

CHAPTER 13

NAMIBIA





CHAPTER 13: NAMIBIA

NAMIBIA KEY INDICATORS
<p style="text-align: center;">2023 WORLD PRESS FREEDOM RANKING: 22nd globally; 1st out of 48 African countries</p> <p style="text-align: center;">“Freedom of the press is firmly anchored in Namibia... The political and legislative environment is conducive to the free exercise of journalism.”</p>
MALABO CONVENTION: Party
BUDAPEST CONVENTION: NOT signatory or party
<p style="text-align: center;">CONSTITUTIONAL PROTECTION FOR FREEDOM OF EXPRESSION: Namibia's 1990 Constitution with amendments through 2014</p> <p>ARTICLE 21 FUNDAMENTAL FREEDOMS</p> <p>(1) All persons shall have the right to:</p> <p style="padding-left: 20px;">(a) freedom of speech and expression, which shall include freedom of the press and other media;</p> <p>[...]</p> <p>(2) The fundamental freedoms referred to in Sub-Article (1) hereof shall be exercised subject to the law of Namibia, in so far as such law imposes reasonable restrictions on the exercise of the rights and freedoms conferred by the said Sub-Article, which are necessary in a democratic society and are required in the interests of the sovereignty and integrity of Namibia, national security, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.</p>
<p>KEY LAWS:</p> <ul style="list-style-type: none"> • Draft Computer Security and Cybercrime Bill, 2019 • Communications Act 8 of 2009
CRIMINAL DEFAMATION: Technically in force under common law, but not used in practice
DATA PROTECTION: Namibia has a draft data protection law that is still under discussion. ¹
ACCESS TO INFORMATION: Namibia has passed an access to information law which had not been brought into force as of mid-2023. ²

¹ [Namibia Draft Data Protection Bill](#), accessed 21 June 2023.

² [Access to Information Act 8 of 2022](#).



13.1 CONTEXT

The **Newspaper and Imprint Registration Act 63 of 1971**, a South African law which is still in force in Namibia, prohibits the printing and publishing of any newspaper that is not registered under the Act³ – with “newspaper” being defined as “a periodical publication published at intervals not exceeding one month and consisting wholly or for the greater part of political or other news or of articles relating thereto or to other current topics, with or without advertisements, and with or without illustrations, but does not include any publication not intended for public sale or public dissemination”.⁴ The law is still applicable, but there have not been any new print newspapers in Namibia since about 2009; all new newspapers in recent years are digital ones which are not required to register.⁵

The **Namibia Film Commission Act 6 of 2000** has never been brought into force, although the Commission operates as though the law is active. This Act requires anyone who is not a Namibian citizen or permanent resident, or a company registered in Namibia, to obtain the written authorization of the Commission in order to carry out any film production in Namibia unless the Commission has granted an exemption to this requirement.⁶

The communications sector in Namibia (including telecommunications) is generally regulated by the **Communications Act 8 of 2009**. The Act establishes the Communications Regulatory Authority of Namibia (CRAN) as the regulatory body for the communications industry, which includes electronic communications and the postal service.⁷ The Board of CRAN is appointed by the relevant minister,⁸ and the minister has explicit authority to issue policy guidelines to CRAN which it must follow in the exercise of its powers.⁹ CRAN is responsible for issuing broadcasting licences, telecommunications licences and postal service licences. The Act envisages the establishment of an “.na Domain Name Association” to administer internet domains using this space, but this portion of the Act has not yet been brought into force.¹⁰ Although the Act refers to CRAN as an “independent regulatory authority”,¹¹ the provisions under which it operates do not satisfy the requirements for independence.¹²

³ [Newspaper and Imprint Registration Act 63 of 1971](#), section 2. Prior to Namibian independence, in 1985, *The Namibian* newspaper was asked to provide a hefty deposit as a decision of registration pursuant to a Cabinet decision. This requirement was invalidated by the High Court of South West Africa (Namibia) in the case *The Free Press of Namibia (Pty) Ltd. v. Cabinet of the Interim Government of South West Africa* 1987 (1) SA 614 (SWA).

⁴ [Newspaper and Imprint Registration Act 63 of 1971](#), section 1.

⁵ Information from MISA Namibia, 23 June 2023.

⁶ [Namibia Film Commission Act 6 of 2000](#), sections 20-21.

⁷ [Communications Act 8 of 2009](#), sections 4-5 read with definition of “communications” in section 1.

⁸ *Id.*, sections 8-9. “The process of appointing CRAN board members is ostensibly transparent, with the Ministry of Public Enterprises advertising calls for applications for all appointments on various boards. These applicants are interviewed by a panel drawn from the government and civil society. A recommended shortlist is drawn up from which the Ministry of ICT makes the final decision.[...] However, members of the CRAN board of directors are generally seen as political appointees. While none of them hold positions in the ruling party, SWAPO, they are known to be aligned with the party’s governing faction.” [African Media Barometer Namibia 2022](#), Media Institute of Southern Africa (MISA) and Friedrich-Ebert-Stiftung (FES), pages 46-47.

⁹ [Communications Act 8 of 2009](#), section 7.

¹⁰ *Id.*, Chapter IX.

¹¹ *Id.*, section 2(b).

¹² Justine Limpitlaw, [Media Law Handbook for Southern Africa – Volume 2](#), “Chapter 11: Namibia”, Konrad Adenauer Stiftung, 2021, pages 162-163.



There are several state media outlets that are established and governed by legislation:

- The government newspaper, *New Era*, is established by the **New Era Publication Corporation Act 1 of 1992**. The object of this corporation is to produce a newspaper that places special emphasis on community-related issues, particularly those relating to the rural areas of Namibia, “issues of national interest” and “government related matters which may concern the community”.¹³ It has been observed that the *New Era* newspaper was never intended to be independent: “It was established overtly as a government newspaper, with a mandate which includes reporting on the government. Its board is entirely appointed by the minister and, while its main aim is to provide an objective and factual information service, there is no reference in the legislation to operating in the public interest.”¹⁴
- The Namibian Press Agency (NAMPA) is also established by a statute, the **Namibian Press Agency Act 3 of 1992**. Its stated object is to operate “a news agency service and Information Technology (IT) service”.¹⁵ The agency is governed by a board appointed by a minister.¹⁶ and funded primarily by budget allocations from Parliament.¹⁷ It is thus not an independent news agency.
- The **Namibian Broadcasting Act 9 of 1991** establishes the Namibian Broadcasting Corporation (NBC), which is tasked carry out a broadcasting service with these objects –
 - to inform and entertain the public of Namibia;
 - to contribute to the education and unity of the nation, and to peace in Namibia;
 - to provide and disseminate information relevant to the socio-economic development of Namibia;
 - to promote the use and understanding of the English language.¹⁸

The NBC is controlled by a board appointed by the minister.¹⁹ The NBC is a state broadcaster, given that it lacks a sufficient degree of independence from government to be considered a public broadcaster.²⁰

Namibia has a **Media Ombudsman** and an **Editor’s Forum of Namibia**, both of which are non-governmental bodies set up by the media for purposes of self-regulation in

¹³ [New Era Publication Corporation Act 1 of 1992](#), section 3.

¹⁴ Justine Limpitlaw, [Media Law Handbook for Southern Africa – Volume 2](#), “Chapter 11: Namibia”, Konrad Adenauer Stiftung, 2021, page 152.

¹⁵ [Namibia Press Agency Act 3 of 1992](#), section 3.

¹⁶ *Id.*, section 6.

¹⁷ *Id.*, section 12; Justine Limpitlaw, [Media Law Handbook for Southern Africa – Volume 2](#), “Chapter 11: Namibia”, Konrad Adenauer Stiftung, 2021, page 164.

