



**REPUBLIC OF NAMIBIA
MINISTRY OF JUSTICE**

MINISTERIAL STATEMENT

ON THE

CRIMINAL PROCEDURE AMENDMENT BILL, 2020

IN THE NATIONAL ASSEMBLY

BY

THE MINISTER OF JUSTICE

MS. YVONNE DAUSAB, MP

18 February 2021

– To be checked against delivery –

Honourable Speaker,
Honourable Members,
Members of the public,

1. I rise this afternoon to table the Criminal Procedure Amendment Bill, 2020.
2. This Bill will amend the Criminal Procedure Act, 1977 (Act No. 51 of 1977) in order to enable a prosecutor and an accused person to enter into a plea and sentence agreement. Before I go into the substantive detail of the proposed Bill, I would like to give this August House some background information on the developments leading up to the tabling of this Bill today.

A. Introduction:

3. This Bill was developed by the Ministry of Justice for the past four years when discussions around plea and sentence agreements started. During this period, Namibia was facing an upsurge in various organized crime operations, including wildlife crime, money laundering and other crimes of a transnational nature. Organized crime syndicates operate across national borders and because kingpins and ring leaders of such syndicates are almost always not present in the countries in which they operate, they make use of local people to carry out their operations, in a similar way to the offence of poaching.
4. Very often, the perpetrators who are caught by law enforcement agencies are not the ones in charge of the syndicates, but they work for those who are in charge. This leads to convictions of the perpetrators but not the kingpins, who continue with their operations unabated as they merely find other runners. We take cognisance that the challenges of unemployment and poverty contributes significantly to our citizens resorting to criminal behaviour and grabbing opportunities to make money in whatever way they can.

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5. This is the reason why we concluded that incorporating a plea and sentencing agreement framework in the Criminal Procedure Act, 1977 will aid us in prosecuting those responsible for organized crime and enable us to also deal with such cases in a speedy and efficient manner in a way that will help our courts to reduce the backlog of cases that are currently clogging our court rolls. We need court rolls to be cleared in order for us to shift our focus to cases where a victim centred approach is needed, like cases involving sexual and gender-based violence, domestic violence and failure to pay maintenance. We also need to clear criminal court rolls in order for us to avail more of our resources to set up Small Claims Courts for small civil claims across the country and to enable Regional Courts to deal with divorce cases.
6. Through plea and sentence agreements, we will be able to increase our focus on rehabilitation of sentenced offenders. The imposition of community service sentencing options will be revisited. This has the potential to promote the re-integration of the perpetrator into society and give them an opportunity to restore the harm caused. These are but some of the much needed initiatives that are imminent.
7. In consultation with the Prosecutor-General of Namibia and other key role players responsible for the implementation of this proposed legislative reform, the Ministry of Justice was able to finalize the Bill and have it certified by the Attorney-General. During one of these consultations in September 2018, the draft Bill was presented to stakeholders. At the time discussions centred around the issue of legal representation, types of crimes to be considered for such agreements and the successes and challenges experienced by other comparable jurisdictions in the implementation of this type of legislation.

8. The proposed section 105A(4) of the Criminal Procedure Amendment Bill requires a plea and sentence agreement to be in writing and to be signed by the prosecutor and the accused or his/her legal representative. I must emphasize here that the sentencing of the accused remains at the discretion of the presiding officer as the court does not participate in the negotiations of a plea and sentencing agreement.

B. Discussion:

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9. I will now elaborate on the substantive matters proposed by this Amendment Bill:
10. Firstly, the proposed section 105A (1) provides that:
“A prosecutor authorised thereto in writing by the Prosecutor-General and an accused who is legally represented may negotiate and enter, before the accused pleads to the charge brought against him or her, into an agreement...”.
11. I submit to this August House that legal representation in criminal matters is a fundamental right. As such, the right is entrenched within the Namibian Constitution and courts has strictly interpreted the right. The Bill makes provision for plea and sentence negotiations and agreements to only be entered into between the prosecution and accused persons who are legally represented, whether by private legal practitioners or legal representation provided at the expense of the State through legal aid.
12. Our view is that lay, unrepresented accused persons would likely be disadvantaged if they were to engage in plea and sentence negotiations without the services of a legally qualified person. We are particularly concerned with the likely inequality that may arise between an unrepresented accused who is unlikely to be well-versed in the law, as compared to a trained and experienced prosecutor.

