Subsection (1) only applies in respect of a sentence that is imposed in respect of an accused who was not assisted by a legal practitioner.

329. Transmission of record

The clerk of the court in question must, within 30 working days after the determination of a case referred to in section 328(1)(a), forward to the registrar the record of the proceedings in the case or a copy thereof certified by such clerk, together with such written remarks as the presiding magistrate may wish to add to his or her judgment, and with any written statement or argument that the person convicted may, within 14 working days after imposition of the sentence, furnish to the clerk of the court, and the registrar must, as soon as practicable, lay the same in chambers before a judge for his or her consideration.

330. Procedure on review

(1) If, on considering the proceedings referred to in section 329 and any further information or evidence that may, by direction of the judge, be supplied or taken by the district court in question, it appears to the judge that the proceedings are in accordance with justice, the judge must endorse his or her certificate to that effect on the record thereof, and the registrar must then return the record to the district court in question.

(2) (a) If, on considering the proceedings referred to in section 329, it appears to the judge that the proceedings are not in accordance with justice or that doubt exists whether the proceedings are in accordance with justice, the judge must lay the record of the proceedings before the High Court for consideration by that Court as a court of appeal.

(b) The High Court may at any sitting thereof hear any evidence and for that purpose summon any person to appear and to give evidence or to produce any document or other article.

(c) The High Court, whether or not it has heard evidence, may, subject to section 339 -

(i) either -

(aa) confirm, alter or quash the conviction, and in the event of the conviction being quashed, where the accused was convicted on one of two or more alternative charges, convict the accused on the other alternative charge or on one or other of the alternative charges;

(bb) confirm, reduce, alter or set aside the sentence or any order of the district court;

(cc) set aside or correct the proceedings of the district court;

(dd) generally give such judgment or impose such sentence or make such order as the district court ought to have given, imposed or made on any matter that was before it at the trial of the case in question; or

(ee) remit the case to the district court with instructions to deal with any matter in such manner as the High Court may think fit; and

(ii) make any such order in regard to the suspension of the execution of any sentence against the person convicted or the admission of that person to bail, or, generally, in regard to any matter or thing connected with that person or the proceedings in regard to that person as to the High Court seems likely to promote the ends of justice.

(3) If the High Court desires to have a question of law or of fact arising in any case argued, it may direct that question to be argued by the Prosecutor-General and by such legal practitioner as the High Court may appoint.

(4) If in any criminal case in which a district court has imposed a sentence that is not subject to review in the ordinary course in terms of section 328 or in which a divisional court has imposed a sentence, it is brought to the notice of the High Court or any judge thereof that the proceedings in which the sentence was imposed were not in accordance with justice, the High Court or judge has the same powers in respect of such proceedings as if the record thereof had been laid before the High Court or judge in terms of section 329 or this section.

331. Special review before imposition of sentence

(1) If a district magistrate or a divisional magistrate after conviction but before sentence is passed is of the opinion that the proceedings in respect of which he or she brought in a conviction are not in accordance with justice or that doubt exists whether the proceedings are in accordance with justice, he or she must, without sentencing the accused, record the reasons for his or her opinion and transmit them, together with the record of the proceedings, to the registrar, and the registrar must, as soon as practicable, lay the same for review in chambers before a judge, who has the same powers in respect of such proceedings as if the record thereof had been laid before the judge in terms of section 329.

(2) When a district magistrate or a divisional magistrate acts in terms of subsection (1), he or she must inform the accused accordingly and adjourn the case to some future date pending the outcome of the review proceedings and, if the accused is in custody, the district magistrate or divisional magistrate may make such order with regard to the detention or release of the accused as he or she may think fit.

332. Accused may set down case for argument

(1) A district court imposing a sentence that under section 328 is subject to review, must immediately inform the person convicted that the record of the proceedings will be transmitted within 30 working days, and that person may then inspect and make a copy of such record before transmission or whilst in the possession of the registrar, and may set down the case for argument before the

High Court in like manner as if the record had been returned or transmitted to the High Court in compliance with any order made by it for the purpose of bringing in review the proceedings of a district court.

(2) When a case is so set down, whether the offence in question was prosecuted at the instance of the State or at the instance of a private prosecutor, a written notice must be served, by or on behalf of the person convicted, on the Prosecutor-General at his or her office not less than seven days before the day appointed for the argument, setting out the name and number of the case, the court before which it was tried, the date for which the case has been set down for argument and the grounds or reasons on which the judgment is sought to be reversed or altered.

(3) Whether the judgment referred to in subsection (2) is confirmed or reversed or altered, no costs are in respect of the proceedings on review payable by the prosecution to the person convicted or by the person convicted to the prosecution.

333. Execution of sentence not suspended unless bail granted

(1) The execution of a sentence is not suspended by the transmission of or the obligation to transmit the record for review unless the court that imposed the sentence releases the person convicted on bail.

(2) If the court releases the person convicted on bail, the court may -

(a) if that person was released on bail under section 62 or 63, extend the bail, either in the same amount or any other amount; or

(b) if that person was not so released on bail, release that person on bail on condition that that person deposits with the clerk of the court or with a member of the prison service at the prison where that person is in custody or with a member of the police at the place where that person is in custody, the sum of money determined by the court in question; or

(c) on good cause shown, permit that person to furnish a guarantee, with or without sureties, that he or she will pay and forfeit to the State the sum of money determined under paragraph (b), in circumstances under which that sum, if it had been deposited, would be forfeited to the State.

(3) It must be a condition of the release of the person convicted that that person must -

(a) at a time and place specified by the court; and

(b) on service, in the manner prescribed by the rules of court, of a written order on him or her or at a place specified by the court,

surrender himself or herself in order that effect may be given to any sentence in respect of the proceedings in question.

(4) (a) If the order contemplated in subsection (3)(b) is not served on the convicted person within 14 days of the issuing thereof because that person cannot be found at the address given by him or her at the time of the granting of bail to him or her, the bail must be provisionally cancelled and the bail money provisionally forfeited and a warrant for that person's arrest must be issued.

(b) Section 71(2) in respect of the confirmation or the lapsing of the provisional cancellation of bail or the forfeiture of bail money, and making final the provisional forfeiture of bail money, section 71(3) in respect of the hearing of evidence and section 76 in respect of the remission of forfeited bail money, apply with the necessary changes in respect of bail pending review.

(5) The court may add any condition of release on bail that it may consider necessary or advisable in the interests of justice, among others, as to -

(a) the reporting in person by the person convicted at any specified time and place to any specified person or authority;

(b) any place to which such person is prohibited to go;

(c) any other matter relating to the conduct of such person.

(6) The court considering an application for bail under this section must record the relevant proceedings in full, including the details referred to in subsection (3) and any conditions imposed under subsection (5).

(7) Sections 66, 67, 68, 70 and 73 apply with the necessary changes in respect of the granting of bail pending review.

334. Correctional supervision not suspended unless bail granted

The execution of a sentence of correctional supervision is not suspended by the transmission of the record for review in terms of section 330(4) unless the court which imposed the sentence releases the person convicted -

(a) on bail, in which event section 333(2), (3), (4), (5), (6) and (7) applies with the necessary changes;

(b) on warning on a condition contemplated in section 333(3), in which event section 78 applies with the necessary changes to the extent that it can be applied.

335. Appeal from magistrate's court by person convicted

(1) A person convicted of an offence by a magistrate's court (including a person discharged after conviction) may appeal against that conviction and against any resultant sentence or order to the High Court.

(2) An appeal under this section must be noted and be prosecuted within the period and in the manner prescribed by the rules of court, but the High Court in any case may extend that period.

(3) The High Court hearing an appeal under this section has the powers referred to in section 330(2), and, unless the appeal is based solely on a question of law, the High Court has, in addition to those powers, the power to increase any sentence imposed on the appellant or to impose any other form of sentence instead of or in addition to such sentence, but, notwithstanding that the High Court is of the opinion that a point raised might be decided in favour of the appellant, no conviction or sentence may be reversed or altered by reason of an irregularity or defect in the record or proceedings unless it appears to the High Court that a failure of justice has in fact resulted from that irregularity or defect.

(4) When an appeal under this section is noted, sections 333 and 334 apply with the necessary changes in respect of the sentence appealed against.

(5) When the High Court gives a decision on appeal against a decision of the magistrate's court and the former decision is appealed against, the High Court has the powers in respect of the granting of bail that a magistrate's court has in terms of section 333.

336. Explanation of certain rights to unrepresented accused

An accused who is unrepresented at the time he or she is convicted and sentenced, must be informed by the presiding magistrate of his or her rights in respect of appeal and of the correct procedures to give effect to those rights.

337. Appeal from magistrate's court by Prosecutor-General or other prosecutor

(1) The Prosecutor-General or, if a body or a person other than the Prosecutor-General or his or her representative was the prosecutor in the proceedings, then such other prosecutor, may appeal

against any decision given in favour of an accused in a criminal case in a magistrate's court, including -

(a) any resultant sentence imposed or order made by that court;

(b) any order made under section 92(3) by that court,

to the High Court, provided an application for leave to appeal has been granted by a judge of the High Court in chambers.

