



**REPUBLIC OF NAMIBIA'S**  
**6<sup>TH</sup> PERIODIC REPORT**  
**ON**  
**THE AFRICAN CHARTER ON HUMAN AND PEOPLE'S RIGHTS,**  
**2015**

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## **FOREWORD**

This periodic report is submitted in terms of Article 62 of the African Charter on Human and Peoples' Rights (ACHPR). On behalf of the Namibian Government, I am proud to present Namibia's 6<sup>th</sup> periodic report to the African Commission on Human and Peoples' Rights. During the reporting period of January 2012 to December 2013, the Government has endeavoured to give effect to Namibia's commitment under the ACHPR.

This report contains significant measures and developments undertaken in promoting and protecting human rights of the citizens in Namibia. The focus of the Government during the period under review was also to implement the Commission's concluding observations and its recommendations which were adopted in May 2011. Nevertheless, Namibia has faced a number of challenges to implement some of the recommendations due to financial constraints as a result of competing priorities about the social needs in the country.

In this regard, the Government is committed to the fundamental principle of a democratic, free and just society, in which all citizens are valued and enjoy the fundamental human rights. In this spirit, the Government has consulted widely with NGO's and other human rights institutions to enrich and balance this report.

Dr. Albert Kawana, MP  
**Minister of Justice**

## **ABBREVIATIONS AND ACRONYMS**

ACHPR	African Charter on Human and Peoples' Rights
ANC	Ante natal clinic
CEDA	Convention on the Elimination of All Forms of Discrimination
CRC	Convention on the Right of the Child
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CSO	Central Statistics Office
EC FUND	Employees' Compensation Fund
EMC	Educationally Marginalized Children
HIV/ AIDS	Human Immune Virus and Acquired Immuno-Deficiency Syndrome
GDP	Gross Domestic Product
GBV	Gender Based Violence
HRDC	Human Rights and Documentation Centre, University of Namibia
ICESCR	International Convention on Economic, Social and Cultural Rights
ICRC	International Committee of the Red Cross
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ILO	International Labour Organization
LAC	Legal Assistance Centre
MoHSS	Ministry of Health and Social Services
MSD	Maternity Leave, Sick Leave and Death Benefit Fund
MTP3	Medium Term Plan 3

NCS	Namibia Correctional Service
NDP	National Development Plan
NSF	National Strategic Framework
NANGOF	Namibia Non-Governmental Organization Forum
NGO	Non-Government Organization
NHDR	Namibia Human Development Report
NHIES	Namibia Households Income & Expenditure Survey
UNAM	University of Namibia
nbc	Namibia Broadcasting Corporation
CRPWD	Convention on the Rights of People with Disabilities
SWAPO	South West Africa People's Organization



## **Introduction**

The Government of the Republic of Namibia is pleased to report to the African Commission on Human and Peoples' Rights on recent developments and measures taken to give effect to the enjoyment of the rights which are contained in the African Charter on Human and Peoples' Rights (ACHPR) in accordance with Article 62 thereof. The organization and structure of this 6<sup>th</sup> Periodic report follows the 1989 version of the Guidelines for national periodic reports under the African Charter.

This report was prepared and compiled by the Ministry of Justice and the Inter-Ministerial Committee on Human Rights and International Humanitarian Law.<sup>1</sup> This report contains information collected from Government Ministries, research information and reports from relevant non-governmental organizations (NGO's). Also, relevant Civil Society Organizations were given an opportunity to comment on the draft report.

## **Structure of the report**

This report consists of three parts. Part One contains responses to the Concluding Observations and Recommendations on the Combined Periodic Report. Part Two outlines the general legal framework, within which the civil and political rights are protected. Part Three contains information about the implementation of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol). The report covers information for the period starting 2011 until 2013.

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<sup>1</sup> A technical committee, charged with the responsibility of drafting State reports.

## **PART ONE**

### **V. Recommendations**

The African Commission recommends that Namibia should:

- i. Ensure that economic, social and cultural rights guaranteed in the African Charter are justiciable, just like civil and political rights enshrined in the Bill of Rights of the Constitution of Namibia.**

#### **IN RESPONSE**

The economic, social and cultural rights are not expressly guaranteed in the Namibian Constitution. In terms of Article 144 of the Namibian Constitution it is possible to invoke the Convention in a court of law or any tribunal, once a Convention or Covenant is signed and ratified. In this sense the court will give effect to the provisions of the ICESCR, as implementation does not require a change in the existing law. Thus, rights contained in the ICESCR can be claimed in terms of the Government's international obligations under the Covenant.

- ii. Take measures to ratify, as soon as possible, and implement the following regional and international human rights instruments:**

- a) The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court, and make the Declaration under Article 34(6) on the same on Human and Peoples' Rights;**
- b) The African Charter on Democracy, Elections and Governance in Africa;**
- c) The Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment;**
- d) The Kampala Convention;**
- e) The ILO Convention 169 on Indigenous and Tribal People;**

IN RESPONSE

Considering the effect of Article 144 of the Namibian constitution on the reception of rules of public international law and international agreements into the domestic law, there is a need for thorough gap analysis of our current laws and the obligations the state is to assume under a particular instrument.

The Government is currently examining its laws to appreciate the potential impact of proposed/intended ratification of the instruments in question.