¹⁸ [Namibian Broadcasting Act 9 of 1991](#), section 3.

¹⁹ *Id.*, sections 5-6.

²⁰ Justine Limpitlaw, [Media Law Handbook for Southern Africa – Volume 2](#), “Chapter 11: Namibia”, Konrad Adenauer Stiftung, 2021, pages 165-166.



terms of a **Code of Ethics and Conduct for Namibian Print, Broadcast and Online Media** issued by the Editor's Forum.²¹

13.2 CONSTITUTION

It is noteworthy that the constitutional right to freedom of speech and expression in Article 21 (a) explicitly states that this includes “freedom of the press and other media” – which is sufficiently broad to include online expression.

There are several grounds for restrictions mentioned in the Constitution for restricting freedom of expression:

- the sovereignty and integrity of Namibia
- national security
- public order
- decency or morality,
- contempt of court
- defamation
- incitement to an offence.²²

However, a restriction imposed on of these grounds must be “reasonable”, imposed by law and “necessary in a democratic society”.²³

The 2019 *Haufiku* case considered the question of a limitation of freedom of expression on national security grounds.²⁴ The case involved an Government attempt to prevent publication of a newspaper article on alleged misuse of public funds by the Namibia Central Intelligence Service for the purchase of farms and houses for private use. The intended publication came to the attention of the Government when the journalist in question approached the Namibia Central Intelligence Service for comment. The Government then sought a court order banning publication of the article on national security grounds.²⁵ The journalist in question, relying on the constitutional right to freedom of expression, asserted that information was lawfully obtained from public databases, posted no security risk and was a matter of public interest because it concerned potential corruption by government officials.

The High Court dismissed the Government’s application on the grounds that it had not presented sufficient evidence to show that the proposed publication would

²¹ The [Code of Ethics and Conduct for Namibian Print, Broadcast and Online Media](#) defines “online media” as “media which is published over the Internet, and includes, without limitation, web-sites, blogs, and social media”. Section 1(f).

²² Article 21(1)(a) of the [Namibian Constitution](#), quoted above on the first page of this chapter.

²³ Article 21(2) of the [Namibian Constitution](#), quoted above on the first page of this chapter.

²⁴ [Director General of the Namibian Central Intelligence Service v Haufiku & Others](#) 2019 (2) NR 556 (SC), summarised and analysed by Global Freedom of Expression [here](#).

²⁵ The Government relied on the [Protection of Information Act 84 of 1982](#) read with the [Namibian Central Intelligence Service Act 10 of 1997](#). Section 4(1)(b) of the Protection of Information Act 84 of 1982 makes it a criminal offence to disclose any information obtained by means of a violation of the Act, or information relating to “a prohibited place, anything in a prohibited place, armaments, the defence of the Republic, a military matter, a security matter or the prevention or combating of terrorism”, amongst other things. The Government argued that the information in question fell into the category of “security matter” because it related to the national security functions of the Namibia Central Intelligence Service as set out in section 5(1)(a) the Namibian Central Intelligence Service Act 10 of 1997.



undermine national security. On appeal, the Supreme Court considered the government's argument that the Court must accept the assertion of the executive that national security issues were at stake, without the requirement of demonstrating this by means of evidence. The Court disagreed, holding that the Government could substantiate its case by presenting any sensitive evidence to the Court *in camera* if necessary – thus affirming that the judiciary does exercise oversight of government attempts to suppress information on national security grounds; the Court stated that the “notion that the court must simply interdict because the State assigns something the label of national security is not consonant with the values of an open and democratic society”.²⁶ The Supreme Court found that the government had not made out a case that information had been obtained illegally, or that there was a valid reason for suppressing its publication.²⁷

13.3 CASE STUDIES

According to Reports Without Borders in its 2023 World Press Freedom assessment:

*Verbal attacks against journalists are not uncommon, especially from members of the government, but they are rarely exposed to threats or dangers. Relations between the authorities and reporters are generally good. No cases of intimidation have been reported when journalists were covering strikes or protests.*²⁸

Freedom House provides a similar overview:

In practice, journalists face few legal restrictions and generally work without risking their personal safety. While self-censorship is common in state media, private media remain critical of the government.²⁹

The US State Department's 2022 Report on Human Rights Practices in Namibia states that the constitutional right to freedom of expression is generally respected by the government.³⁰

Few specific examples of State action against journalists were located.

In 2023, an anti-LGBT protest was organised by a church group in Windhoek. Upon receiving the required advance notification of the protest, police had warned the anti-LGBT protesters not to use hate speech. A single counter-protester who was waving a pride flag at the same venue was **detained by police** along with some of

²⁶ [Director General of the Namibian Central Intelligence Service v Haufiku & Others](#), paragraph 74.

²⁷ *Id.*, paragraphs 106-108.

²⁸ “2023 World Press Freedom Index: Namibia”, section on “Safety”.

²⁹ “Freedom in the World 2022: Namibia”, Freedom House, section D1.

³⁰ “2022 Country Reports on Human Rights Practices: Namibia”, US State Department, section 2A.



his colleagues. They were released without charge a few hours later, and informed that they had been removed from the scene for their own protection.³¹

In 2022, two Namibian journalists John Grobler and Nrupesh Soni, were arrested for alleged **trespassing** on a private farm when they used a drone to film elephants on the farm. The journalists were investigating the possible illegal sale of pregnant wild elephants to buyers based in Dubai. The arrest took place after the farm owner made complaints to police and wildlife authorities. According to the journalists, they were detained at a police roadblock and taken to a police station, where they were held for about four hours. Grobler reported that police disabled his vehicle's car security system and searched the vehicle without his consent, as well as seizing Soni's drone and its memory card for further investigation. They were also reportedly investigated for using a drone to **wilfully disturb specially protected game without a permit or written authority** from the Ministry of Environment, Forestry and Tourism.³² As of late August 2023, the drone had not been returned.³³

Some journalists were reportedly **detained by police** during a 2020 “#Shutitalldown” protest against gender-based violence. They were not charged with any crime. Police said that they had not recognised them as journalists rather than protesters, as they had no visible media attire, but the journalists maintained that they had presented accreditation cards to police officers.³⁴

There were a few reports of rough and intimidating treatment of journalists during 2020-2022:

- Two female journalists from private newspapers who attempted to cover an official opening of a new isolation centre at Windhoek State Hospital in 2020 were forcibly removed from the venue by security officials, despite having been invited. They were told that only state media was permitted entry, and later threateningly told by police, “You are lucky you weren't shot”. They reported the incident to the police and the Office of the Ombudsman but were informed that the Prosecutor-General decided that the case would not be prosecuted.³⁵
- During a press briefing on the ruling party's involvement in the Fishrot corruption scandal, a government minister reportedly “manhandled” a female journalist from the *Namibian Sun*.³⁶
- A female journalist from Eagle FM, who was wearing a press jacket, was reportedly harassed by police during the course of her work.³⁷
- In June 2022, journalists covering a disgruntled group of pensioners who had not received their social welfare grants were forcibly pushed away by members of the

³¹ Personal communication with the counter-protester, June 2023.

³² “[Namibian journalists investigated for trespassing for drone journalism](#)”, Committee to Protect Journalists, 28 March 2022

³³ Personal communication with John Grobler, 24 August 2023.

³⁴ June Shimuoshili, “A Beacon of Hope for Press Freedom” in “[The State of Press Freedom in Southern Africa 2020-2021](#)”, Media Institute of Southern Africa (MISA), pages 44-46.