(2) (a) A written notice of an application referred to in subsection (1) must be lodged with the registrar by the Prosecutor-General or other prosecutor, within 30 days of the decision, sentence or order of the magistrate's court or within such extended period as may on application on good cause be allowed.

(b) The notice must state briefly the grounds for the application.

(3) The Prosecutor-General or other prosecutor must, at least 14 days before the day appointed for the hearing of the application, cause to be served by a member of the police or the deputy sheriff on the accused in person a copy of the notice, together with a written statement of the rights of the accused under subsection (4), but if the member of the police or the deputy sheriff is not able so to serve a copy of the notice, it may be served in any other manner that may on application be allowed.

(4) The accused may, within 10 days of the serving on him or her of the notice under subsection (3) or within such extended period as may on application on good cause be allowed, lodge a written submission with the registrar, and the registrar must submit it to the judge who is to hear the application, and must also send a copy thereof to the Prosecutor-General or other prosecutor.

(5) (a) A decision of a judge under subsection (1) in respect of an application for leave to appeal referred to in that subsection, may be set aside by the Supreme Court on application made to it by the Prosecutor-General or other prosecutor or the accused, within 21 days of the decision or within such extended period as may on application on good cause be allowed.

(b) An application to the Supreme Court under paragraph (a) must be submitted by petition addressed to the Chief Justice, and thereupon section 343(6), (7), (8), (9) and (10) applies with the necessary changes in respect thereof.

(6) Subject to this section, section 335 applies with the necessary changes in respect of an appeal under subsection (1).

(7) If an application for leave to appeal referred to in subsection (1) or an application to set aside a decision referred to in subsection (5) or an appeal under this section, brought by the Prosecutor-General is refused or dismissed, the judge or judges or the court may order that the State pay the accused concerned the whole or any part of the costs to which that accused may have been put in opposing any such application or appeal, taxed according to the scale in civil cases of the court in question.

(8) For the purposes of paragraph (a) of subsection (1), any reference in that subsection to an accused is to be construed as including a reference to any person, other than the accused, who claims that any right is vested in him or her in respect of any matter or article declared forfeited by the magistrate's court as if it were a decision by that court, and that appeal may be heard either separately or jointly with an appeal against a decision as a result whereof the declaration of forfeiture was made.

338. Appeal from High Court to Supreme Court

(1) Where the High Court on appeal, whether brought by the Prosecutor-General or other prosecutor or the accused, gives a decision in favour of the Prosecutor-General or other prosecutor or the accused, the Prosecutor-General or other prosecutor or the accused against whom the decision is given may appeal to the Supreme Court which must, if it decides the matter in issue in favour of the appellant,

set aside or vary the decision appealed from and, if the matter was brought before the High Court under -

(a) section 335(1), reinstate the conviction, sentence or order of the magistrate's court appealed from, either in its original form or in such modified form as the Supreme Court may consider appropriate; or

(b) section 337(1), give such decision or take such action as the High Court ought, in the opinion of the Supreme Court, to have given or taken, including any action under section 335(3).

(2) Section 343, to the extent that it relates to an application or appeal by an accused under that section, applies with the necessary changes in respect of an appeal under subsection (1).

(3) If an appeal under subsection (1) or an application referred to in subsection (2), brought by the Prosecutor-General is dismissed or refused, the court or the judge or judges may order that the State pay the accused concerned the whole or any part of the costs to which that accused may have been put in opposing the appeal or application, taxed according to the scale in civil cases of the court in question.

339. Review or appeal and failure to comply with subsection (1)(b) or (2) of section 125

(1) Where a conviction and sentence under section 125 are set aside on review or appeal on the ground that any provision of subsection (1)(b) or (2) of that section was not complied with, or on the ground that section 126 should have been applied, the court in question must remit the case to the court by which the sentence was imposed and direct that court to comply with the provision in question or to act in terms of section 126.

(2) When the provision referred to in subsection (1) is complied with and the magistrate is after such compliance not satisfied as is required by section 125(1)(b) or section 125(2), whichever may be applicable, the magistrate must enter a plea of not guilty, whereupon section 126 applies in respect of the matter.

340. Institution of proceedings anew when conviction set aside on appeal or review

Section 351 applies with the necessary changes in respect of any conviction and sentence of a magistrate's court that are set aside on appeal or review on any ground referred to in that section.

341. Obtaining presence of convicted person in magistrate's court after setting aside of sentence or order

(1) Where a sentence or order imposed or made by a magistrate's court is set aside on appeal or review and the person convicted is not in custody and the court setting aside the sentence or order remits the matter to the magistrate's court in order that a fresh sentence or order may be imposed or made, the presence before that court of the person convicted may be obtained by means of a written notice addressed to that person calling upon that person to appear at the stated place and time on a stated date in order that such sentence or order may be imposed or made.

(2) Sections 56(2) and 57(1), (2) and (3) apply with the necessary changes in respect of a written notice issued under subsection (1).

Chapter 37
APPEALS IN CASES OF CRIMINAL PROCEEDINGS IN HIGH COURT

342. Court of appeal in respect of High Court judgments

(1) In respect of appeals and questions of law reserved in connection with criminal cases heard by the High Court, the court of appeal is the Supreme Court.

(2) An appeal referred to in subsection (1) lies to the Supreme Court only as provided in sections 343 to 347, inclusive, and not as of right.

343. Applications for condonation, for leave to appeal and for leave to lead further evidence

(1) An accused convicted of an offence before the High Court may, within 14 days of the passing of any sentence as a result of such conviction or within such extended period as may on application (in this section referred to as an application for condonation) on good cause be allowed, apply to the judge who presided at the trial or, if that judge is not available, to any other judge of the High Court for leave to appeal against his or her conviction or against any sentence or order following thereon (in this section referred to as an application for leave to appeal), and an accused convicted of an offence before the High Court on a plea of guilty may, within the same period, apply for leave to appeal against any sentence or any order following thereon.

(2) Every application for leave to appeal must set out clearly and specifically the grounds on which the accused desires to appeal, but, if the accused applies verbally for leave to appeal immediately after the passing of the sentence, the accused must state such grounds and they must be taken down in writing and form part of the record.

(3) When in an application under subsection (1) for leave to appeal it is shown by affidavit -

(a) that further evidence that would presumably be accepted as true, is available;

(b) that, if accepted, the evidence could reasonably lead to a different verdict or sentence; and

(c) except in exceptional cases, that there is a reasonably acceptable explanation for the failure to produce the evidence before the close of the trial,

the High Court hearing the application may receive that evidence and further evidence rendered necessary thereby, including evidence in rebuttal called by the prosecutor and evidence called by that Court.

(4) Any evidence received in pursuance of an application under subsection (1) for leave to appeal, is for the purposes of an appeal deemed to be evidence taken or admitted at the trial.

(5) If an application under subsection (1) for leave to appeal is granted, the registrar of the High Court must immediately cause notice to be given accordingly to the registrar of the Supreme Court, and must also cause to be transmitted to the registrar of the Supreme Court a certified copy of the record, including copies of the evidence, whether oral or documentary, taken or admitted at the trial, and a statement of the grounds of appeal, but with the consent of the accused and the Prosecutor-General, the registrar of the High Court may, instead of transmitting the whole record, transmit copies, one of which must be certified, of such parts of the record as may be agreed on by the accused and the Prosecutor-General to be sufficient, in which event the Supreme Court may nevertheless call for the production of the whole record.

(6) If an application under subsection (1) for condonation or leave to appeal is refused or if in an application for leave to appeal an application for leave to call further evidence is refused, the accused may, within 21 days of such refusal or within such extended period as may on good cause be allowed, by petition addressed to the Chief Justice submit his or her application for condonation or for leave to appeal or his or her application for leave to call further evidence, or all such applications, to the Supreme Court, and must at the same time give written notice that this has been done to the registrar of the High Court who must forward to the Supreme Court a copy of the application or applications in question and of the reasons for refusing such application or applications.

(7) The petition must be considered in chambers by three judges of the Supreme Court designated by the Chief Justice.

(8) The judges considering the petition may -

(a) call for any further information from the judge who heard the application for condonation or the application for leave to appeal or the application for leave to call further evidence, or from the judge who presided at the trial to which any such application relates;

(b) order that the application or applications in question or any of them be argued before them at a time and place appointed;

(c) whether the judges have acted under paragraph (a) or (b) or not -

(i) in the case of an application for condonation, grant or refuse the application and, if the application is granted, direct that an application for leave to appeal must be made, within the period determined by them, to the High Court or the judge referred to in subsection (1) or, if they consider it expedient, that an application for leave to appeal must be submitted under subsection (6) within the period determined by them as if it had been refused by the High Court or the judge referred to in subsection (1);

(ii) in the case of an application for leave to appeal or an application for leave to call further evidence, grant or refuse the application or, if they are of the opinion that the application for leave to call further evidence should have been granted, they may, before deciding on the application for leave to appeal, or, in the case where the High Court or the judge referred to in subsection (1) has granted the application for leave to appeal but has refused leave to call further evidence, set aside the refusal of the High Court or that judge to grant leave to call further evidence and remit the matter in order that further evidence may be received in accordance with subsection (3); or

(d) refer the matter to the Supreme Court for consideration, whether on argument or otherwise, and the Supreme Court may thereupon deal with the matter in any manner contemplated in paragraph (c).