**iii. Provide in the next Periodic Report information on the Implementation of the provisions of Article 27, 28 and 29 of the African Charter**

IN RESPONSE

Namibia regrets not having included information about the above mentioned Articles in the last report which was submitted during 2010. Relevant and necessary information regarding the above mentioned Articles is provided in paragraphs 27, 28 and 29 below.

**iv. Take measures to ensure the effective implementation of legislative measures put in place to protect the rights of women especially the Affirmative Action (Employment) Act No 29 of 1998 and the Combating of Domestic Violence Act No 4 of 2003. Namibia should also provide in its next periodic Report, disaggregated statistics in this respect;**

IN RESPONSE

The Affirmative Action (Employment) Act, Act No 29 of 1998 requires specified employers to prepare affirmative action plans setting forth steps to improve the representation of people with disabilities and women, in the workforce. Progress in implementing affirmative action measures is monitored by the Government through the Employment Equity Commission. Non-compliance results in disqualification of employers from state contracts and concessions.

According to the Annual Report for 2012/13 of the Employment Equity Commission of Namibia, women comprised 45% of the total number of employees across all sectors, while only 0, 4% are people with disabilities.<sup>2</sup>

It is also noteworthy to mention that the Traditional Authorities Act, Act No 25 of 2000, which provides procedures for official recognition of traditional authorities, requires that they “promote affirmative action amongst the members of that community” particularly by “promoting women to positions of leadership”.

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<sup>2</sup> See 2012/13 annual report on employment statistics annexed hereto, marked as annexure “A”

Tax laws in Namibia now treat all individuals equally, men or women, married or single. The Labour Act, Act No 11 of 2007 forbids discrimination in any aspect of employment on the basis of sex, marital status or family responsibilities, amongst other grounds. The Act guarantees 12 weeks of maternity leave to all female employees who have been working for the same employer for at least one year.

The Government launched the revised National Gender Policy (2010-2020) in March 2010. The overarching goal is to achieve gender equality and the empowerment of both female and male persons in Namibia. Amongst other things, the policy framework aims to provide mechanisms and guidelines for all sectors and relevant stakeholders for planning, implementing and monitoring gender equality strategies and programmes in order to ensure effective strategies for gender equality and women's empowerment.

The Namibian Government through the Ministry of Gender Equality and Child Welfare embarked on an aggressive policy to eradicate all forms of gender based violence. This includes reviewing and strengthening existing laws against gender based violence, as well as holding an annual event of 16 Days Against Gender Based Violence and Human trafficking.

The National Plan of Action on Gender Based Violence (GBV) 2012-2016 was launched to coordinate efforts of various stakeholders in combating gender based violence. The National GBV Plan of Action aims to create an enabling environment for GBV-related services, improved access to GBV prevention measures, improved access to GBV mitigation services, and strengthen integration and coordination of GBV programs. The *Goals of the Plan of Action on Gender-Based Violence* are to reduce the incidence of GBV and improve responses thereto.

The Plan of Action focuses on four pillars namely prevention; responses to GBV; data collection and research; and coordination and monitoring. The envisaged outcomes of the GBV Plan of Action is to reduce GBV through prevention initiatives, improved services for survivors of GBV, increased understanding of GBV in Namibia and more efficient interventions as a result of improved coordination and monitoring. There is also a National Advisory Committee on GBV composed of Cabinet ministers and it is chaired by the Minister of Gender and Child Welfare.

A number of rape cases have been prosecuted over the past years, and the courts imposed sentences ranging between 5 and 45 years imprisonment on convicted rapists<sup>3</sup>. However, a number of factors such as limited resources, shortage of expertise in dealing with violence against women and children, inadequate facilities in accommodating vulnerable witnesses, and withdrawals of cases by rape victims

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<sup>3</sup> See attached statistics on rape cases provided by the Namibian Police, marked as annexure "B"

(complainants) after they have filed charges continue to hamper investigations and prosecutions.

The Zero Tolerance Media Campaign on Gender Based Violence including Human Trafficking has been strengthened and extended. The campaign focuses on three areas: “passion killing”/killing of spouse or partner, baby dumping and human trafficking. Media materials have been developed on these issues. For example, radio drama series are being aired on the national radio, pamphlets, posters, billboards, television adverts and newspaper adverts.

In 2012, workshops were conducted in all the regions in an attempt to identify some of the root causes of GBV. The aim of the workshops was to empower the communities to take a stand against GBV through public education. The Government, through the Ministry of Health and Social Services, in collaboration with the Ministry of Justice (magistrates’ courts) also developed guidelines to assist social workers to render therapeutic services to perpetrators of domestic violence.

**v. Accelerate action to finalize the draft Bill on the criminalization of torture, and enact same into law as soon as possible;**

IN RESPONSE

Progress has been made pursuant to the Committee’s advice that Namibia to criminalize torture as a specific crime through legislation in order to supplement constitutional provisions. The Bill has not yet been finalized and is still with the Law Reform and Development Commission (LRDC). Consultations on final draft are ongoing and the LRDC will engage a specialist drafter to finalize the Bill.