³⁵ “[African Media Barometer Namibia 2022](#)”, Media Institute of Southern Africa (MISA) and Friedrich-Ebert-Stiftung (FES), pages 66-67; “[CIPEA and Small Media UPR Submission, Session 38](#)”, [2020]. paragraph 12.

³⁶ “[African Media Barometer Namibia 2022](#)”, Media Institute of Southern Africa (MISA) and Friedrich-Ebert-Stiftung (FES), page 67.

³⁷ *Id.*, page 67. No further details about this incident were provided.



Special Field Force, a military unit, who told them not to take photographs and to leave the area.³⁸

In 2009, two British journalists who were filming Namibia's annual seal cull were arrested after some of the persons who were culling the seals reportedly attacked them with the clubs that are used to kill the seals and seized their equipment. The journalists were convicted on charges of **entering a protected marine area without a permit**, fined, and given six-month suspended sentences. None of the hunters who accosted them were arrested.³⁹

In 2011, a decade-long **State advertising boycott** of *The Namibian*, the country's largest daily newspaper, finally came to an end. This boycott was initiated by Namibia's first President, Sam Nujoma, in December 2000 in an attempt to punish the newspaper for what was perceived as an anti-government stance. The State stopped advertising in the newspaper and forbid government purchases of its issues. According to the newspaper's founding editor, this move caused a loss of only 6% of the newspaper's advertising revenue and 650 single-copy sales to government officials. Thus, this attempt to use financial pressure to muzzle the newspaper was entirely unsuccessful and was quietly cancelled by the State.⁴⁰

Several public officials have filed **civil defamation suits** against media outlets or individuals in Namibia.

- For example, in 2022 the High Court ruled on a lawsuit for civil defamation brought by the First Lady of Namibia after a video clip on social media accused her of encouraging the liquidation of Air Namibia to further her own commercial interests in a private aviation company, and alleged that she had been romantically involved and conceived a child with a prominent Namibian businessman who is currently in jail on charges of corruption in the Fishrot matter (discussed below). It further alleged that this businessman procured her as a bride for the current President Hage Geingob. The defence of the person who made and circulated the video was that he was just repeating widely-circulating rumours. He conceded that he could provide no factual basis for the allegations but maintained that the circulation of the allegations was in the public interest. The Court found that allegations to be defamatory and false. Furthermore, it found no evidence that the allegation had been published to further public interest. It awarded the First Lady N\$ 250 000 in damages, as well as requiring the defendant to pay punitive costs.⁴¹
- In 2021, Namibia's labour minister, Utoni Nujoma, filed a defamation suit against the owners and editor of a weekly newspaper, the *Windhoek Observer*, in response to a 2019 article alleging he had extorted money from a farmer in exchange for providing a government certificate of waiver that would enable the farmer to sell part of his property.⁴²

³⁸ Id, page 68.

³⁹ Tom Rhodes, "[In Namibia seal hunt, journalists said to become prey](#)", Committee to Protect Journalists, 17 July 2009.

⁴⁰ Tom Rhodes, "[A quiet victory for The Namibian](#)", Committee to Protect Journalists, 9 September 2011.

⁴¹ *Geingos (born Kalondo) v Hishoono* 2022 (2) NR 512 (HC).

⁴² "[Freedom in the World 2022: Namibia](#)", section D1; Maria Amakali, "[Nujoma sues over N\\$1.5m extortion claims](#)", *New Era*, 30 September 2021.



- Other civil defamation cases have been brought successfully by the previous director of Air Namibia,⁴³ the Permanent Secretary in the Ministry of Foreign Affairs,⁴⁴ and the former mayor of Namibia's capital city, Windhoek.⁴⁵

Namibia is currently in the throes of a massive corruption scandal popularly known as "Fishrot", which led to the arrest of the former Minister of Justice and the Minister of Fishing on allegations of corrupt allocation of fishing quotas. This case was exposed by the combined efforts of a whistleblower and investigative journalists in Namibia and Iceland and was the subject of an *Al Jazeera* documentary. The whistleblower, a former employee of the Icelandic company Samherji which allegedly also benefitted from the scheme, shared some 30 000 documents supporting his allegations with Wikileaks, which made them accessible to the various journalists working on the story.⁴⁶ Those who are criminally charged in this case have not yet come to trial, but the Fishrot saga already illustrates the power and importance of unfettered independent journalism in Namibia. It also shows how documents which may have been obtained and shared without authorisation were crucial to uncovering what appears to be a far-reaching instance of corruption.

13.4 CYBERCRIME LEGISLATION AND OTHER LEGAL PROVISIONS RELEVANT TO FREEDOM OF EXPRESSION

Namibia is the only SADC country without a dedicated cybercrime law or a set of cybercrime offences in a broader law - with Lesotho close behind, having a cybercrime bill that has made it through Parliament but has not yet been finalised as law.⁴⁷

A) DRAFT COMPUTER SECURITY AND CYBERCRIME BILL, 2019

Discussions around a new cybercrime law in 2005, with consultations taking place in 2010. This process produced the draft Electronic Transactions and Cybercrime Bill 2013 which was crafted with technical assistance from the International Telecommunications Union. This bill was placed on the Parliamentary agenda in early 2017, but almost immediately withdrawn for further consideration. After the initial bill was prepared, the adoption of the *African Union Convention on Cyber Security and Personal Data Protection* in June 2014 provided an updated source of guidelines which had not been incorporated into the 2013 Bill. A revised draft Electronic Transactions and Cybercrime Bill was produced in 2017.⁴⁸ The 2017 Bill was considered by Cabinet in early 2019, and a decision was taken to split it into two separate bills,

⁴³ *Free Press of Namibia (Pty) Ltd and Others v Nyandoro* 2018 (2) NR 305 (SC).

⁴⁴ *Nghiwete v Nekundi* 2009 (2) NR 759 (HC).

⁴⁵ *Shikongo v Trustco Group International Ltd and Others* 2009 (1) NR 363 (HC).

⁴⁶ Roman Grynberg, Shinovene Immanuel and Tangeni Amupadhi, *Fishrot: Fisheries and Corruption in Namibia*, 2023.

⁴⁷ Lesotho's cybercrime law had been passed by Parliament as of mid-2023, but had not yet received Royal Assent and was still a under debate.

⁴⁸ The government invited written submissions from the public, but these do not appear to have had much influence on the revised 2017 Bill. See Frederico Links, "[Tackling Cyber Security/Crime In Namibia – Calling For A Human Rights Respecting Framework](#)", Institute for Public Policy Research, January 2018 at 1-2, 11.



one on electronic transactions and one on cybercrimes.⁴⁹ The Electronic Transactions Act 4 of 2019 was enacted in late 2019 and brought partly into force on 16 March 2020,⁵⁰ but the draft Computer Security and Cybercrime Bill is still a work in progress.⁵¹

The most recent draft made available to the public proposes three categories of technical offences and three categories of content-based offences. The technical offences are listed in the table below.