(9) (a) The decision of the Supreme Court or of the judges thereof considering the petition to grant or refuse an application, is final.

(b) For the purposes of subsection (7), a decision of the majority of the judges considering the petition, is deemed to be the decision of all three judges.

(10) Notice must be given to the Prosecutor-General and the accused of the date fixed for the hearing of an application under this section, and of the place appointed under subsection (8) for a hearing.

344. Appeal from High Court by Prosecutor-General or other prosecutor

(1) The Prosecutor-General or, if a body or a person other than the Prosecutor-General or his or her representative was the prosecutor in the proceedings, then such other prosecutor, may appeal against any decision given in favour of an accused in a criminal case in the High Court, including -

(a) any resultant sentence imposed or order made by the High Court;

(b) any order made under section 92(3) by the High Court,

to the Supreme Court.

(2) Section 343, to the extent that it relates to an application or appeal by an accused under that section, applies with the necessary changes in respect of an appeal under subsection (1).

(3) If an appeal under subsection (1) or an application referred to in subsection (2), brought by the Prosecutor-General is dismissed or refused, the court or the judge or judges may order that the State pay the accused concerned the whole or any part of the costs to which that accused may have been put in opposing the appeal or application, taxed according to the scale in civil cases of the court in question.

(4) For the purposes of paragraph (a) of subsection (1), any reference in that subsection to an accused is to be construed as including a reference to any person, other than the accused, who claims that any right is vested in him or her in respect of any matter or article declared forfeited by the High Court as if it were a decision by that Court, and that appeal may be heard either separately or jointly with an appeal against a decision as a result whereof the declaration of forfeiture was made.

345. Special entry of irregularity or illegality

(1) If an accused thinks that any of the proceedings in connection with or during his or her trial before the High Court are irregular or not according to law, the accused may, either during his or her trial or within 14 days after his or her conviction or within such extended period as may on application (in this section referred to as an application for condonation) on good cause be allowed, apply for a special entry to be made on the record (in this section referred to as an application for a special entry) stating in what respect the proceedings are alleged to be irregular or not according to law, and such special entry must, on such application for a special entry, be made unless the court to which or the judge to whom the application for a special entry is made is of the opinion that the application is not made bona fide or that it is frivolous or absurd or that the granting of the application would be an abuse of the process of the court.

(2) Except as provided in subsections (3) and (4), an application for condonation or for a special entry must be made to the judge who presided at the trial or, if that judge is not available, or, if in the case of a conviction before a circuit court that court is not sitting, to any other judge of the High Court.

(3) The terms of a special entry must be settled by the court which or the judge who grants the application for a special entry.

(4) If an application for the condonation or for a special entry is refused, the accused may, within 21 days of such refusal or within such extended period as may on good cause be allowed, by petition addressed to the Chief Justice, apply to the Supreme Court for condonation or for a special entry to be made on the record stating in what respect the proceedings are alleged to be irregular or not according to law, and thereupon section 343(7), (8), (9) and (10) applies with the necessary changes.

346. Appeal on special entry under section 345

(1) If a special entry under section 345 is made on the record, the person convicted may appeal to the Supreme Court against his or her conviction on the ground of the irregularity or illegality stated in the special entry if, within 21 days after entry is so made or within such extended period as may on good cause be allowed, notice of appeal has been given to the registrar of the Supreme Court and to the registrar of the High Court.

(2) The registrar of the High Court must immediately after receiving the notice of appeal in terms of subsection (1) give notice thereof to the Prosecutor-General and transmit to the registrar of the Supreme Court a certified copy of the record, including copies of the evidence, whether oral or documentary, taken or admitted at the trial and of the special entry, but with the consent of the person convicted and the Prosecutor-General, the registrar of the High Court may, instead of transmitting the whole record, transmit copies, one of which must be certified, of such parts of the record as may be agreed on by the person convicted and the Prosecutor-General to be sufficient, in which event the Supreme Court may nevertheless call for the production of the whole record.

347. Reservation of question of law

(1) If a question of law arises at the trial in the High Court of a person for an offence, the High Court may, of its own motion or at the request of the prosecutor or the accused, reserve that question for the consideration of the Supreme Court, and thereupon the High Court must state the question reserved and direct that it be specially entered in the record and that a copy thereof be transmitted to the registrar of the Supreme Court.

(2) The grounds on which an objection to an indictment is taken are for the purposes of this section deemed to be questions of law.

(3) Sections 345(2), (3) and (4) and 346(2) apply with the necessary changes in respect of all proceedings under this section.

348. Report of trial judge to be furnished on appeal

The judge or judges of the High Court before whom a person was on trial for an offence must, in the case of an appeal under section 343 or 344 or of an application for a special entry under section 345 or the reservation of a question of law under section 347 or an application to the Supreme Court for leave to appeal or for a special entry under this Act, furnish to the registrar of the High Court a report giving his or her or their opinion on the case or on any point arising in the case, and such report, which forms part of the record, must immediately be transmitted by the registrar of the High Court to the registrar of the Supreme Court.

349. When execution of sentence may be suspended

(1) The execution of the sentence of the High Court is not suspended by reason of any appeal or by reason of any question of law having been reserved for consideration by the Supreme Court unless the High Court thinks fit to order that the accused be released on bail or that the accused be treated as an unconvicted prisoner until the appeal or the question reserved has been heard and decided, but -

(a) when the accused is ultimately sentenced to imprisonment, the time during which the accused was so released on bail must be excluded in computing the period for which the accused is so sentenced;

(b) when the accused has been detained as an unconvicted prisoner, the time during which the accused has been so detained must be included in computing the period for which the accused is ultimately sentenced.

(2) If the High Court under subsection (1) orders that the accused be released on bail, sections 70, 71, 73 and 333(2), (3), (4), (5) and (6) apply with the necessary changes in respect of bail so granted, and any reference in -

(a) section 70 to the court that may act under that section, is to be construed as a reference to the High Court;

(b) section 71 to the court that may act under that section, is to be construed as a reference to the magistrate's court within whose area of jurisdiction the accused is to surrender himself or herself in order that effect be given to any sentence in respect of the proceedings in question;

(c) section 73 to a magistrate is to be construed as a reference to a judge of the High Court.

350. Powers of Supreme Court

(1) In the case of an appeal or of any question of law reserved, the Supreme Court may -

(a) allow the appeal if it thinks that the judgment of the trial court should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a failure of justice; or

(b) give such judgment as ought to have been given at the trial or impose such punishment as ought to have been imposed at the trial; or

(c) make such other order as justice may require,

but, notwithstanding that the Supreme Court is of the opinion that a point raised might be decided in favour of the accused, no conviction or sentence may be set aside or altered by reason of an

irregularity or defect in the record or proceedings unless it appears to the Supreme Court that a failure of justice has in fact resulted from that irregularity or defect.

(2) On an appeal under section 343 or 344 against any sentence, the Supreme Court may confirm the sentence or may set aside or alter the sentence and impose such punishment as ought to have been imposed at the trial.

(3) Where a conviction and sentence are set aside by the Supreme Court on the ground that a failure of justice has in fact resulted from the admission against the accused of evidence otherwise admissible but not properly placed before the trial court by reason of some defect in the proceedings, the Supreme Court may remit the case to the trial court with instructions to deal with any matter, including the hearing of such evidence, in such manner as the Supreme Court may think fit.

(4) Where the Prosecutor-General or other prosecutor has appealed or a question of law has been reserved on the application of a prosecutor in the case of an acquittal, and the Supreme Court has given a decision in favour of the Prosecutor-General or other prosecutor, the Supreme Court may order that such of the steps contemplated in section 351 be taken as the Supreme Court may direct.

(5) The order or direction of the Supreme Court must be transmitted by the registrar of the Supreme Court to the registrar of the High Court, and that order or direction must be carried into effect and authorizes every person affected by it to do whatever is necessary to carry it into effect.

(6) The powers conferred by this section on the Supreme Court in relation to the imposition of punishments, include the power to impose a punishment more severe than that imposed by the trial court or to impose another punishment instead of or in addition to such punishment.

351. Institution of proceedings anew when conviction set aside on appeal

When a conviction and sentence are set aside by the Supreme Court on the ground -

(a) that the court that convicted the accused was not competent to do so; or

(b) that the indictment on which the accused was convicted was invalid or defective in any respect; or

(c) that there has been any other technical irregularity or defect in the procedure,

proceedings in respect of the same offence to which the conviction and sentence referred may again be instituted either on the original charge, suitably amended where necessary, or on any other charge as if the accused had not previously been arraigned, tried and convicted, but no judge or assessor before whom the original trial took place may take part in such proceedings.