**vi. Extend human rights training to all judicial, defence and correctional services officers and include in such training, the principles enunciated in the Guidelines and Measures on the Prohibition and Prevention of Torture, Cruel, Inhuman and Degrading Treatment or Punishment in Africa.**

IN RESPONSE

Namibia welcomes this recommendation and already shared this recommendation with relevant stakeholders such as University of Namibia’s Human Rights Documentation Centre (HRDC), Polytechnic of Namibia and Legal Assistance Centre (LAC) who play important roles in compiling training manuals on human rights for law enforcement officers. The Ombudsman has been involved in human rights training on invitation from the Ministry of Home Affairs and Immigration as well as Ministry of Safety and Security.

The Namibian Police Force offer human rights courses at its basic training to their recruits. In addition, Southern African Regional Police Chiefs Cooperation Organization (SARPCCO) provides training on code of conduct, human rights and policing towards ethical policing on which the following topics are covered:

- Human Rights and Policing
- Major Human Rights Instruments
- The Universal Declaration of Human Rights
- The International Covenant on Civil and Political Rights
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- The African Charter on Human and Peoples' Rights
- The Convention on the Rights of the Child
- The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

The training Curriculum of the Namibian Correctional Services provides for a significant number of courses, which are aimed at teaching correctional officers how to treat offenders humanely and avoid alleged incidences of torture (GBH), cruel, inhuman and degrading treatment. These topics include: The mission of the Namibian Correctional Service, the Constitution of Namibia, Human Rights in prisons, duty to act fairly, the use of force, crisis intervention and conflict management, responding to manipulative behaviours, person and area searches and report writing; defusing situations, and the use of weapons, firearms, batons and handcuffs.

The Namibia Defence Force which has participated in several regional and international peacekeeping missions, and, having been faced with security concerns nationally places emphasis on educating its members on Human Rights and Humanitarian Law. Topics on Human Rights and Humanitarian Law are included as part of subjects taught during basic military training, Non-Commissioned Officers courses, Officers cadets training, and basic and advanced military law training. As part of the Humanitarian Law, the aspect of torture receives prominence and most of the materials used are sourced from the Namibian Constitution, international instruments and the International Committee of the Red Cross (ICRC). In addition, the Ministry of Defence, in collaboration with the ICRC, conducts human rights workshops for its members on an annual basis. The Ministry of Defence has entered into an agreement with local tertiary institutions to offer courses in human rights law to its members.

**vii. Make effective, the provisions of the Prisons Act which establishes Visiting Justices to oversee prison conditions, with a view to ensuring independent and regular oversight of prison and detention conditions;**

IN RESPONSE

The Prisons Act, Act No. 17 of 1998 was repealed by the Correctional Service Act, Act No 9 of 2012 which reenacted the provisions on visiting justices.

The newly passed Correctional Services Act, Act No.9 of 2012 in Section 122 provides for Visiting Justices. The Act recognizes a variety of persons as visiting justices e.g. Judges of the Supreme and High Court of Namibia, Cabinet Ministers, Members of Parliament, the Permanent Secretary (of the Ministry of Safety and Security), Governors and regional council members of a specific region for Correctional facilities in the specific region as well as the magistrate for that specific region. The visiting justices perform a variety of functions that range from visiting the whole facility including the persons in solitary confinement as well as testing the food being served. They can also investigate any complaint received by them and make recommendations to parliament.

The major challenge however remains in structuring these visits in such a way that they take place systematically with formal documentation of the recommendations made as well as a follow up whether these recommendations were in fact implemented. The Ombudsman has encouraged the various magistrates to visit places of detention in their districts. Members of the Regional Councils have in the past undertaken visits to various police cells but no visits to correctional facilities to specifically perform the functions of visiting justices. However, the Office of the Ombudsman still undertakes inspection visits to all correctional facilities and police cells and report to Parliament.

Social Workers from the Ministry of Gender Equality and Child Welfare do undertake periodic visits to police cells (not prisons) and keep record of these visits on their findings through a monthly report system.

**viii. Provide in the next Periodic Report comprehensive information on prisons and conditions of detention as well as disaggregated statistics in this regard;**

IN RESPONSE

Several measures pertaining to the improvements of standards of living in prisons are being taken to improve the situation. These include the renovations of the old

correctional facilities to increase accommodation and ventilation, and where applicable transferring of inmates to less populated correctional facilities.

There are a total of thirteen (13) gazetted correctional facilities countrywide, namely; Windhoek, in Khomas region; Hardap, in Hardap region; Oluno; in Oshana region; Walvis Bay, Swakopmund and Omaruru, in Erongo region; Grootfontein and Evaristus Shikongo, in Otjozondjupa region; Keetmanshoop and Luderitz in //Karas region; Gobabis, in Omaheke region; Elizabeth Nepembe, in Kavango West region and Divundu, in Kavango East region.

The current official bed capacity of the Namibian Correctional Service facilities is 4475. According to the 2010/2011 offender statistics, the total offenders detained were 4445. The following correctional facilities are currently experiencing overcrowding: Oluno Correctional Facility (79%), Omaruru Correctional Facility (64%), Grootfontein Correctional Facility (54%), Windhoek Central Correctional Facility (44%), Walvis Bay Correctional Facility (31%) and Swakopmund Correctional Facility (10%).<sup>4</sup>

The management of the number of offenders and the provision of appropriate accommodation and services to offenders remain the constant priority activities of the Namibian Correctional Service. Conditions in the Correctional Facilities have changed drastically in recent years with the introduction of Unit Management concept. Unit Management is a modern correctional practice that aims to cluster offenders into smaller, more manageable groupings within a larger correctional setting.