DRAFT COMPUTER SECURITY AND CYBERCRIME BILL, 2019 - TECHNICAL OFFENCES	
Clause 10: Unauthorised access	<p>It is an offence for a person to access a computer system or an information system while he or she knows or should reasonably have known that he or she is not authorised to do so, or to access a system in a manner which he or she knows or should reasonably have known that he or she is not authorised to do.</p> <p>Higher penalties may be imposed if the unauthorised access was for the purpose of committing fraud or theft, if the access had the effect of, or was calculated to cause, major disruption or serious damage, or if the access was for the purpose of obtaining information that is detrimental to the national security of Namibia.</p> <ul style="list-style-type: none"> o "Access" in relation to a computer system or an information system, means to - <ul style="list-style-type: none"> (a) transfer data to; (b) obtain data from; (c) run a program on that system (whether that program is stored on that system or is transferred to that system) or causes any program to perform any action or function or to render any data, function or action accessible to any program or person; or (d) do anything that might reasonably have the effect that the system in question performs any action referred to in paragraph (a) to (c)" (definition in clause 1). <p>This definition narrows the meaning of access beyond merely entering a computer and "looking around", but it requires no intent to cause harm of to commit another crime.</p> <ul style="list-style-type: none"> o This offence is broad and vague, exacerbated by the fact that "national security" is not defined for the purpose of heavier penalties.
Clause 11: Unauthorised interference	<p>It is an offence for any person "intentionally, without authorisation" to perform any action that has the result (or is calculated to have the result) that -</p> <ul style="list-style-type: none"> • computer data is altered, damaged or deteriorates • computer data is deleted; • computer data is recorded wrongly; • computer data is rendered inaccessible to any person or program; or • the performance or effectiveness of any information system, computer system or any program running on such system deteriorates,

⁴⁹ The splitting of the two bills was recommended by civil society; see id at 12.

⁵⁰ [Electronic Transactions Act 4 of 2019](#).

⁵¹ The government circulated a draft Computer Security and Cybercrimes Bill for comment in 2021, but this version of the bill was the same as the one circulated in 2019. The Ministry of Information and Communication Technology (MICT) has indicated that the bill has been revised since it was last circulate, but the revised version has not yet been made available to the public. MICT input to Child Online Protection Task Force quarterly meeting, 28 June 2023. For more information about the background to the bill, see "[Familiar Flaws – Unpacking Namibia's draft Cybercrime Bill](#)", Institute for Public Policy Research (IPPR), February 2022, sections 1 and 2.



	<p>Higher penalties may be imposed if the unauthorised interference had the effect of, or was calculated to cause, major disruption or serious damage, or if “the action was for the purpose of obtaining information that is detrimental to the national security of Namibia”.</p> <ul style="list-style-type: none"> ○ As in the case of unauthorised access, this offence is broad and vague, exacerbated by the fact that “national security” is not defined for the purpose of heavier penalties.
<p>Clause 12: Unlawful devices, systems or programs</p>	<p>It is an offence to intentionally create, distribute or possess any system, program, device or data whose purpose is to commit any offence under this Act or any other law.</p> <p>There are exceptions where a person in good faith -</p> <ul style="list-style-type: none"> • does research relating to the security of information systems or computer systems; • is learning or teaching skills relating to the security of information systems or computer systems; • is testing the security of information systems or computer systems in whose security he or she has a legitimate interest; or • communicates security vulnerabilities or laws to the public in order to promote the security of a specific information system or information systems in general. <ul style="list-style-type: none"> ○ The exceptions are commendable, particularly the last one, which could apply to journalists.⁵²

In addition, the draft bill proposes content-based offences relating to **child pornography, electronic harassment** and **grooming**. The way forward is not yet settled, as it has been proposed that these content-based offences in the cybercrime bill should be replaced by more detailed and comprehensive bills that cover both online and offline manifestations of these issues. A bill on the online and offline sexual exploitation of children, persons with severe mental disabilities, and in some instances adults, is on the table for discussion.⁵³ A more comprehensive draft bill that would provide quick and accessible remedies for both online and offline harassment has also been put forward.⁵⁴ In addition, the Office of the Ombudsman has also proposed a bill covering online and offline hate speech which is currently with the Law Reform and Development Commission for study, as a replacement for the seldom-used Racial Discrimination Prohibition Act 26 of 1991.⁵⁵ It was envisaged that these three laws would move forward together as companions to the Cybercrime Bill, to prevent gaps

⁵² See also “Situation Report Namibia: Legislation on cybercrime and electronic evidence”, GLACY+ (Global Action on Cybercrime Extended), Version 20 March 2020, page 8 on this clause: “The carveouts are well-drafted and a positive addition to the draft legislation [...]”

⁵³ *Draft Combating of Sexual Exploitation Bill*, October 2020, which would create offences aimed at child pornography, voyeurism, non-consensual distribution of intimate images, grooming and other forms of sexual exploitation, with particular attention to the protection of children and persons with severe mental disabilities. The development of this bill was commissioned by Sisters for Change (an international NGO which is a member of the Equality & Justice Alliance), acting in consultation with the Minister of Justice, from the Legal Assistance Centre (a Namibian NGO)

⁵⁴ *Draft Combating of Harassment Bill*, October 2020, which was part of the same project. The two bills were initially combined, but split at the suggestions of a consultation with key stakeholders in February 2020.

⁵⁵ This is the *Prohibition of Discrimination, Discriminatory Harassment and Hate Speech Bill*, which was discussed at a public consultation in May 2021.



in coverage if only online wrongs were addressed in the law.⁵⁶ Part of the advantage of these three more dedicated bills is that their greater attention to detail would help to prevent situations where good faith journalism or other speech in the public interest is caught up in the net of prohibitions on harmful speech.

In the meantime, the Cybercrime Bill still contains proposals on child pornography, grooming and harassment. The proposed provision on **child pornography** is not limited to online manifestations of “child pornography”, which is defined as:

the depiction by means of images, sounds, text or in any other manner of a real or imaginary person who is under the age of eighteen years, who appears to be under the age of eighteen years or who is represented or held out to be below that age (referred to in this definition as “the child”) –

- (a) while performing a sexual act;
- (b) in such a manner that it strongly suggests that the child is performing such an act or is inviting such an act;
- (c) while engaging in other sexually explicit conduct where the material is calculated or appears to be calculated to stimulate erotic, sadistic or masochistic feelings or emotions:

Provided that material whose primary purpose is scientific, educational or artistic is not child pornography.⁵⁷

It seems inappropriate and possibly misleading to cover offline instances of child pornography in a law on cybercrime. As the *Luxembourg Guidelines on Child Sexual Exploitation* point out, the line between online and offline child sexual exploitation “is often blurred” and “the Internet is a means, albeit very potent, to exploit children sexually; it is not, in and by itself, a distinct type of sexual exploitation”.⁵⁸ Moreover, the proposed definition does not seem to cover all of the possible forms of child pornography. The formulation of the offence has other weaknesses, but none that seem particularly problematic for freedom of expression or journalism.

The proposed offence of **grooming**, in contrast, covers only online activities. It applies to using “a computer system or another communications device” to –

- procure or attempt to procure a child under the age of 16 for the performance of a sexual act or for the performance of any action complying with the definition of child pornography, irrespective of where that child is in the world;
- engages a child in conversations or exchanges data messages with that child for the purposes of determining the child’s willingness to perform a sexual act or to participate in child pornography, or suggests the performance of these acts;

⁵⁶ Discussions at consultations around these bills attended by the authors during 2021-2023.

⁵⁷ The offence is contained in clause 13 of the *Draft Computer Security And Cybercrime Bill, 2019*, and the definition appears in clause 1.

⁵⁸ [Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse Adopted by the Interagency Working Group in Luxembourg](#) (“Luxembourg Guidelines”), adopted by the Interagency Working Group in Luxembourg, 28 January 2016 at 27-28 (footnotes omitted).



- arranges a meeting or attempts to arrange a meeting with a child referred to as which a sexual act or to participation in child pornography is “performed, discussed or suggested”.⁵⁹

This definition does not seem sufficiently exhaustive, but its weaknesses do not appear to raise significant freedom of expression concerns.