Chapter 38
GENERAL PROVISIONS

352. Force of process

A warrant, subpoena, summons or other process relating to any criminal matter is of force throughout Namibia and may be executed anywhere within Namibia.

353. Court process may be served or executed by member of police

A member of the police is, subject to the rules of court, qualified to serve or execute a subpoena or summons or other document under this Act as if he or she had been appointed deputy sheriff or deputy messenger or other like officer of the court.

354. Transmission of court process by facsimile or telegraph or similar communication

A document, order or other court process that under this Act or the rules of court is required to be served or executed with reference to a person, may be transmitted by facsimile or telegraph or similar written or

printed communication, and a copy of such facsimile, telegraph or communication, served or executed in the same manner as the original document, order or other court process is required to be served or executed, is of the same force and effect as if the document, order or other court process in question had itself been served or executed.

355. Irregular warrant or process

A person who acts under a warrant or process that is bad in law on account of a defect in the substance or form thereof is, if he or she has no knowledge that the warrant or process is bad in law and whether or not such defect is apparent on the face of the warrant or process, exempt from liability in respect of that act as if the warrant or process were good in law.

356. Prosecution of corporations and members of associations

(1) In this section "director", in relation to a corporate body, means a person who controls or governs that corporate body or who is a member of a body or group of persons that controls or governs that corporate body or, where there is no such body or group, who is a member of that corporate body.

(2) For the purpose of imposing on a corporate body criminal liability for an offence, whether under a statute or at common law -

(a) any act performed, with or without a particular intent, by or on instructions or with permission, express or implied, given by a director or employee of that corporate body; or

(b) the omission, with or without a particular intent, of any act that ought to have been but was not performed by or on instructions given by a director or employee of that corporate body,

in the exercise of his or her powers or in the performance of his or her duties as such a director or employee or in furthering or in endeavouring to further the interests of that corporate body, is deemed to have been performed (and with the same intent, if any) by that corporate body or to have been an omission (and with the same intent, if any) on the part of that corporate body.

(3) In any prosecution against a corporate body, a director or employee of that corporate body must be cited, as representative of that corporate body, as the offender, and thereupon the person so cited may, as such representative, be dealt with as if he or she were the person accused of having committed the offence in question, but -

(a) if that person pleads guilty, other than by way of admitting guilt under section 59, the plea is not valid unless the corporate body authorized that person to plead guilty;

(b) if at any stage of the proceedings that person ceases to be a director or employee of that corporate body or absconds or is unable to attend, the court in question may, at the request of the prosecutor, from time to time substitute for that person any other person who is a director or employee of that corporate body at the time of such substitution, and thereupon the proceedings must continue as if no substitution had taken place;

(c) if that person, as representing the corporate body, is convicted, the court convicting that person may not impose on him or her, in his or her representative capacity, any punishment, whether direct or as an alternative, other than a fine, even if the relevant law makes no provision for the imposition of a fine in respect of the offence in question, and that fine is payable by the corporate body and may be recovered by attachment and sale of property of the corporate body in terms of section 317;

(d) the citation of a director or employee of a corporate body as aforesaid, to represent that corporate body in any prosecution instituted against it, does not exempt that director or employee from prosecution for that offence in terms of subsection (6).

(4) In criminal proceedings against a corporate body, any record that was made or kept by a director, employee or agent of the corporate body within the scope of his or her activities as such a director, employee or agent, or any document that was at any time in the custody or under the control of

any such director, employee or agent within the scope of his or her activities as such a director, employee or agent, is admissible in evidence against the accused.

(5) For the purposes of subsection (4), any record made or kept by a director, employee or agent of a corporate body or any document that was at any time in his or her custody or under his or her control, is presumed, in the absence of evidence to the contrary, to have been made or kept by him or her or to have been in his or her custody or under his or her control within the scope of his or her activities as such a director, employee or agent.

(6) When an offence has been committed, whether by the performance of any act or by the failure to perform any act, for which any corporate body is or was liable to prosecution, a person who, at the time of the commission of the offence, was a director or employee of the corporate body is, in the absence of evidence that he or she did not take part in the commission of the offence and that he or she could not have prevented it, deemed to have committed the offence and is liable to prosecution therefor, either jointly with the corporate body or apart therefrom, and is on conviction personally liable to punishment therefor.

(7) In criminal proceedings against a director or employee of a corporate body in respect of an offence -

(a) any evidence that would be or was admissible against that corporate body in a prosecution for that offence, is admissible against the accused;

(b) whether or not that corporate body is or was liable to prosecution for that offence, any document, memorandum, book or record that was drawn up, entered up or kept in the ordinary course of business of that corporate body or that was at any time in the custody or under the control of a director, employee or agent of that corporate body, in his or her capacity as director, employee or agent, is, in the absence of evidence that at all material times he or she had no knowledge of that document, memorandum, book or record, in so far as its contents are relevant to the offence charged, and that he or she was in no way a party to the drawing up of that document or memorandum or the making of any relevant entries in that book or record, prima facie proof of its contents and admissible in evidence against the accused.

(8) When a member of an association of persons, other than a corporate body, has, in carrying on the business or affairs of that association or in furthering or in endeavouring to further its interests, committed an offence, whether by the performance of any act or by the failure to perform any act, a person who, at the time of the commission of the offence, was a member of that association, is, in the absence of evidence that he or she did not take part in the commission of the offence and that he or she could not have prevented it, deemed to have committed the offence, but, if the business or affairs of the association are governed or controlled by a committee or other similar governing body, this subsection does not apply to a person who was not at the time of the commission of the offence a member of that committee or other body.

(9) In any proceedings against a member of an association of persons in respect of an offence mentioned in subsection (8) any record that was made or kept by a member or employee or agent of the association within the scope of his or her activities as such a member, employee or agent, or any document that was at any time in the custody or under the control of any such member, employee or agent within the scope of his or her activities as such a member, employee or agent, is admissible in evidence against the accused.

(10) For the purposes of subsection (9), any record made or kept by a member or employee or agent of an association or any document that was at any time in his or her custody or under his or her control, is presumed, in the absence of evidence to the contrary, to have been made or kept by him or her or to have been in his or her custody or under his or her control within the scope of his or her activities as such a member or employee or agent.

(11) The provisions of this section are additional to and not in substitution for any other law that provides for a prosecution against corporate bodies or their directors or employees or against associations of persons or their members.

(12) Where a summons under this Act is to be served on a corporate body, it must be served on the director or employee referred to in subsection (3) and in the manner referred to in section 56(2).

357. Attorney-General may invoke decision of Supreme Court on question of law

When a decision in a criminal case on a question of law is given by the High Court that is in conflict with a previous decision in a criminal case on a question of law given by the High Court, the Attorney-General may submit such conflicting decisions to the Supreme Court and cause the matter to be argued before the Supreme Court in order that it may determine that question of law for the future guidance of all courts.

358. Minister may declare certain persons peace officers for specific purposes

(1) (a) The Minister may by notice in the Gazette declare that a person who by virtue of his or her office falls within any category specified in that notice, is, within an area specified in that notice, a peace officer for the purpose of exercising, with reference to any provision of this Act or any offence or any class of offences likewise specified, the powers specified in that notice.

(b) The powers referred to in paragraph (a) may include any power that is not conferred on a peace officer by or under this Act.

(2) (a) No person who is a peace officer by virtue of a notice issued under subsection (1) may exercise any power conferred on him or her under that subsection unless that person is at the time of exercising such power in possession of a certificate of appointment issued by his or her employer, which certificate must be produced on demand.

(b) A power exercised contrary to paragraph (a) has no legal force or effect.

(3) The Minister may by notice in the Gazette prescribe -

(a) the conditions that must be complied with before a certificate of appointment may validly be issued under subsection (2)(a);

(b) any matter that must appear in or on such certificate of appointment in addition to any matter that the employer may include in such certificate.

(4) Where the employer of a person who becomes a peace officer under this section would be liable for damages arising out of any act or omission by that person in the discharge of any power conferred on him or her under this section, the State is not liable for such damages unless the State is the employer of that person, in which event the office, ministry or agency in whose service that person is, is so liable.

359. Person who makes statement entitled to copy thereof

When a person has in relation to any matter made to a peace officer a statement in writing or a statement that was reduced to writing, and criminal proceedings are thereafter instituted against that person in connection with that matter, the person in possession of that statement must furnish the person who made the statement, at his or her request, with a certified copy of the statement.

360. Prohibition of publication of identity of persons towards or in connection with whom certain offences have been committed

(1) No person may, with regard to an offence referred to in paragraph (a), (b) or (c) of section 175(4), as from the date on which the offence in question was committed or allegedly committed until the prohibition in terms of section 176(2)(c) of the publication of information contemplated in that section commences, publish any information that might reveal the identity of the person towards or in connection with whom the offence was committed or allegedly committed, except with the authorization of a magistrate granted, on application in chambers, with due regard to the wishes of the person towards or in connection with whom the offence was committed.