**ix. Adopt alternative sentencing policies and impose non-custodial sentences such as community services, for less serious crimes;**

IN RESPONSE

Community Service as a non-custodial sentence is being imposed by the courts in Namibia, and the Namibian Correctional Service (NCS) monitors those offenders who have been sentenced to Community Service.

A Community Service Order (CSO) is an order of the Court instructing an offender who has committed a non-serious offence to serve his/her sentence in the community by performing unpaid work for the benefit of the public as an alternative to incarceration. The NCS undertakes the following activities concerning the CSOs:

- Identify suitable institutions for placement of offender on CSOs.

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<sup>4</sup> See attached 2008/2009 - 2010/11 combined annual report for offenders population profile, marked as annexure "C"



- Screening of offender on request of the court to determine skills, time availability and other factors affecting placement and suitability of the offender for CSOs.
- Providing offenders with orientation on the goals of the CSOs scheme and educate them on the reporting procedures and other requirements.
- Maintain necessary records to monitor compliance or non-compliance of court orders.

There are currently only seven (7) CSOs offices in the North Eastern region and North Western region of the Namibian Correctional Service. Therefore, efforts are still required to introduce the CSOs initiative in more regions to address the intake of offenders in some of the overcrowded correctional facilities of the NCS like, Oluno, Omaruru, Grootfontein and Walvis Bay.

**x. Adopt affordable fines for less serious crimes and increase the budget made available to penitentiary services;**

IN RESPONSE

Fines are regulated by either specific legislation or in general by the provisions of the Criminal Procedure Act, Act No. 51 of 1977, as amended. Namibia's legal system provides that the presiding officer (Magistrate or Judge) determine the appropriate sentence suitable for every offender individually after considering his/her circumstances as well as personal position.

The budget of the Namibian Correctional Services is increasing every year. During 2011/2012 financial year it was N\$ 424 973 000 (approx. US\$ 42 497 000), it increased to N\$ 447 264 000 (approx. US\$ 44 726 000) during 2012/2013 financial year. It increased again during the financial year 2013/2014 to N\$ 586 647 000 (approx. US\$ 58 664 000)

**xi. Take all necessary measures to bring the treason trial of the 113 accused persons that have been on-going for almost twelve years to a speedy conclusion;**

IN RESPONSE

Article 78(2) of the Namibian Constitution explicitly states that the courts are independent from the executive, and the legislature, and are subject only to the Constitution and the law. In other words, the provisions of Article 78(1) clearly demonstrate that judicial independence and impartiality are protected by the highest law of the land.

The Caprivi treason trial is on-going and all the defendants have been afforded State funded legal aid to mount their defences. During August 2012 and on February 2013, a total of 44 suspects were found not guilty and were discharged, and the remaining 65 accused persons still face trial in the High Court.

**xii. Provide in its next Periodic Report, information on protection of the rights of older persons and persons with disabilities;**

IN RESPONSE

The Aged Persons Act, Act No. 81 of 1967, provides for the protection and welfare of certain aged and debilitated persons. The Ministry of Health and Social Services provides subsidy to ten (10) registered homes for older people in the country. The Government is in the process to revise the above mentioned Act in order to fully provide for the rights, protection, care and welfare of older people. In addition, a draft National Policy on the Rights, Care and Protection of Older People will be finalized within the next two financial years.

In terms of Section 1 of the National Pension Act, Act No. 10 of 1992, an elderly person is defined as any person who has attained the age of 60. This law took away the discriminatory differentiation between men and women where 60 and 65 was put as the retirement age for women and men respectfully.

The Namibia Household Income & Expenditure Survey (NHIES) for 2009/2010 and the National Population and Housing Census of 2011 revealed that slightly more than 7% of people in Namibia are above sixty.

The Namibian Constitution provides in Article 8 for respect for human dignity. Article 10, the principal equality provision, states that: "all persons shall be equal before the law". Sub-article 2 provides that: "no persons shall be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status. Therefore older persons are protected against discrimination in terms of Article 10, especially on the ground of social or economic status. The basic amenities such as the old age grant also known as social grant/pension and housing units for independent low-income older people are provided by Government. Financial assistance in the form of subsidies is provided to private residential care facilities for older people.

In terms of Namibia National Housing Policy the Government provides subsidies and grants to the elderly and people with disabilities to support social housing programme. Social housing is a sub-programme under the Build Together Programme.

## **Persons with disabilities**

According to the National Population and Housing Census of 2011, about 5% of the people in Namibia are people living with disabilities. Apart from the UN Convention on the Rights of Persons with Disabilities (CRPWD) which Namibia ratified in 2006. Prior to ratification of the Convention Namibia adopted the National Policy on Disability of 1997, the Affirmative Action (Employment) Act, Act No. 29 of 1998, and the National Disability Council Act, Act No. 26 of 2004 as well as the Labour Act, Act No. 11 of 2007 which are most exemplary in terms of protection of the rights of persons with disabilities.

**xiii. Refer to indigenous communities and population by their ethnic or tribal names, and discourage the use of any derogatory terms which are discriminatory to these groups.**

IN RESPONSE

The Government and all official documents refer and/or mention the indigenous communities such as the San, Ovatie and Ovattimba as they prefer to call themselves.