The most problematic content-based provision is the proposed crime of **electronic harassment**, which does not seem to be clearly conceptualised. For instance, it leaves victims of physical stalking and some other forms of offline harassment without any remedy – even though offline and online forms of harassment often occur in tandem. It also places the non-consensual sharing of intimate images under the concept of harassment, which seems unhelpful since this is a crime even if the person who is depicted in the images is unaware that the images have been created or shared. At the same time, part of the provision reiterates to a large extent the existing common-law offence of criminal defamation, while many international standards and guidelines recommend the complete abolition of this crime.⁶⁰

The **Combating of Harassment Bill** and **Combating of Sexual Exploitation Bill** which have been proposed as alternatives include the following remedies which are absent from the draft cybercrime bill:

- a simple expedited procedure for protection orders modelled on the protection orders already in place for domestic violence;

14. ELECTRONIC HARASSMENT (PROPOSED OFFENCE)

A person who intentionally posts or sends a data message, or who intentionally causes a data message to be displayed

- (a) with the intention that it causes serious emotional distress to another person;
- (b) which makes credible threats of violence or other harm;
- (c) which contains a statement that the accused knows to be false or with reckless disregard whether it is true or false, and with the intention to do serious harm to the reputation of another person;
- (d) which makes explicit sexual suggestions knowing it to be offensive or annoying to the person to whom it is directed;
- (e) contains any pictorial representation of sexual activity or nudity of a specific person -
 - (i) if that person has provided that information to the perpetrator privately and the person who provided that information has a reasonable expectation that the information should not be shared with other persons or the public;
 - (ii) if the photographic material has been created without the permission of the person depicted therein or the material has been obtained without the permission of the person depicted therein; or
 - (iii) if that pictorial representation has been created by the manipulation of an image or photograph that does not depict sexual activity or nudity, commits an offence and is on conviction liable to a fine not exceeding N\$10 000 or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment.

⁵⁹ *Draft Computer Security and Cybercrime Bill, 2019*, clause 15.

⁶⁰ See the section on criminal defamation in Chapter 2 of this report.



- mechanisms for assistance from police and electronic service providers in the case of anonymous harassment or exploitation;
- quick and accessible procedures for getting unlawful materials removed from various forums with safeguards for free speech rights;
- provisions designed to facilitate investigation by law enforcement officers – such as where such officers take over an email or cell phone account and pretend to be a child or a victim of harassment in order to collect evidence of wrongdoing.

The **proposed Combating of Harassment Bill** would also create a new civil action for damages resulting from harassment and provide for more severe criminal penalties and punitive civil damages in respect of harassment based on protected personal characteristics such as sex, race, ethnicity, religious belief or disability. It has been asserted that addressing harassment and sexual exploitation in separate laws “with greater specificity allows for a more carefully drawn balance between the need to protect against these harms and the constitutional necessity of minimising infringement on the right of free speech”.⁶¹

The draft cybercrime bill also includes a number of procedural and evidentiary provisions. It **applies the existing search, seizure and forfeiture provisions in Namibia’s criminal procedure law to the digital realm**,⁶² with some details about how this would work in practice. The import is that cybercrime-related searches will normally require warrants issued by a judicial authority, except where the search is conducted with the consent of the relevant persons or where police reasonably believe that a warrant would be issued but the delay involved would probably defeat its purpose because it would give the suspects time to hide or destroy the evidence. Police also have the authority to search a person without a warrant where an arrest has been made on a reasonable suspicion of committing a crime.⁶³

The draft cybercrime bill allows police to issue a **preservation order** for a period of seven days, which can be extended for periods of up to three months at a time by a judicial officer.⁶⁴ It also provides for **production orders**, but only on the authority of a judicial officer.⁶⁵

Under the proposed cybercrime bill, police may, with judicial authorisation, **intercept communications** or make use of a “**forensic tool**”, defined as “an investigative tool (including software or hardware) installed on or in relation to a computer system or part of a computer system which logs, stores or transmits any activity, data or any other matter relating to such a system”.⁶⁶ The three-fold criteria for a warrant for either of these purposes is that (1) a less intrusive method of investigation will not provide the information required; (2) the investigation is sufficiently important and the offence is sufficiently serious to justify the method specified in the warrant; and (3) the information sought is relevant for the investigation of an offence under this Act or any

⁶¹ “Input on the Cybercrime Bill as discussed during the workshop held on 17-28 February 2020”, Legal Assistance Centre, 30 April 2020.

⁶² *Draft Computer Security and Cybercrime Bill, 2019*, clause 18(1): “The provisions of Chapter 2 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) are construed to relate to computer systems, computer equipment, storage media or data.”

⁶³ [Criminal Procedure Act 51 of 1977](#), sections 21-23.

⁶⁴ *Id.*, clause 20.

⁶⁵ *Draft Computer Security and Cybercrime Bill, 2019*, clause 19.

⁶⁶ *Id.*, clause 21(1) and definition of “forensic tool” in clause 1.



other law.⁶⁷ A warrant for either of these purposes is valid for a maximum of three months, but may be renewed.⁶⁸ A warrant for the interception of communications must specify what communications it covers, but it is permissible for it to apply to all of the communications of a specified person.⁶⁹

Warrants are understandably issued without notice to the person who is being investigated,⁷⁰ but the draft lacks a provision for notifying the person in question of the communications monitoring after the investigation is completed – meaning that the affected persons may never know that their data has been accessed, in contrast to traditional searches and seizures which generally become known by their nature. It also lacks an independent oversight mechanism for assessing the use of such warrants. Without such mechanisms, Namibia's surveillance actions cannot easily be analysed or challenged.

B) COMMUNICATIONS ACT 8 OF 2009

Namibia's Communications Act 8 of 2009 also creates certain criminal offences relating to communications of all kinds. The following are particularly relevant to freedom of expression.

It is an offence to use a telecommunications device knowingly to make, create, solicit or initiate transmission of “any comment, request, suggestion, proposal, image, or other communication which is obscene, lewd, lascivious, filthy, or indecent, with intent to annoy, abuse, threaten, or harass another person”.⁷¹ This provision with its multitude of undefined terms is very vague, and it sets the bar very low by including an intent to “annoy”.

The same is true of the offence of making a telephone call or utilising a telecommunications device “without disclosing his or her identity and with intent to annoy, abuse, threaten, or harass any person at the called number or who receives the communications”.⁷² However, the inclusion of the failure to disclose identity helps to narrow this offence.

CONTENT RESTRICTIONS IN OTHER LAWS

The Defence Act 1 of 2002 prohibits the publication by any means of “any information calculated or likely to endanger national security or the safety of members of the Defence Force”, except where the information has been furnished or the publication has been authorized on the Minister's authority. The penalty is a fine of up to N\$20 000 or imprisonment for up to five years, or both (section 54(1)-(2) read with section 63) .

The Protection of Information Act 84 of 1982 makes it an offence to publish any secret official code or password, or any document, model, article or information relating to “the defence of the Republic, a military matter, a security matter or the prevention or combating of terrorism”, in any manner or “for any purpose which is prejudicial to the security or interests of the Republic”. The penalty is a fine of up to R10 000 or to imprisonment for up to 10 years, or both (section 54).

⁶⁷ Id, clause 21(1).

⁶⁸ Id, clause 21(4).

⁶⁹ Id, clause 21(8).

⁷⁰ Id, clause 21(2).

⁷¹ Communications Act 8 of 2009, section 117(1)(d). The Act does not define a “telecommunications device”, but “telecommunications services” means “services whose provision consists wholly or partly in the transmission or routing of information on telecommunications networks by means of telecommunications processes but does not include broadcast services” (section 1)

⁷² Communications Act 8 of 2009, section 117(1)(e).