(2) A person who contravenes subsection (1) commits an offence and is liable on conviction to a fine not exceeding N$10 000 or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

(3) To the extent that this section provides for a limitation of the fundamental right contemplated in paragraph (a) of Article 21(1) of the Namibian Constitution, in that it authorizes interference with a person's freedom to publish information relating to criminal proceedings, such limitation is enacted on the authority of Article 21(2) of the said Constitution.

361. Medical examination of minors towards or in connection with whom certain offences have been committed

(1) If a member of the police charged with the investigation of a case is of the opinion that it is necessary that a minor in respect of whom it is alleged that an offence of a sexual or indecent or violent nature has been committed be examined by a district surgeon or, if a district surgeon is not available, by a registered medical practitioner, but that the parent or guardian of that minor -

(a) cannot be traced within a reasonable time;

(b) cannot grant consent in time;

(c) is a suspect in respect of the offence in consequence of which the examination must be conducted;

(d) unreasonably refuses to consent that the examination be conducted;

(e) is incompetent on account of mental disorder to consent that the examination be conducted; or

(f) is deceased,

a magistrate may, on the written application of that member of the police and if the magistrate is satisfied that the medical examination is necessary, grant the necessary consent that such examination be conducted.

(2) If a magistrate is not available to grant consent as contemplated in subsection (1), a member of the police of the rank of commissioned officer or the member of the police in charge of the local police station may in writing grant such consent if the member of the police charged with the investigation of the case declares under oath or affirmation that the consent of a magistrate cannot be obtained within a reasonable period of time and the district surgeon or registered medical practitioner declares under oath or affirmation that the purpose of the medical examination will be defeated if the examination is not conducted immediately.

362. Act or omission constituting offence under two or more laws

Where an act or omission constitutes an offence under two or more statutory provisions or is an offence under a statute and at common law, the person alleged to have committed that act or omission is, unless the contrary intention appears, liable to be prosecuted and punished under either statutory provision or under the statute or at common law, but is not liable to more than one punishment for the act or omission constituting the offence.

363. Estimating age of person

If in criminal proceedings the age of a person is a relevant fact of which no or insufficient evidence is available at such proceedings, the presiding judge or magistrate may estimate the age of that person by his or her appearance or from any information that may be available, and the age so estimated is deemed to be the correct age of that person unless -

(a) it is subsequently proved that that estimate was incorrect; and

(b) the accused at such proceedings could not lawfully have been convicted of the offence with which he or she was charged if the correct age had been proved.

364. Production of document by accused at criminal proceedings

Where a law requires a person to produce a document at criminal proceedings at which that person is an accused, and that person fails to produce that document at such proceedings, that person commits an offence, and the court may in a summary manner enquire into his or her failure to produce that document and, unless that person satisfies the court that there is a reasonable possibility that his or her failure was not due to fault on his or her part, sentence him or her to any punishment provided for in that law, or, if no punishment is so provided, to a fine not exceeding N$1 000 or to imprisonment for a period not exceeding three months.

365. Removal of accused from one prison to another for purposes of attending criminal proceedings

When an accused is in custody and it becomes necessary that the accused be removed from one prison to another prison for the purpose of attending his or her trial, the magistrate of the district in which the accused is in custody must issue a warrant for the removal of the accused to such other prison.

366. Prison list of unsentenced prisoners

Every head of a prison within the area for which any session or circuit of the High Court is held for the trial of criminal cases must deliver to that court, at the commencement of each such session or circuit, a list of the unsentenced prisoners who, at such commencement, have been detained within his or her prison for a period of 90 days or longer, and that list must, in respect of each such prisoner, specify the date of his or her admission to the prison, the authority for his or her detention and the cause of his or her detention.

367. Compounding of certain minor offences

(1) If a person receives from a peace officer a notification in writing alleging that that person has committed, at a place and on a date and at a time or during a period specified in the notification, an offence likewise specified, of any class mentioned in Schedule 6, and specifying the amount of the fine that a court trying that person for the offence in question would probably impose on him or her, that person may within 30 days after the receipt of the notification deliver or transmit the notification, together with a sum of money equal to that amount, to the magistrate of the district or area wherein the offence is alleged to have been committed, and thereupon that person may not be prosecuted for having committed that offence.

(2) (a) In the case of an offence, other than an offence at common law, relating to a vehicle, committed within the area of jurisdiction of a local authority, a person receiving a notification under subsection (1) from a peace officer in the employment of the local authority, may deliver or transmit the notification, together with a sum of money equal to the amount specified in the notification, to that local authority.

(b) A sum of money paid to a local authority as provided in paragraph (a) is deemed to be a fine imposed as a traffic fine.

(c) Not later than seven days after receipt of a sum of money as provided in paragraph (a), the local authority concerned must forward to the magistrate of the district or area wherein the offence is alleged to have been committed a copy of the notification relating to the payment in question.

(d) If the magistrate finds that the amount specified in the notification exceeds the amount determined in terms of subsection (5) in respect of the offence in question, the magistrate must notify the local authority of the amount whereby the amount specified in the notification exceeds the amount so determined, and the local authority concerned must immediately refund the amount of such excess to the person concerned.

(3) Any money paid to a magistrate in terms of subsection (1) must be dealt with as if it had been paid as a fine for the offence in question.

(4) The Minister may from time to time by notice in the Gazette add any offence to the offences mentioned in Schedule 6, or remove therefrom any offence mentioned therein.

(5) The amount to be specified in a notification issued under this section as the amount of the fine that a court would probably impose in respect of an offence, must be determined from time to time for any particular area by the magistrate of the district or area in which that particular area is situated, and may differ from the admission of guilt fine determined under section 59(4)(a) for the offence in question.

368. Charges for giving conflicting statements

If a person has made a statement on oath, whether orally or in writing, and that person thereafter on another oath makes another statement, whether orally or in writing, that is in conflict with the first-mentioned statement, that person commits an offence and may, on a charge alleging that he or she made the two conflicting statements, and on proof of those two statements and without proof as to which of those statements was false, be convicted, in the absence of evidence that when that person made each statement he or she believed it to be true, of that offence and punished with the penalties that may lawfully be imposed for the offence of perjury.

369. Binding over of persons to keep the peace

(1) When a complaint on oath is made to a magistrate that a person is conducting himself or herself violently towards, or is threatening injury to the person or property of, another or that that person has used language or behaved in a manner towards another likely to provoke a breach of the peace or assault, the magistrate may, whether such conduct occurred or such language was used or such threat was made in a public or private place, order that person to appear before him or her and, if necessary, may cause that person to be arrested and brought before him or her, and thereupon the magistrate must enquire into and determine on such complaint and may place the parties or any witnesses thereat on oath and may order the person against whom the complaint is made to give for a period not exceeding six months recognizances, with or without sureties, in an amount not exceeding N$5 000 to keep the peace towards the complainant and refrain from doing or threatening injury to the complainant's person or property.

(2) The magistrate may, on any such enquiry, order the person against whom the complaint is made or the complainant to pay the costs of and incidental to the enquiry.

(3) If a person after having been ordered to give recognizances under this section refuses or fails to do so, the magistrate may order that person to be committed to prison for a period not exceeding six months unless such security is sooner found.

(4) If the conditions on which the recognizances were given are not observed by the person who gave the same, the magistrate may declare the recognizances to be forfeited to the State, and such declaration of forfeiture has the effect of a judgment in a civil action in the court of that magisterial district.

370. Conviction or acquittal no bar to civil action for damages

Subject to section 326(6)(b), a conviction or an acquittal in respect of an offence does not bar a civil action for damages at the instance of a person who has suffered injury, damage or loss in consequence of the commission of that offence.

371. Unreasonable delays in trials

(1) A court before which criminal proceedings are pending must investigate any delay in the completion of proceedings that appears to the court to be unreasonable and that could cause

substantial prejudice to the prosecution, the accused or his or her legal practitioner, the State or a witness.

(2) In considering the question whether any delay is unreasonable, the court must consider the following factors:

(a) The duration of the delay;

(b) the reasons advanced for the delay;

(c) whether any person is responsible for the delay;

(d) the effect of the delay on the personal circumstances of the accused and witnesses;

(e) the seriousness, extent or complexity of the charge or charges;

(f) actual or potential prejudice caused to the State or the defence by the delay, including a weakening of the quality of evidence, the possible death or disappearance or non-availability of witnesses, the loss of evidence, problems regarding the gathering of evidence and considerations of cost;

(g) the effect of the delay on the administration of justice;

(h) the adverse effect on the interests of the public or the victims in the event of the prosecution being stopped or discontinued;

(i) any other factor that in the opinion of the court ought to be taken into account.