The term “San” is a collective name, which refers to the San communities which consist of seven distinct groups. However, Government has recognized the San community’s traditional authorities according to their distinct ethnic groups.

In 1993 there was an international conference (Common Access to Development) in !Kha ttu, Botswana where all the San people in Southern Africa were represented and decided that the term San will be used in the meantime. During 1996 at the inaugural annual general assembly of the Working Group of Indigenous Minorities in Southern Africa (WIMSA), the San delegates decided that they should be referred to and be called San when addressing various San groups in Southern Africa.

The term San is therefore at no stage used as a derogatory term but a group name generally used in southern Africa to refer to the language group classification which is the Khoisan language.

**xiv. Continue and enhance its affirmative actions aimed at ensuring the protection of the rights of indigenous population and communities.**

IN RESPONSE

Namibia is a signatory to the United Nations Declaration on the Rights of Indigenous Peoples of 2007. The Government, through the Office of the Prime Minister, established the San Development Programme in 2005. The Programme is

run by the Special Projects Division in the Office of the Prime Minister which was mandated by Cabinet to ensure that the formerly marginalized ethnic minorities in Namibia are fully integrated in the mainstream economy. The Programme mainly focuses on resettlement, sustainable livelihood support programmes, education, land and income-generating initiatives for formerly marginalized communities.

The San Development Programme has been expanded to include other ethnic minorities such as the Ovahimba and Ovaherero. The Government has set up an Inter-Sectoral Task Force to formulate policy guidelines for Educationally Marginalized Children (EMC), to coordinate the activities of Ministries, NGOs, and other stakeholders regarding EMC, in order to promote access to education for formerly marginalized communities. In this regard, a policy document entitled "National options for educationally marginalized children" was formulated and adopted by Government in 1998. EMC include children from the San community, the Ovahimba community and children in various urban centers.

The Government, through the Ministry of Lands and Resettlement acquired land in both communal (five projects) and commercial areas (four projects) where some San Communities have been resettled. Four of the nine projects, translate into about 18,600 ha of land acquired in the commercial area with 358 families being resettled. Three of the five projects in communal areas with a size of 18,333 ha, are allocated to 281 San families, while the other farms were allocated to 313 families.

In order to ensure that the Ovahimba children get access to education, the Ministry introduced mobile school units. Co-operation between the Ministry of Education and the Namibia Association of Norway made it possible to start the mobile school units for the Ovahimba community in Kunene Region. This intervention is aimed at providing access to education to the Ovahimba children without uprooting their traditional way of nomadic life.

**xv. Accelerate establishment of an independent body to cater for the protection of the environment;**

IN RESPONSE

The Ombudsman is an independent office established in terms of the Namibian Constitution, and in terms of Article 91(c) of the Namibian Constitution one of its four main functions, is the protection of the environment. In this regard, the Ombudsman investigates complaints on the over-utilization of living natural resources (such as plants and animals); the irrational exploitation of non-renewable resources (such as diamonds or natural gas), the degradation and

destruction of ecosystems and failure to protect the beauty and character of Namibia.

The Ombudsman can take a variety of steps to remedy such problems, including negotiation between the parties concerned and court action.

During the period under review the Ombudsman investigated complaints around the over-utilization of seals, focusing on the legality of the annual seal harvest. The findings were inter alia that the harvesting of seals is lawful and that the Minister of Fisheries and Marine Resources did not exceed his jurisdiction and his powers in respect of the management and utilization of seals in Namibia.

The Environmental Management Act, Act No. 7 of 2007 further established an Environmental Commissioner with inter alia the function to advise Government bodies on the preparation of environmental plans, to receive and record all applications for environmental clearance certificates, to determine whether or not a particular listed activity requires an environmental assessment and to determine the scope, procedure and methods for a particular environmental assessment. This Act also provides for the appointment of environmental officers who have powers of search and seizure, and to issue compliance orders when someone violates the law.

**xvi. Continue to take all necessary measures to curb the spread of HIV and AIDS, protect those infected and affected against discrimination, stigmatization and ostracism, and provide information in its next Report, on the availability of anti-retroviral treatment;**

IN RESPONSE

The Government adopted a National Health Policy Framework for the period 2010/2020. Most of the primary health care policies of the World Health Organization have been incorporated into the Policy.

In its national effort to combat HIV and AIDS, the Government launched a Strategic Plan Programme in 1999, and in 2009 the Government launched an HIV and AIDS Policy that calls on all stakeholders to contribute to the fight against HIV and AIDS and Prevention. An amount of N\$ 7, 6 million (US\$ 800, 000) was allocated to fight HIV and AIDS and Prevention from 2005 to 2012 financial years.

The National Strategic Framework (NSF) for HIV and AIDS 2010/11 -2015/16 succeeded the Medium Term Plan 3 (MTP3) that came to an end in March 2010. The framework provides strategic policy, planning and implementation guidance and leadership for the national HIV and AIDS multi-sectoral response.