Other offences which require repeated communications actions in order to constitute harassment are more justifiable.⁷³ It is also useful to journalists seeking comment that making repeated telephone calls or communications to someone is an offence only if this is done *solely* to harass the recipient of the communication.⁷⁴

In any event, the communications offences in this law do not seem to be utilised in practice.

C) DATA RETENTION AND STATE SURVEILLANCE

Communications Act 8 of 2009: The provisions of the Communications Act on data retention and surveillance are more problematic.

The Act charges the President to establish “such **interception centres** as are necessary for the combating of crime and national security” to be staffed by the Namibia Central Intelligence Service. Where any law authorises the interception or monitoring of electronic communications, the person or institution in question can forward a request “together with any warrant that may be required under the law in question” to the head of an interception centre to carry out the interception or monitoring, as well as any decoding or decryption that is necessary. The Director-General of the Namibia Central Intelligence Service is empowered to issue directives on how information obtained by interception must be handled and on any other technical or procedural matters that are “necessary or expedient” to ensure that intercepted information is used only for its intended purpose.⁷⁵

Telecommunications service providers have a legal duty to provide their services in a manner that allows for interception; in instances of interception, to store information relating to the originator, destination and contents of the telecommunications concerned in the manner prescribed by regulations; and to provide assistance for the purposes of interception.⁷⁶ Regulations on storage of the *content* of telecommunications have not yet been issued.

However, **section 73 of the Communications Act requires telecommunications service providers to collect and retain certain information about all of their customers**, as set out in regulations issued under the Act.⁷⁷ For customers who are natural persons, this information currently includes the customer's name, address and Namibian identity number (or other identification information). The service provider must also retain a copy of an identity document for that person which contains a photograph. Similar information is required for juristic persons. The service provider must store the identification data in question while the person is a customer and for at least five years after that. In addition, the service provider must collect and store each customer's

⁷³ Id, section 117(1)(f) and (g).

⁷⁴ Id, section 117(1)(g).

⁷⁵ Id, section 70.

⁷⁶ Id, sections 71-72.

⁷⁷ [Regulations in terms of Part 6 of Chapter V of the Communications Act](#), issued on 15 March 2021. This discussion draws on “[Communications Act 8 of 2009: Is the collection and retention of data on telecommunications users constitutional?](#)”, Legal Assistance Centre [written by one of the authors of this paper], June 2021.



telephone number or IP address, in addition to “any information that might be necessary to link a specific packet to a specific customer”, as well as data about individual communications including the nature of the telecommunications; their source and destination; their date, time and duration; and specified location data in respect of the use of cellular phones or similar devices whether it is voice, fax, a message service or any other form of data.

Although there is no authorisation for the storage of content data, the other data that must be stored constitutes a serious intrusion into individual privacy which essentially removes the possibility of anonymous communications and reveals a great deal of personal information. As the Office of the United Nations High Commissioner for Human Rights has stated:

The aggregation of information commonly referred to as “metadata” may give an insight into an individual’s behaviour, social relationships, private preferences and identity that go beyond even that conveyed by accessing the content of a private communication.⁷⁸

Stored information about a specific person can be accessed by police or by the Namibia Central Intelligence Service after getting authority from a judge or a magistrate, who must be satisfied that the requested information is “necessary or relevant” for the investigation concerned, that there is “no other expedient manner of obtaining the information concerned”; and that “the obtaining of the information is authorised by the law of Namibia”.⁷⁹

Following the approach of Namibia’s general criminal procedure law, **the regulations make provision for the police (but not the intelligence services) to access customer information from a telecommunications service provider without court authorisation in urgent situations**. However, in contrast to the approach in Namibia’s Criminal Procedure Act 51 of 1977,⁸⁰ the communication regulations place responsibility for this assessment on the *telecommunications service provider* instead of on the police officer. The regulations require the police officer making the request to convince the *authorised officer at the telecommunications service provider* “on reasonable grounds” of three things: (1) that the requested information is required urgently; (2) that the delay in getting court authorisation would defeat the purpose of the request; and (3) that a request to the court for authority for requesting the information would have been granted if it had been made.⁸¹ The following problems have been identified with this approach:

⁷⁸ “[The right to privacy in the digital age](#)”, Report of the Office of the United Nations High Commissioner for Human Rights, A/HRC/27/37, 30 June 2014.

⁷⁹ [Regulations in terms of Part 6 of Chapter V of the Communications Act](#), regulation 5.

⁸⁰ Section 22 of the Criminal Procedure Act 51 of 1977 allows a police official to search any person or container or premises without a search warrant if *that police official* believes on reasonable grounds that a search warrant would be issued but that the delay in obtaining the warrant would defeat the object of the search.

⁸¹ [Regulations in terms of Part 6 of Chapter V of the Communications Act](#), regulation 5(7).



Firstly, service providers designate the staff members who will function as “authorised staff members”, and they can be selected individually or identified on the basis of the positions that they hold. The names/positions must be provided to the Communications Regulatory Authority of Namibia, but there are no requirements concerning qualifications, training or even orientation to the relevant law. The selection of these persons/positions is solely at the discretion of the service provider. This means that the “authorised staff members” of telecommunications service providers are unlikely to have training or experience in legal matters. Secondly, a police officer is subject to statutory authority and could be disciplined if he or she abused the power to bypass judicial authorisation to access information – but there would be no similar recourse against staff members of a private telecommunications service provider.⁸²

This mass data retention scheme raises several potential concerns about its constitutionality in light of Namibia's constitutional protection for privacy:

No persons shall be subject to interference with the privacy of their homes, correspondence or communications save as in accordance with law and as is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the protection of health or morals, for the prevention of disorder or crime or for the protection of the rights or freedoms of others.⁸³

One concern is overbreadth. The current law requires telecommunications service providers to retain a massive amount of data of which only a tiny proportion is likely to ever be requested by the police or intelligence services. This would likely mean that the law probably violates the principle that justifiable interference with a constitutional right must be as minimal as possible, and only what is reasonably necessary to serve the objective. It is more likely that a *targeted* data retention scheme will pass constitutional muster - with data being retained and stored in the first place *only in respect of persons who are reasonably suspected of having some connection to serious crime*. The types of data that must be collected and retained may also be found to go beyond what is strictly necessary for the law's purposes, which could mean that the approach is disproportionate to the objective.

It can also be questioned whether the data retention requirements are well-suited to their crime-fighting objectives. It is likely that terrorists and persons involved in organised crime will have or develop techniques to evade this type of surveillance, meaning that the intrusion into the privacy of innocent citizens may be for nought.

As in the case of the communications interception provisions in the draft cybercrime bill, the legal regime for accessing telecommunications data under the Communications Act lacks any *ex post facto* notice to affected individuals and no other safeguards in respect of the *ex parte* proceedings involved in obtaining a warrant to access the data.

⁸² “[Communications Act 8 of 2009: Is the collection and retention of data on telecommunications users constitutional?](#)”, Legal Assistance Centre [written by one of the authors of this paper], June 2021, page 4 (reference omitted).

⁸³ [Namibian Constitution](#), Article 13(1).



Another concern is the absence of any attention to data protection principles such as measures pertaining to the security of the data, protections for confidentiality and the prevention of unauthorised access, or provision for the erasure or destruction of data after the requisite time period for its retention has expired.

It has been noted that these measures could undermine the ability of journalists to protect confidential sources, which is an integral aspect of media freedom, as well as endangering whistleblowers, interfering with attorney-client privilege and undermining the work of civil society researchers that involves confidential sources of information.⁸⁴

The provisions in the Communications Act on the interception of telecommunications tie in with the authority to monitor communications in other laws, discussed below.