(3) If the court finds that the completion of the proceedings is being delayed unreasonably, the court may issue such order as it considers fit to eliminate the delay and any prejudice arising from it or to prevent further delay or prejudice, including an order -

(a) refusing further postponement of the proceedings;

(b) granting a postponement subject to such conditions as the court may determine;

(c) where the accused has not yet pleaded to the charge, that the case be struck off the roll and the prosecution not be resumed or instituted anew without the written authority of the Prosecutor-General;

(d) where the accused has pleaded to the charge and the State or the defence is unable to proceed with the case or refuses to do so, that the proceedings be continued and disposed of as if the case for the prosecution, where the State is unable to proceed or refuses to do so, or the case for the defence, where the defence is unable to proceed or refuses to do so, had been closed;

(e) that -

(i) the State must pay the accused the wasted costs incurred by the accused as a result of the unreasonable delay caused by a person in the employment of the State;

(ii) the accused or his or her legal practitioner must pay the State the wasted costs incurred by the State as a result of the unreasonable delay caused by the accused or his or her legal practitioner;

(f) that the matter be referred to the appropriate authority for an administrative investigation and possible disciplinary action against any person responsible for the delay.

(4) (a) An order contemplated in subsection (3)(a), where the accused has pleaded to the charge, and an order contemplated in subsection (3)(d), may not be issued unless exceptional circumstances exist and all other attempts to speed up the process have failed and the defence or the State has given notice beforehand that it intends to apply for such an order.

(b) The Prosecutor-General and the accused may appeal against an order contemplated in subsection (3)(d), and section 337 and section 343, to the extent that it relates to an

application or appeal by an accused under that section, apply with the necessary changes in respect of a case in which the Prosecutor-General appeals and, in the case of an appeal by the accused, sections 335 and 343 apply with the necessary changes.

(5) Where the court has made an order contemplated in subsection (3)(e) -

(a) the costs must be taxed according to the scale the court considers fit; and

(b) the order has the effect of a civil judgment of that court.

(6) If, on notice of motion, it appears to the High Court that the institution or continuance of criminal proceedings is being delayed unreasonably in a magistrate's court that is seized with a case but does not have jurisdiction to try the case, the High Court may, with regard to such proceedings, institute the investigation contemplated in subsections (1) and (2) and issue any order contemplated in subsection (3) to the extent that it is applicable.

372. Repeal and amendment of laws, and savings

(1) Subject to subsection (2), the laws mentioned in Schedule 7 are repealed or amended to the extent indicated in the third column thereof.

(2) Any regulation, rule, notice, approval, authority, return, certificate, document, direction or appointment made, issued, given or granted or any other thing done under a provision of any law repealed by subsection (1), and which could have been made, issued, given, granted or done under a provision of this Act, is, subject to subsection (3), deemed to have been made, issued, given, granted or done under the corresponding provision of this Act.

(3) Notwithstanding the repeal of any law by subsection (1), criminal proceedings that commenced under any such law before the date of commencement of this Act in any superior court or magistrate's court and in which evidence had before such date of commencement been led in respect of the relevant charge, must, if such proceedings have at such date of commencement not been concluded, be continued and concluded in every respect under such law as if it had not been repealed.

373. Short title and commencement

(1) This Act is called the Criminal Procedure Act, 2004, and comes into operation on a date determined by the Minister by notice in the Gazette.

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

Schedule 1

(Sections 38, 42, 44, 63 and 112 and Schedules 3, 4 and 5)

Treason.

Sedition.

Public violence.

Murder.

Culpable homicide.

Rape, whether under a statute or at common law.

Indecent assault.

Sodomy.

Bestiality.

Robbery.

Assault, when a dangerous wound is inflicted.

Kidnapping.

Childstealing.

Arson.

Malicious injury to property.

Breaking or entering any premises, whether under a statute or at common law, with intent to commit an offence.

Theft, whether under a statute or at common law.

Receiving stolen property knowing it to have been stolen.

Fraud.

Forgery or uttering a forged document knowing it to have been forged.

An offence relating to the illicit dealing in or smuggling of ammunition, firearms, explosives or armament.

An offence relating to the smuggling of migrants or trafficking in persons.

An offence relating to money laundering.

An offence relating to the coinage.

Any offence, except the offence of escaping from lawful custody in circumstances other than the circumstances referred to immediately hereunder, 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 an 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 an offence referred to in this Schedule.

Schedule 2

(Section 35(1)(b))

An offence under any law relating to the illicit possession, conveyance or supply of intoxicating liquor or dependence-producing drugs or substances.

An offence under any law relating to the illicit dealing in or possession of precious metals or precious stones.

An offence under any law relating to the illicit dealing in or smuggling of ammunition, firearms, explosives or armament.

An offence under any law relating to the smuggling of migrants or trafficking in persons. Breaking or entering any premises, whether under a statute or at common law, with intent to commit an offence.

Theft, whether under a statute or at common law.

Schedule 3

(Sections 61, 62(1), 63(12) and 78(1) and Schedule 4)

Treason.

Sedition.

Public violence.

Murder.

Rape, whether under a statute or at common law.

Indecent assault on a child under the age of 16 years.

Robbery.

Assault, when a dangerous wound is inflicted.

Kidnapping.

Childstealing.

Arson.

Breaking or entering any premises, whether under a statute or at common law, with intent to commit an offence.

Housebreaking, whether under a statute or at common law, with intent to commit an offence.

Theft, whether under a statute or at common law, or receiving stolen property knowing it to have been stolen, in each case -

(a) where, in circumstances other than those contemplated in paragraph (b), the amount or value involved in the offence exceeds N$10 000; or

(b) where the property involved in the offence is -

(i) stock as defined in section 1 of the Stock Theft Act, 1990 (Act No. 12 of 1990), of a value in excess of N$2 000;

(ii) a motor vehicle as defined in section 1 of the Motor Vehicle Theft Act, 1999 (Act No. 12 of 1999); or

(iii) a firearm.

An offence relating to exchange control, corruption, extortion, fraud, forgery or uttering, in each case where the amount or value involved in the offence exceeds N$10 000.

An offence under any law relating to the illicit dealing in or possession of precious metals or precious stones, in each case where the value involved in the offence exceeds N$5 000.

An offence under any law relating to the illicit -

(a) possession of -

(i) dagga exceeding 115 grams; or

(ii) any other dependence-producing drugs or substances; or

(b) conveyance or supply of dependence-producing drugs or substances.

An offence relating to -

(a) the dealing in or smuggling of ammunition, firearms, explosives or armament; or

(b) the possession of an automatic or semi-automatic firearm, explosives or armament.

An offence in contravention of section 33 of the Arms and Ammunition Act, 1996 (Act No. 7 of 1996), on account of being in possession of more than 1 000 rounds of ammunition intended for firing in an arm contemplated in section 38(2)(b)(i) of that Act.

An offence relating to the smuggling of migrants or trafficking in persons.

An offence relating to money laundering.

An offence relating to the coinage.

An offence under the Controlled Game Products Proclamation, 1980 (Proclamation No. AG. 42 of 1980), where the value involved in the offence exceeds N$5 000.

[The Controlled Game Products Proclamation 42 of 1980 has been replaced by the Controlled Wildlife Products and Trade Act 9 of 2008.]

An offence under the Nature Conservation Ordinance, 1975 (Ordinance No. 4 of 1975), where the value involved in the offence exceeds N$5 000.

An offence in contravention of section 52(1) or (2) of the Marine Resources Act, 2000 (Act No. 27 of 2000), where the value involved in the offence exceeds N$5 000.

An offence in contravention of section 1(a) to (f), inclusive, of the Witchcraft Suppression Proclamation, 1933 (Proclamation No. 27 of 1933).

Escaping from lawful custody, where the person concerned is in such custody in respect of an offence referred to in Schedule 1 or 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 an offence referred to in this Schedule.

Schedule 4

(Sections 61 and 63(12))

Murder, when -

(a) it was planned or premeditated;

(b) the victim was -

  (i) a law enforcement officer performing his or her functions as such, whether on duty or not, or a law enforcement officer who was killed by virtue of his or her holding such a position; or

  (ii) a person who has given or was likely to give material evidence with reference to an offence referred to in Schedule 1;

(c) the death of the victim was caused by the accused in committing or attempting to commit or after having committed or having attempted to commit one of the following offences, namely -

  (i) rape, whether under a statute or at common law; or

  (ii) robbery, in any of the circumstances contemplated in this Schedule; or

(d) the offence was committed by a person, group of persons or syndicate acting in the execution or furtherance of a common purpose or conspiracy.

Rape, whether under a statute or at common law -

(a) when committed -

  (i) in circumstances where the victim was raped more than once, whether by the accused or by any co-perpetrator or accomplice;

  (ii) by more than one person, where those persons acted in the execution or furtherance of a common purpose or conspiracy;

  (iii) by a person who is charged with having committed two or more offences of rape, whether under a statute or at common law; or

  (iv) by a person, knowing that he or she has the acquired immune deficiency syndrome or the human immunodeficiency virus;

(b) where the victim -

(i) is a child -

(aa) under the age of 16 years; or

(bb) of or over the age of 16 years, but under the age of 18 years, and the accused is the victim's parent, guardian or caretaker or is otherwise in a position of trust or authority over the victim;

(ii) is, in circumstances other than those contemplated in subparagraph (i), due to age rendered particularly vulnerable;

(iii) is a physically disabled person who, due to physical disability, is rendered particularly vulnerable; or

(iv) is a mentally ill person as contemplated in section 1 of the Mental Health Act, 1973 (Act No. 18 of 1973); or

(c) involving -

(i) the use or wielding of a firearm or any other weapon; or

(ii) the infliction of grievous bodily or mental harm.