The purpose of the NSF is to:

- Facilitate strategies that will curb the spread of HIV and AIDS epidemic and mitigate the social and economic impacts through a multi-sectoral response.
- Articulate a strategic framework for the implementation of the national multi-sectoral HIV and AIDS response in Namibia. It is based on the concept of the “Three Ones” principle of having one national strategic framework, one national coordinating authority, and one national monitoring and evaluation framework.
- Identify and articulate national priorities and targets (results) for the multi-sectoral HIV and AIDS response.
- Facilitate a multi-sectoral and decentralised planning and implementation framework where sectors, regions and communities identify their strategic niche, design and implement appropriate evidence based and results focused interventions that contribute to national results (targets). All stakeholders are expected to develop and align their HIV and AIDS strategic operational plans to the NSF.

The results from the biennial Sentinel Survey shows that incidences of HIV and AIDS rose from 19.3% in 2000, to 22.0% in 2002, and stabilized thereafter at 19.7% in 2004, 19.6% in 2006, 16.8% in 2010 and 13.3% in 2012.

All Namibians have access to health facilities and antiretroviral (ARV) medicine is offered to them free of charge. Approximately 131 158 of infected people need ARV treatment in the country, and 75 681 people were on ARV treatment as at March 2010 which increased to 110 053 people during 2012/13 financial year. The programme started in 2004 at all Government hospitals.

**xvii. Take all necessary measures to decentralize medical expertise from Windhoek in order to enable people in other parts of the country to have easy access to specialist health care;**

IN RESPONSE

The main objective of the Government in the delivery of health services is to improve the health of the Namibian population through the provision of relevant preventative, curative and rehabilitative services, which are affordable to all Namibians.

There are State hospitals in virtually all major towns in the country. In smaller towns, villages and rural settlements there are well-equipped and staffed clinics and healthcare centers which are operated by the Ministry of Health and Social Services. Windhoek, the capital city has three private hospitals and there are six more private hospitals in the major towns of Otjiwarongo, Tsumeb, Walvisbay, Swakopmund and Ongwediva.

In order to decentralize medical expertise from Windhoek to other parts of the country, the Ministry of Health and Social Services has adopted a road map for the development of hospitals and health facilities: Windhoek Central Hospital is currently the only Class “A” State Hospital. It is envisaged to add Oshakati Hospital by 2023 and Rundu Hospital by 2030 to this category. There are currently three intermediate referral hospitals (Class B Level 1) in the country and it is envisaged to have four (4) by 2030. There is currently only one regional referral hospital (Class B Level 2) in Namibia, but the Ministry of Health and Social Services (MoHSS) plans to have seven by 2018. There are currently thirty district hospitals (Class C) in the country and the Ministry of Health and Social Services plans to have 36 by 2018. There are forty-six Class D centres (Health Centre’s) in the country, and it is envisaged having 52 by 2018; 55 by 2023 and 60 by 2030. There are 261 clinics (Class E) at the moment in the country, and the MoHSS plans to have 300 in 2018; 320 in 2023 and 350 by 2030.

There is currently only one mental hospital in Namibia. The assessment of the current situation with regard to specialized mental hospitals country wide has already started and the MoHSS envisages having fully functional specialized mental hospitals in Windhoek, Oshakati and Rundu by 2018 and another one in Keetmanshoop by 2023.

There are no specialized mother and child hospitals in Namibia. The MoHSS plans on having one in Windhoek by 2018; another one in Oshakati by 2023 and another one in Rundu by 2030. Infectious Disease hospitals are also planned for Windhoek, Oshakati and Walvis Bay by 2018. Apart from the one in Windhoek, another oncology department is planned for Oshakati by 2018.

**xviii. Ensure that the provisions of the Education Act No 16 of 2001 are scrupulously respected and that children who are unable to afford secondary education are assisted;**

IN RESPONSE

Article 20 of the Namibian Constitution provides that all persons in Namibia shall have the right to education. It further provides that primary education shall be compulsory and shall be provided free of charge at State schools. In 2001 Parliament passed the Education Act, (Act 16 of 2001) to give effect to the Constitution and international instruments.

The Namibian Constitution states that formal basic education is free and compulsory from age six until the child reaches the age of 16, or when she/he completes primary education if before then. Under the Education Act (Act no.16 of 2001), free basic education is extended to Grade 12, but is not compulsory beyond the limits set in the Constitution. It should be noted that Ministry of Education has implemented Universal Primary Education as of January 2013. In addition, a school grant is given to each primary school. Furthermore, the Education Act, (Act 16 of 2001) provides for the establishment of an “Education Development Fund” which assists learners who are not financially able to contribute towards the School Development Fund (SDF), to purchase school uniforms and even toiletries in such cases.

Free education in the context of basic education means that no fees are charged for attendance, tuition, or textbooks. However, in Grades 10 and 12 a registration fee for the examination is required and parents are expected to provide materials for the learner such as pens, pencils, and notebooks, and to contribute to the school development fund. The Ministry of Education has put in place exemption procedures for hostel and examination fees for children whose parents are not financially able to pay these fees. Discrimination in access to education is prohibited by the Namibian Constitution, strengthened by anti-discriminatory education policies and regulations.

A National Conference on Education was held from 27 June – 1 July 2011 to discuss the many challenges in the education sector under the theme “Collective Delivery of the Education Promise; Improving the Education and training System for Quality learning Outcomes and Quality of Life”. The Conference aimed to provide a platform for the public and key stakeholders to scrutinize the current state of the education and training system in Namibia and develop strategies to address it. All recommendations made at the Conference were subsequently approved by Cabinet. Cabinet, inter alia gave a directive that free primary



education must prevail in accordance with the provisions of the Namibian Constitution. Periodic update is given on implementation and realization of the conference resolutions. The implementation of Universal Primary Education was one of the many resolutions taken and endorsed by the Namibian Cabinet.