13. This requirement of legal representation thus responds to the fair trial protections such as the right against self-incrimination and the presumption of innocence, as reflected in Article 12 of the Namibian Constitution. We have thus been scrupulous to include provisions, such as that of legal representation, to ensure that the rights of the accused are safe-guarded during the process of plea and sentence negotiations and agreements, particularly in light of what is known as the “innocence problem”, whereby a factually innocent accused might be unduly induced to plead guilty so as to suffer a lighter punishment and avoid an often long and arduous criminal trial, a process that can be both socially and financially ruinous.
14. Secondly, the proposed section 105A (19) of the Bill provides that:
“The Prosecutor-General shall issue, in consultation with the Minister and the Attorney-General, directives regarding all matters which are reasonably necessary or expedient to be issued in order to achieve the objects of this section and any directive so issued shall be observed in the application of this section”.
15. Simply stated, this means that the Bill does not restrict the category of offences that would be eligible for plea and sentence negotiations and agreements. However, the Prosecutor General may issue directives under the Bill and utilise such directives to potentially specify those offences that would be eligible for plea and sentence negotiations and agreements. The State, represented by the Prosecutor-General in criminal cases, is *dominus litis* – meaning, the owner of the case and the discretion rests with that authority on which cases to prosecute and which ones to consider for plea and sentence agreements.
16. The category of offences is something that will be considered very carefully in order not to negate the objectives of this endeavour. Caution will be applied in order to ensure that the criminal justice system does not become a gateway for escaping harsh sentences in the case of conviction of serious offences.
17. Victims will be an important role player and active participant in this process and will be consulted throughout the process to ensure that we adequately consider the

views and opinions of victims, especially in cases involving sexual and gender-based violence and domestic violence.

18. In the third place, the proposed section 3 of the Bill provides that:
“Section 105A of the principal Act as inserted by this Act also applies in respect of offences that have been committed before the commencement of this Act, and an accused who has not pleaded at the time when this Act comes into operation may enter into a plea and sentence agreement as contemplated in that section”.
19. The Bill provides that plea and sentence negotiations and agreements may be entered into before the accused pleads to the charge brought against him. Therefore, if any accused has not pleaded at the time at which this Bill becomes law and enters into force, it would be possible for such an accused to negotiate the plea and sentence with the prosecution, so as conclude an agreement.

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20. While the Bill has been drafted with respect to the Namibian Constitution and the domestic criminal justice context, it has also drawn from learnings in various jurisdictions. Principally, the Bill is modelled on the South African Criminal Procedure Amendment Act, 2001 (Act No. 61 of 2001), which law also introduced plea and sentence agreements amendments to the South African Criminal Procedure Act, 1977 (Act No. 51 of 1977). As we are aware, the South African experience is valuable as the Namibian criminal procedure framework is similar to that of South Africa. We have also learnt positive—and negative —lessons from jurisdictions that apply various models related to plea bargaining including India, Israel and the United States of America, in addition to South Africa.

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21. Reforms in the criminal justice system must take place in an ongoing fashion as the world evolves and new developments come to light every day. The criminal justice system is under pressure to respond speedy and efficiently to the demands of the fast-evolving world we find ourselves in. A world where crime knows no boundaries, a world where the most vulnerable members of our societies have become even more vulnerable. We need to shift our focus to a responsive preventative strategy and we need to come up with a National Crime Prevention Strategy as a matter of urgency.

22. The Ministry of Justice (which has the Office of the Prosecutor-General under its tutelage), in collaboration with the Judiciary and other role players, is awake and sensitive to the needs that exist currently and we are working without cease to address the loopholes in our system and to create a criminal justice system that is compatible with the needs of our nation.

I thank you and so submit.