Robbery -

(a) involving -

(i) the use or wielding of a firearm or any other dangerous weapon; or

(ii) the infliction of grievous bodily harm,

by the accused or any of the co-perpetrators or participants on the occasion when the offence is committed, whether before or during or after the commission of the offence; or

(b) involving the taking of a motor vehicle.

Indecent assault on a child under the age of 16 years, involving the infliction of grievous bodily harm.

An offence referred to in Schedule 3 -

(a) and the accused has previously been convicted of an offence referred to in Schedule 3 or in this Schedule; or

(b) that was allegedly committed whilst the accused was released on bail in respect of an offence referred to in Schedule 3 or in this Schedule.

Schedule 5

(Section 309(3) and (4))

Part 1 – Treason, when committed in circumstances that caused death or grievous bodily harm to another person or serious damage to property.

Murder, when -

(a) it was planned or premeditated;

(b) the victim was -

(i) a law enforcement officer performing his or her functions as such, whether on duty or not, or a law enforcement officer who was killed by virtue of his or her holding such a position; or

(ii) a person who has given or was likely to give material evidence with reference to an offence referred to in Schedule 1;

(c) the death of the victim was caused by the accused in committing or attempting to commit or after having committed or having attempted to commit one of the following offences, namely -

(i) rape, whether under a statute or at common law; or

(ii) robbery, in any of the circumstances contemplated in this Part; or

(d) the offence was committed by a person, group of persons or syndicate acting in the execution or furtherance of a common purpose or conspiracy.

Rape, other than rape under a statute -

(a) when committed -

(i) in circumstances where the victim was raped more than once, whether by the accused or by any co-perpetrator or accomplice;

(ii) by more than one person, where those persons acted in the execution or furtherance of a common purpose or conspiracy;

(iii) by a person who has been convicted of two or more offences of rape, whether under a statute or at common law, but has not yet been sentenced in respect of those convictions; or

(iv) by a person, knowing that he or she has the acquired immune deficiency syndrome or the human immunodeficiency virus;

(b) where the victim -

(i) is a child -

(aa) under the age of 16 years; or

(bb) of or over the age of 16 years, but under the age of 18 years, and the accused is the victim's parent, guardian or caretaker or is otherwise in a position of trust or authority over the victim;

(ii) is, in circumstances other than those contemplated in subparagraph (i), due to age rendered particularly vulnerable;

(iii) is a physically disabled person who, due to physical disability, is rendered particularly vulnerable; or

(iv) is a mentally ill person as contemplated in section 1 of the Mental Health Act, 1973 (Act No. 18 of 1973); or

(c) involving -

(i) the use or wielding of a firearm or any other weapon; or

(ii) the infliction of grievous bodily or mental harm.

Robbery –

(a) involving -

(i) the use or wielding of a firearm or any other dangerous weapon; or

(ii) the infliction of grievous bodily harm,

by the accused or any of the co-perpetrators or participants on the occasion when the offence is committed, whether before or during or after the commission of the offence; or

(b) involving the taking of a motor vehicle.

Part II – Robbery involving only threats of violence without -

(a) the use or wielding or possession of a firearm or any other dangerous weapon; or

(b) the taking of a motor vehicle.

An offence relating to -

(a) the dealing in or smuggling of ammunition, firearms, explosives or armament; or

(b) the possession of an automatic or semi-automatic firearm, explosives or armament.

An offence relating to exchange control, corruption, extortion, fraud, forgery, uttering or theft, including the counterfeiting of any current coin or forging of a banknote and the uttering, tendering or acceptance of any counterfeit coin or forged banknote -

(a) involving amounts of more than N$500 000;

(b) involving amounts of more than N$100 000, if it is proved that the offence was committed by a person, group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy; or

(c) if it is proved that the offence was committed by a law enforcement officer -

  (i) involving amounts of more than N$10 000; or

  (ii) as a member of a group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy.

Theft of -

(a) telecommunications line as defined in section 1 of the Posts and Telecommunications Act, 1992 (Act No. 19 of 1992), installed by a telecommunications company as likewise defined, or receiving stolen telecommunications line so installed knowing it to have been stolen;

(b) medicine as defined in section 1(1) of the Medicines and Related Substances Control Act, 2003 (Act No. 13 of 2003), or medical equipment or material, belonging to the State or a State-owned enterprise.

Part III – Indecent assault on a child under the age of 16 years, involving the infliction of bodily harm.

Assault with intent to do grievous bodily harm on a child under the age of 16 years.

An offence in contravention of section 33 of the Arms and Ammunition Act, 1996 (Act No. 7 of 1996), on account of being in possession of more than 1 000 rounds of ammunition intended for firing in an arm contemplated in section 38(2)(b)(i) of that Act.

Part IV – Arson.

Theft or fraud involving money or other property belonging to the State or a State-owned enterprise, committed in circumstances other than those contemplated in Part II, if it is proved that any such offence was committed by a person who, at the time of the commission of the offence, was in the employment of the State or a State-owned enterprise.

Any offence referred to in Schedule 1, other than -

(a) an offence otherwise referred to in this Part;

(b) an offence referred to in Part 1, II or III of this Schedule;

(c) an offence referred to in Schedule 1, not being an offence contemplated in paragraphs (a) and (b), in respect of which this Act or any other law prescribes a minimum punishment,

if the accused, at the time of the commission of that offence, had with him or her a firearm that was intended for use in the commission of the offence.

Schedule 6

(Section 367(1) and (4))

A contravention of any bye-law or regulation made by or for any council, board or committee established by or under any law for the management of the affairs of any city, town, borough, village or other similar community.

Any offence committed by -

(a) driving a vehicle at a speed exceeding a prescribed limit;

(b) driving a vehicle that does not bear prescribed lights, or any prescribed means of identification;

(c) leaving or stopping a vehicle at a place where it may not be left or stopped, or leaving a vehicle in a condition in which it may not be left;

(d) driving a vehicle at a place where and at a time when it may not be driven;

(e) driving a vehicle that is defective or any part whereof is not properly adjusted, or causing any undue noise by means of a motor vehicle;

(f) owning or driving a vehicle for which no valid licence is held;

(g) driving a motor vehicle without holding a licence to drive it.

Schedule 7

Laws repealed or amended (Section 372(1))

No. and year of law	Short title	Extent of repeal or amendment
Ordinance No. 34 of 1963	Criminal Procedure Ordinance, 1963	The repeal of sections 300(3) and 370
Act No. 18 of 1973	Mental Health Act, 1973	1. The amendment of section 1 - (a) by the deletion of the definition of "President's patient"; (b) by the insertion after the definition of "Secretary" of the following definition:"'State patient' means a person detained by order of any court of law or other competent authority at any place pending the decision of a judge in chambers;"; and (c) by the addition of the following subsection, the excisting section becoming subsection (1): "(2) Any reference in any other law or document to the expression 'President's patient' or 'State President's patient' or 'State President's decision patient' shall be construed as a reference to the expression 'State patient'.". [[The word "existing" in paragraph (c) is misspelt in the Government Gazette, as reproduced above.]] 2. The substitution for section 17 of the following section: "Official curator ad litem 17. The Prosecutor-General shall be the official curator ad litem of - (a) any patient detained under a reception order issued by a magistrate or further detained

under the order of a judge under section 19;

(b) a State patient;

(c) a patient referred to in paragraph (a) or (b) who has been conditionally discharged.".

3. The substitution for section 29 of the following section:

"Discharge of State patient or termination of detention as such

29. (1) (a) Where any person is, with reference to a charge of murder or culpable homicide or rape (whether under a statute or at common law) or any other charge involving serious violence, detained as a State patient in terms of section 84 or 85 of the Criminal Procedure Act, 2004, a judge in chambers may at any time after the order of detention, on written application being made to him or her -

(i) call for such further information as he or she may consider necessary and may summon any psychiatrist to his or her assistance;

(ii) if he or she is of the opinion that it is desirable to do so, appoint of his or her own accord or at the request of any interested person, on good cause shown, a curator ad litem for the State patient;

(iii) order that the State patient -(aa) be discharged either absolutely or conditionally;(bb) no longer be treated as such;

(cc) be further detained as a State patient; or

(dd) be further detained as a patient under Chapter 3;

(iv) make such other order under section 19 as he or she may think fit; or

(v) reject the application if a similar application had been rejected by a judge in chambers less than 12 months before the

date of the aforementioned application, without making an order in terms of subparagraph (iii) or (iv) or make any order he or she thinks fit.