**xix. Take measures to curb child abuse and prostitution, hold those who abuse farm and mine workers to account, and ensure that employers, and especially foreign firms are accountable for non-adherence to established labour standards;**

IN RESPONSE

The Children's Act, Act No.33 of 1960 makes provision for measures to protect children against abuse.

Steady progress has been made in the Government's quest to combat and eliminate child labour as per the Action Programme which was developed during 2011. The Ministry of Labour and Social Welfare produced a report on the Technical Co-operation Programme on elimination of child labour in the country.

The Action Plan was developed for five Government line ministries to co-operate to eliminate child labour. These include Ministry of Labour and Social Welfare, Ministry of Education, Ministry of Gender Equality and Child Welfare and the Ministry of Safety and Security.

The Directorate of Labour Inspectors in the Ministry of Labour and Social Welfare conducts periodic inspections to farms and other places of employment to identify cases of child labour. During these sessions compliance orders are issued. Arrests are made of those who do not adhere to compliance orders.

The Ministry of Labour and Social Welfare conducted various inspections in 2010-2011 where cases of forced labour of children under the age of 18 have been reported in Namibia.

An inter-ministerial committee has been set up consisting of the Ministry of Labour and Social Welfare, Ministry of Gender and Child Welfare and the Ministry of Safety and Security to monitor reports on human trafficking and smuggling of migrants in Namibia.

The Labour Act 2007, No 11 of 2007 has statutory provisions in place to regulate child labour. Chapter Two (2) provides for Fundamental Rights and Protections.

Section 3 (1) (2) provides for the prohibition and restriction of child labour whilst Section 4 (1) (2) of the Act provides for the prohibition of forced labour. Both Section 3 (6) and 4 (3) provide for the punishment and remedies a court can apply if a person is found guilty of the offence.

In terms of international instruments, Namibia has ratified the following International Labour Standards:

- Forced Labour Convention, 1930 (Convention no. 29);
- Abolition of Forced labour Convention, 1957 (convention no. 105);
- Minimum age convention (convention no. 138)
- Worst forms of child labour Convention, 1999 (no. 182)

Any person who alleges that his/her fundamental rights are infringed can approach the Labour Commissioner or the Labour Court for an appropriate relief. The Labour Act prescribes imposition of fines if a person is convicted of any offence. A convicted person is liable for a fine not exceeding N\$20 000 or imprisonment not exceeding four years or both fine and imprisonment.

**xx. Incorporate in its next Periodic Report, all legislative and other measures taken to give effect to the provisions of the Maputo Protocol, by complying with the Guidelines adopted by the African Commission to that effect;**

IN RESPONSE

The information regarding legislative and administrative measure which are in place to give effect to the provisions of the Maputo Protocol is provided in PART THREE (paragraph 33) of the report.

**xxi. Inform the African Commission, on its next Periodic Report, due in April 2013, of the measures it has taken to address the areas of concern, and also to implement the recommendations included in the Concluding Observations.**

IN RESPONSE

Some of the information regarding measures to address areas of concern which were highlighted by the Commission after the last report has been provided in the responses to the concluding observations as reflected in the paragraphs above.

**(Xi) The report continues to make use of the term civilizing in relation to indigenous population in spite of the fact that the African Commission has consistently emphasized that such a term is derogatory.**

The use of the term “civilizing” which appeared in the last report was unfortunate but the message we wish to convey is to improve the quality of life of the San community.

**(xii) The report is silent on access of indigenous women to health and political participation**

With regard to access of indigenous women to health and political participation; all Government institutions and public services are open to the public and are accessible in all the regions of the country.

In addition to the government health facilities through- out the country, there are specific health facilities in the areas which are predominantly occupied by the indigenous communities such as at Tsumkwe, Farm Uitkoms, Seringkop, Tsintsabis, Omega and Ohaijuua. Furthermore, health extension workers are based in different communities to provide health services to those communities.

There are mobile clinics in all the regions which cater for the communities including the indigenous women in the remote rural areas.

There are examples of indigenous women who have served in Government structures as Deputy Minister, and Regional Councilor. Traditional leaders are recognized by the Government and as such they play a significant role in the political processes. There are various examples of indigenous women who are chiefs and queens of their communities.

**(xvi) The Report does not indicate the protection, if any, of human rights defenders, and the implementation of the UN Declaration on Human Rights Defenders.**

In terms of Article 21(1) of the Namibian Constitution, Non-governmental organizations (NGO's) can be registered as non-profitable company under Section 21 of the Companies Act of 1973, as amended. The NGO may also exist as trusts, foundations, voluntary organizations or community-based organizations. The Government has a good working relationship with the Namibia Non-Governmental Organizations Forum (NANGOF), an umbrella body established by NGOS and civil society themselves.

## **PART TWO**

### **1. THE GENERAL LEGAL FRAMEWORK, WITHIN WHICH THE CIVIL AND POLITICAL RIGHTS ARE PROTECTED**

#### **The Constitution**

Chapter 3 of the Namibian Constitution incorporates all the fundamental human rights and freedoms contained in the ACHPR; particularly the civil and political rights which are all enshrined in the Namibian Constitution.