Namibian Central Intelligence Service Act 10 of 1997: The Namibian Central Intelligence Service Act provides for the issue of judicial directives authorising the Namibian Central Intelligence Service (NCIS) –

- to intercept a particular postal article or a particular communication transmitted by telephone or over a telecommunications system;
- to intercept *all* postal articles or communications to or from a specific person, body or organization;
- to monitor conversations by or with a person, body or organization by means of a monitoring device, whether or not a telecommunications system is being utilised.⁸⁵

A judge can issue such a directive only if the judge is convinced that the gathering of information concerning a threat or potential threat to the security of Namibia is necessary to enable the NCIS to properly investigate such a threat or potential threat, or to effectively perform its functions in terms of the Act or any other law, *and* that the NCIS cannot accomplish these objectives in any other manner.⁸⁶ Such a directive is valid for three months but can be extended by a judge for three months at a time.⁸⁷

Combating and Prevention of Terrorist and Proliferation Activities Act 4 of 2014: This Act contains a provision on the interception of communications that follows a similar procedure as that in the Namibian Central Intelligence Service Act. A judge can issue a warrant for the interception of communications that authorises the Inspector-General of Police –

- to require a communications service provider to intercept and retain a specified communication or communications of a specified description
- to authorise a member of the Police or the Namibia Central Intelligence Agency to make use of devices for the interception and retention of communication installed on any premises
- to intercept all postal articles to or from a particular person, body or organization.⁸⁸

⁸⁴ Frederico Links “[Quality of Democracy Under Threat](#)”, *IPPR blog*, 20 June 2023, quoting

⁸⁵ [Namibian Central Intelligence Service Act 10 of 1997](#), section 24(2).

⁸⁶ *Id.*, section 25(1)(b).

⁸⁷ *Id.*, section 25(3)-(4).

⁸⁸ [Prevention and Combating of Terrorist and Proliferation Activities Act 4 of 2014](#), section 40.



A judge can issue such a warrant only if convinced that the gathering of such information concerning a terrorist activity is necessary to enable the police force to investigate properly, and that the terrorist or proliferation activity in question cannot be properly investigated in any other manner.⁸⁹ Such a warrant is valid for three months but can be extended by a judge for three months at a time.⁹⁰

It should be noted that the test for interception of communication in the case of threats to national security or suspected terrorist-related activities seem to be *more stringent* than those for accessing data about telecommunications from telecommunications service providers – which can be authorised by a judge or a magistrate, and in urgent cases even by an authorised officer at a telecommunications service provider, only upon a showing that the information is necessary or relevant to a criminal investigation, that there is no other expedient manner of obtaining the information, and that there is some legal authority for obtaining the information.

None of the provisions on secret interception of communications or communications data provide for any notice to the affected person after the investigation is concluded, or for any overarching monitoring mechanism to guard against abuse.

D) TAKE-DOWN NOTIFICATIONS IN THE ELECTRONIC TRANSACTIONS ACT 4 OF 2019

Namibia's Cybercrime Bill and the other laws making certain communications illegal must be read in conjunction with the take-down provision in the **Electronic Transactions Act 4 of 2019**. Chapter 6 of this Act concerns the liability of service providers for unlawful material. A service provider can avoid civil or criminal liability in respect of material that originates with third parties provided that certain conditions are met – one of which is removing or disabling access to the material upon receiving a notification that the material is unlawful. This refers to a written notice alleging that identified material infringes some right of the complainant. It is an offence to make a false or misleading statement in such a notice.⁹¹

In a provision that is unique in the SADC region, a service provider that removes the material must notify the person who made the material available within three days of the take-down. That person may then give notice to the service provider of any objection to the removal of the material. The service provider must forward the objection to the person who requested the take-down, who then has three days to provide further information to the service provider. The service provider must restore the information if he or she has a *bona fide* belief that the information may reasonably be lawful after considering the relevant submissions. It is an offence to make a false or misleading statement in any of the notices that form part of this procedure.⁹²

⁸⁹ Id, section 41(1)(b).

⁹⁰ Id, section 41(3)-(4).

⁹¹ [Electronic Transactions Act 4 of 2019](#), sections 51-52 and 54(1) and (8).

⁹² Id, section 54(3)-(7).



The law explicitly states that a service provider is not liable for wrongful take down when acting in good faith in response to a complaint about unlawful materials – which clearly skews the balance in favour of removal of material that is alleged to be unlawful.⁹³

This approach to urgent removal of online material is problematic. It makes service providers, who are not necessarily expected to have legal training or to be accountable to the public, to make decisions on the legality of online materials. The scheme in the law could lead to censorship, where online media outlets are subjected to removal of their publications without the involvement of any judicial officer, which appears to constitute a serious inroad into the right to freedom of expression as well as undermining the right of the public to access information. The removal of harmful materials such as child pornography or intimate images published without consent could be dealt with by means of urgent access to a court, rather than placing the decision in the hands of telecommunications service providers.⁹⁴

13.5 ELECTION LAW AND FREEDOM OF EXPRESSION

Elections in Namibia for President, National Assembly and regional councils are scheduled to take place in **late 2024**. The newly-elected Regional Councils will elect members from amongst their number to the second house of Parliament, the National Council.⁹⁵

Elections in Namibia are supervised by the **Electoral Commission of Namibia (ECN)** which is set up by the Constitution as an independent body. Its commissioners are appointed by the President with the approval of the National Assembly, and no commissioner may serve more than two five-year terms of office.⁹⁶

Namibian Constitution

Article 94B Electoral Commission of Namibia

- (1) There shall be an Electoral Commission of Namibia which shall be the exclusive body to direct, supervise, manage and control the conduct of elections and referenda, subject to this Constitution, and an Act of Parliament shall further define its powers, functions and duties.
- (2) The Electoral Commission of Namibia shall be an independent, transparent and impartial body.
- (3) The Electoral Commission of Namibia shall consist of five Commissioners, including the Chairperson, appointed by the President with the approval of the National Assembly, and such Commissioners shall be entitled to serve for a five (5) year term: Provided that no Commissioner shall serve more than two (2) terms.

⁹³ Id, section 54(2)

⁹⁴ See, for example, "[Submission: Draft Provisions of the Electronic Transactions and Cybercrime Bill](#)", Access to Information Namibia (ACTION) Coalition, 13 September 2017.

⁹⁵ [Namibian Constitution](#), Articles 28(2), 46, 49 and 69(1).

⁹⁶ Article 94B was inserted into the Namibian Constitution by the [Namibian Constitution Third Amendment Act 8 of 2014](#).



- (4) Subject to Sub-Article (3), the Chairperson shall serve in a full-time capacity for a term of five (5) years and shall be eligible for reappointment.
- (5) The depository of the records, minutes, documents of the Electoral Commission of Namibia, as well as the electoral and referenda materials shall be the Chief Electoral and Referenda Officer.
- (6) The qualifications for appointment, conditions and termination of service for the Chairperson, Commissioners and the Chief Electoral and Referenda Officer shall be determined in accordance with an Act of Parliament.

Elections are governed by the **Electoral Act 5 of 2014**,⁹⁷ which also provides more details about the organization and functions of the ECN.