(b) An application referred to in paragraph (a) may be made by -

(i) the official curator ad litem;

(ii) the superintendent of the institution concerned, the person in charge of the place where the State patient is being detained or the medical practitioner in charge of that patient;

(iii) the State patient;

(iv) a relative of the State patient; or

(v) any other person or body on behalf of the State patient.

(c)

(i) Such -

(aa) application referred to in paragraph (a);

(bb) recommendation referred to in subparagraph (ii) of paragraph (d); or

(cc) reports referred to in paragraphs (d) and (f),

shall be furnished to the registrar of the High Court.

(ii) The registrar of the High Court shall forthwith submit -

(aa) such application, reports and recommendations to a judge in chambers; and

(bb) a copy of the application to the official curator ad litem, if the application is made by someone other than the official curator ad litem.

(d) The official curator ad litem shall upon receipt of an application from the registrar of the High Court as soon as practicable -

(i) obtain reports on the State patient concerned by -

(aa) the superintendent of the institution concerned, the person in charge of the place where the State patient is being detained or the medical practitioner in charge of that patient; and

(bb) two medical practitioners,

and either that superintendent or one of those two medical practitioners shall be a psychiatrist, provided that he or she may obtain a report by a registered clinical psychologist in addition to the aforementioned reports;

(ii) compile his or her own report and recommendation regarding the application, provided that if it appears to the official curator ad litem upon the receipt of such application that a similar application in respect of the State patient concerned had been rejected by a judge in chambers less than 12 months before the date of the aforementioned application, he or she may, instead of obtaining the reports referred to in subparagraph (i), make a recommendation that the application be rejected; and

(iii) furnish such reports and recommendation to the registrar of the High Court for submission to a judge in chambers.

(e) The reports referred to in subparagraph (i) of paragraph (d) and subparagraph (i) of paragraph (f) shall contain a detailed history of the State patient and information as to, and a prognosis of, his or her mental condition.

(f) The curator ad litem appointed under subparagraph (ii) of paragraph (a), shall -

(i) obtain a report as contemplated in paragraph (e) by a psychiatrist, but may also obtain a report by a registered clinical

psychologist in addition to the report by the psychiatrist;

(ii) adduce any available evidence relevant to the application; and

(iii) perform such other duties as the judge in chambers instructs.

(g) A curator ad litem appointed under subparagraph (ii) of paragraph (a) shall be entitled to such remuneration as the Minister may from time to time determine in consultation with the Minister of Finance.

(2) Notwithstanding anything to the contrary contained in section 84 or 85 of the Criminal Procedure Act, 2004, the Minister may, after obtaining a report from the hospital board concerned and a report from the official curator ad litem, either absolutely or conditionally order the discharge of a State patient, other than a State patient detained as such in respect of a charge referred to in subsection (1)(a), or order that he or she shall not longer be treated as such.

(3) It shall be the function of the official curator ad litem to decide for the purposes of subsections (1)(a) and (2) whether any charge with reference to which a person is detained as a State patient, involves or does not involve serious violence.

(4) On receipt of the order of the Minister under subsection (2) that a State patient shall no longer be treated as such, the superintendent of the institution or the person in charge of the place in which the patient is being detained shall forthwith transmit a report as to the condition of the patient to the official curator ad litem, who shall without delay transmit the report, together with such other documents as may be deemed necessary, to the registrar of the High Court for submission to a judge in chambers.

		(5) The judge may thereupon order the further detention of the person concerned as a patient under Chapter 3, or may make such other order under section 19 as he or she may think fit.”. 4. The substitution for the expression “President’s patient” or “State President’s decision patient”, wherever it occurs, of the expression “State patient”.
Act No. 51 of 1977	Criminal Procedure Act, 1977	The repeal of the whole
Act No. 79 of 1978	Criminal Procedure Matters Amendment Act, 1978	The repeal of the whole
Act No. 56 of 1979	Criminal Procedure Amendment Act, 1979	The repeal of the whole
Act No. 15 of 1981	Criminal Procedure Amendment Act, 1981	The repeal of the whole
Act No. 29 of 1985	Appeals Amendment Act, 1985	The repeal of sections 6 to 11, inclusive
Act No. 31 of 1985	Criminal Procedure Matters Amendment Act, 1985	The repeal of the whole
Act No. 5 of 1991	Criminal Procedure Amendment Act, 1991	The repeal of the whole
Act No. 26 of 1993	Criminal Procedure Amendment Act, 1993	The repeal of the whole
Act No. 8 of 2000	Combating of Rape Act, 2000	The repeal of sections 11 to 18, inclusive
Act No. 9 of 2000	International Co-operation in Criminal Matters Act, 2000	The amendment of Schedule 2 by the deletion of the entries relating to the Criminal Procedure Act, 1977
Act No. 10 of 2001	Appeal Laws Amendment Act, 2001	The repeal of sections 4 and 5

Act No. 4 of 2003	Combating of Domestic Violence Act, 2003	The amendment of the Second Schedule by the deletion of the entries relating to the Criminal Procedure Act,1977
Act No. 24 of 2003	Criminal Procedure Amendment Act, 2003	The repeal of the whole

Schedule 8

Victim Impact Statement (Section 39(3)(a))

(Annex additional pages with a reference to the paragraph in question if space in this form is insufficient. Items not applicable should be answered 'not applicable'.)

1. Reference number .....

2. Offender's name .....

3. Charge(s) .....

4. Victim (separate forms must be completed in respect of each victim) .....

5. Additional victim(s).....Yes/No.....Number of additional victim(s).....

   (a) Name of direct victim .....

   (b) Address of direct victim .....

   (c) If direct victim is deceased:

      (i) Names of dependants(s) .....

      (ii) Address(es) of dependant(s) .....

   (d) If indirect victim, such as third party who intervened and suffered harm:

      (i) Name(s) of indirect victim(s) .....

      (ii) Address(es) of indirect victim(s) .....

7. Age.....

8. Occupation .....

9. Is compensation sought in accordance with section 326 of the Criminal Procedure Act, 2004? Yes/No

10. Injury suffered:

    (a) Full details of injuries (including physical, psychological and emotional);

    brief details of treatment; time spent in hospital; specialist treatment; has treatment ended; residual effects (annex summary of injuries where appropriate) .....

    (b) Where doctor(s) supplied medical report(s): Name, address and contact telephone number of doctor(s) .....

    (c) Does victim consent to access to medical and other reports? Yes/No

(d) Details of estimated damages suffered for physical injury, pain and suffering, shock, loss of earnings and, in the case of victims who are dependants, loss of maintenance:

(i) Pain, suffering, shock .....

(ii) Medical expenses to date .....

(iii) Prospective medical expenses .....

(iv) Loss of earnings to date:

Time away from work .....

Prospective loss of earnings .....

(v) In the case of dependants:

Loss of maintenance to date .....

Prospective loss of maintenance .....

(Annex all available medical and other reports and, where necessary, further particulars of method of calculation of damages)

11. Other expenses:

Damage to clothes, spectacles, tools of trade, etc. Employment of persons because of injury, counseling expenses, etc. Receipts/valuations to be specified in annex

.....

12. Property stolen or damaged:

(a) Full details of property stolen or obtained by fraud, and not recovered, including the replacement value. Receipts/valuations to be annexed whether or not insurance has paid out, excess details, etc.....

(b) Full details of property damaged or stolen or obtained by fraud and recovered in damaged condition, including estimate of value and cost of replacement. Receipts/valuations to be annexed .....

13. Any compensation received from State or State assisted institutions, medical aid funds or insurance. Specify the source and amount .....

(a) Details of any third party interested in the property (e.g. insurance company, television hire company, finance company, etc.) .....

(b) Address of interested party.....

15. Details of restitution or damages offered/not offered by accused or family of accused .....

16. Details of accused's ability to pay compensation (e.g. employment status, assets, insurance policies, etc., if known .....

17. Other comments or concerns, including whether or not victim's life has changed and, if so, to what extent, if not expressed or apparent from answers to previous questions .....

I declare that the particulars contained in this victim impact statement are correct.

.....

Signature or mark of victim or other competent person

.....

Date

Oath/Affirmation

1. I certify that before administering the prescribed oath/affirmation I asked the deponent the following questions and wrote down his/her answers in his/her presence:

   (a) Do you know and understand the contents of the declaration?

   Answer .....

   (b) Do you have any objection to taking the prescribed oath?

   Answer .....

   (c) Do you consider the prescribed oath to be binding on your conscience?

   Answer.....

2. I certify that the deponent has acknowledged that he/she knows and understands the contents of this declaration that was sworn to/affirmed before me and the deponent's signature/mark was affixed thereto in my presence.

   .....

   Commissioner of Oaths

   Full first names and surname .....

   Area .....

   Designation (if appointment is held ex officio) .....

   Street address of institution .....

   Date ..... Place .....

Other relevant particulars

Name of member of police, legal practitioner or other person who prepared the victim impact statement or assisted in preparing it (if any) .....

Designation of that person .....

Signature of that person .....

Name and rank of investigating officer.....

Police station .....

Name of interpreter (if any).....

Designation of interpreter.....