Under UN -supervised elections in November 1989, Swapo (Namibia's liberation movement turned political party) obtained a majority of 58%. Independence was proclaimed on 21 March 1990, with a Constitution that was unanimously adopted by the Constituent Assembly which served as Namibia's first Parliament. By 2014, Swapo had consolidated its political dominance into an impressive 80% of votes for the National Assembly, and 86% of votes in the direct election that put the current president, Hage Geingob, into office. However, the next election in 2019 proved to be a turning point, coming shortly after allegations of corruption in the Namibian fishing industry led to the resignation and arrest of two government ministers. It also comes during a time of increasing frustration with Namibia's widespread unemployment. SWAPO lost its two-thirds majority in the National Assembly by a hair, with a majority of 65.5%, while President Geingob was re-elected with only 56% of the vote. The runner-up was Panduleni Itula, who ran as an independent candidate and received 29% of the vote, while the leader of the official opposition party, McHenry Venaani, came in third with 5.3%.⁹⁸

The **2019 election results were challenged in court** by Itula, who asserted that it was unconstitutional to use electronic voting machines without a paper trail that could be used to verify the results. Section 97(1) and (2) of the Electoral Act provided for the use of electronic voting machines, while sections 97(3) and (4) required that they must be accompanied by paper trails. The relevant minister brought subsections (1) and (2) into force, but not subsections (3) and (4). Namibia's Supreme Court found that this selective implementation of section 97 breached the separation of powers by undermining the intended legislative scheme. However, the Court declined to nullify the 2019 Presidential elections on this basis, holding that it had not been proved that the lack of paper trails had materially affected the election result.⁹⁹

⁹⁷ [Electoral Act 5 of 2014](#).

⁹⁸ See, for example, "[Namibia and South Africa's ruling parties share a heroic history - but their 2024 electoral prospects look weak](#)", *The Conversation*, 10 May 2023; "[Namibia election: president wins second term despite scandal and recession](#)", *The Guardian*, 1 December 2019.

⁹⁹ *Itula & Others v Minister of Urban & Rural Development & Others* 2020 (1) NR 86 (SC); Ndjodi Ndeunyema, "[Vote, But You Cannot Verify: The Namibian Supreme Court's Presidential Election Decision](#)", Oxford Human Rights Hub, 17 February 2020.



The impact of the ensuing 2020 local authority elections, and in some regional by-elections, has been assessed as follows:

The regional and local authority elections in late November 2020 reinforced the centrifugal tendencies with a substantial shift from SWAPO to opposition parties, as LPM, IPC and PDM won power in several regions and many local authorities (including in all the large municipalities). For the first time, SWAPO was degraded to an opposition party in several regions, and many cities and towns. This has changed the political atmosphere and tested SWAPO's respect for democracy, as the party is no longer in firm control. It now faces the challenge of regaining credibility and trust.

The loss was to some extent a result of a lack of delivery due in part to the negative effects of an ongoing recession since 2016. It was also a response to the growing number of large-scale corruption cases and misappropriation of funds. Namibia has entered a stage of political competition in which SWAPO for the first time must earn support from voters. It remains to be seen if the support the party wins is based on fair competition and a result of improved governance, or on coercion through the monopoly over state power that is vested in the military and police loyal to SWAPO.¹⁰⁰

In 2024, President Geingob is not eligible to run again due to Namibia's two-term limit,¹⁰¹ and it is likely that Swapo will field Namibia's first female Presidential candidate, Netumbo Nandi-Ndaitwah, who is currently the Deputy Prime Minister, with Itula and Venaani also expected to join the field once again along with Job Amupanda, former Mayor of the capital city of Windhoek and others.¹⁰²

In terms of rules on expression during election periods, this law makes it an offence to use a loudspeaker to interrupt voter registration and the nomination of candidates, or to urge voters to register or not to register in a manner that disturbs, hinders or interferes with voter registration.¹⁰³ It is also an offence to engage in certain acts within 500 meters of a polling station on polling day: to canvass for votes, to put up posters for this purposes, to use a loudspeaker (other than for official purposes), or to organise or participate in any procession or demonstration.¹⁰⁴ In addition, it is an offence to attempt to influence or interfere with voters by means of threats of violence or by the application or threat of any physical or psychological injury, damage, hazard, loss, or disadvantage.¹⁰⁵ The "Bill of Fundamental Voters' Rights and Duties" appended to the Electoral Act requires voters to refrain from dressing in any political party colours and regalia within five hundred meters of polling stations or other electoral centres, and "to refrain from instigating, participating and involving in any conduct which may result in causing any infringement upon any other voter's right to participate in elections without fear".¹⁰⁶ These rules technically infringe freedom of expression, but they appear to be reasonably and narrowly crafted to safeguard crucial electoral processes.

¹⁰⁰ "Namibia Country Report 2022", BTI (Bertelsmann Transformation Index), Bertelsmann Stiftung, "Executive Summary".

¹⁰¹ [Namibian Constitution](#), Article 29(3).

¹⁰² Edward Mumbuu, "[Road to State House gets crowded](#)", *New Era*, 5 May 2023.

¹⁰³ [Electoral Act 5 of 2014](#), sections 174(1)(d) and 175(1)(d)(i).

¹⁰⁴ *Id.*, section 178(1)(b).

¹⁰⁵ *Id.*, section 180.

¹⁰⁶ *Id.*, Schedule ;: Bill of Fundamental Voters' Rights and Duties, items 3.3 and 3.5, read with section 95(b) of the Act.



There are also criminal offences regarding campaign materials. Every bill, placard, poster, pamphlet, circular or other printed matter which references an election or referendum, published electronically or otherwise, must include the name of the political party, organization or candidate who has approved it and the name and address of the printer and publisher. Printing, publishing or posting such material without this information is an offence that attracts stiff penalties (a fine of N\$25 000 or imprisonment for up to five years, or both, on a first offence, doubling in the case of a second or subsequent conviction). The proprietor or publisher of a printed or electronic publication must cause the words “advertisement” and “endorsed by (the name of the political party, organization or candidate endorsing the advertisement)” to appear as a headline for any paid publicity, with failure to do so punishable by a fine of up to N\$10 000 or imprisonment for up to two years, or both.¹⁰⁷ Note that this requirement applies only to materials officially endorsed by a political party, organization or candidate, and thus does not interfere with the rights of others to engage in anonymous speech.

The **Guidelines for the Conduct of Political Activities by Political Parties in Respect of Elections** state that speakers at political rallies may not use language which incites violence, and that parties must not issue “pamphlets, newsletters or posters” that incite people to violence.¹⁰⁸ Because this Code dates from 1992, it fails to make any mention of electronic communications.

The **Broadcasting Code for broadcasting licensees issued in terms of the Communications Act 8 of 2009**¹⁰⁹ contains a section which requires fair and balanced coverage on “current affairs programmes that deal with elections or referendums”, but leaves “news coverage of elections and referendums” at the discretion of the news editor of the broadcasting licensee. However, broadcasting licensees are required to be balanced and impartial in their election or referendum reporting and to ensure that no political party, candidate or proponent is discriminated against in editorial coverage or the granting of access to coverage. A broadcasting licensee that allows any party election broadcast must make available at least four time slots not exceeding two minutes each to all political parties every day throughout the election broadcast period (which extends from the day declared as nomination day under the Electoral Act up to 48 hours before the polling commences). If the State broadcaster, NBC, affords free airtime to any political party, it appears that the Code requires it to afford the minimum free slots to other political parties – although this part of the Code is confusingly drafted.¹¹⁰

¹⁰⁷ Id, section 187.

¹⁰⁸ General Notice 143/1992 ([Government Gazette 503](#)).

¹⁰⁹ The Broadcasting Code for Broadcasting Licensees is issued under the [Communications Act 8 of 2009](#), section 89. It is contained in General Notice 602/2018 ([Government Gazette 6750](#)), Part C, and definitions in section 1. The Code is amended by General Notice 134/2019 ([Government Gazette 6915](#)) and by General Notice 24/2021 ([Government Gazette 7445](#)), but these amendments do not affect the provisions discussed here.

¹¹⁰ See Part C, in particular sections 19, 20(2), 21 and 22. The references in section 21 to the “formulae” in section 22 are unclear.