In terms of Article 24 of the Namibian Constitution, certain rights cannot be derogated from or suspended even if a state of emergency has been declared. These are the right to life, fair trial, and the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Article 6 of the Namibian Constitution explicitly abolishes death penalty.

By virtue of Article 144 of the Namibian Constitution, the ACHPR is part of the Namibian domestic laws. The effect of Article 144 is that the rights and freedoms provided in the Charter are enforceable within Namibia by the judiciary and quasi-judicial bodies. Undoubtedly, Chapter 3 of the Namibian Constitution is justiciable and it fully complies with the legal obligations as spelt out in Article 7 of the Charter. The Government respects, protects and fulfills the court rulings relating to the rights contained in the Charter.

Article 5 of the Namibian Constitution further provides that the fundamental rights and freedoms enshrined in Chapter 3 shall be respected and upheld by the Executive, Legislature and Judiciary and all organs of the Government and its agencies, and by all natural and legal persons in Namibia, and shall be enforceable by the courts.

Article 5 is strengthened and supported by Article 25 (2) of the Namibian Constitution, which gives the right to the aggrieved persons who claim that their fundamental rights or freedoms guaranteed by the Constitution have been infringed, threatened or violated, to approach a competent court for a remedy. In addition, Article 25(4) empowers the courts when dealing with cases of human rights violations, to award monetary compensation to the victims.

## 2. GENERAL MEASURES OF IMPLEMENTATION

Legislation and other enabling measures passed in support of human rights instruments since the last report are the following:

**Employment Service Act No 8 of 2011.** The Act provides for the establishment of the National Employment Service; to impose reporting and other obligations on certain employers and institutions; and to provide for the licensure and regulation of private employment agencies.

**Correctional Service Act No 9 of 2012.** The Act has replaced the whole Prisons Act No 17 of 1998. The new Act provide for the establishment of the Namibian Correctional Service and matters incidental thereto.

**Prevention and Combating of Terrorist Activities Act No 12 of 2012.** The Act provide for the offence of terrorism and other offences connected or associated with terrorist activities; and to provide for measures to give effect to international conventions. This Act was subsequently repealed in 2014 and was replaced by the Prevention and Combating of Terrorist and Proliferation Activities Act, Act No 4 of 2014

**Rules of the High Court of Namibia, under Section 9 of the High Court Act, Act No 16 of 1990,** which came into operation on 16 April 2014. The new Rules repealed all the other old Rules of the High Court. Section 108 of the new Rules outlines procedures and conditions precedent to the execution against immovable property and transfer of judgment. The new Rules were promulgated to prohibit the execution or sale of immovable property without proof to the court that the execution debtor or person has insufficient movable property to satisfy the writ of execution, which was not a prerequisite in the past.

## 3. SUBSTANTIVE RIGHTS RECOGNIZED UNDER THE CHARTER AND MEASURES TAKEN TO IMPLEMENT THEM

For the purposes of this report, some Articles which contain similar issues have been grouped together for better comprehension of related rights and freedoms.

#### **4. ARTICLE 1 AND 2: LEGAL FRAMEWORK AND MEASURES TAKEN TO RECOGNIZE THE RIGHTS, DUTIES, FREEDOMS AND ENTITLEMENT TO THE RIGHTS AND FREEDOMS AND THEIR ENJOYMENTS**

There is no new information regarding these two Articles to report on; the situation is still remains the same under these articles, as it was stated in the last report.

#### **5. ARTICLE 3, 19 AND 26: EQUALITY AND EQUAL PROTECTION BEFORE THE LAW**

##### **5.1 The Constitution**

There is no new information to report on under this heading, the information and the situation still remains the same.

##### **5.2 Elderly persons and the right to equality**

Older persons fall in the ambit of Article 10 of the Namibian Constitution, which prohibits discrimination on among other grounds, social and economic status. All other constitutional rights apply equally to older persons.

The Aged Persons Act No. 81 of 1967 provides for the protection and care of older persons. The government is currently reviewing legislation on the rights of older persons.

The National Pension Act (Act No 10 of 1992) provides for payment of pension grants and other financial support to citizens who have attained the age of 60 years. Namibia is also a signatory to the UN Principles for Older Persons Declaration. Government has a policy for elderly persons to receive free medical treatment at State hospitals, and to receive preferential treatment at all Government institutions and at banking institutions.

The City of Windhoek has exempted senior citizens from paying for transport when using the buses of the city of Windhoek municipality. Some local authorities and other service providers have come up with initiatives to give rebate to the elders.

There are seven (7) Government sponsored accommodation facilities for the older persons. Those elderly persons who are still self-sufficient can be accommodated at these facilities against a nominal fee. These facilities are situated in Khomas, //Karas, Omaheke, Kunene and Erongo Regions.

## **6. ARTICLE 26: INSTITUTIONAL FRAMEWORK FOR THE PROTECTION OF HUMAN RIGHTS**

### **6.1 The role of the judiciary in the protection of human rights**

Article 78(2) of the Namibian Constitution explicitly states that the courts are independent from the executive, and the legislature, and are subject only to the Constitution and the law. Article 78 (1) clearly demonstrates that judicial independence and impartiality are protected by the highest law of the land.

Namibia has a strong judiciary which has actively defended the constitutional rights of citizens and non-citizens. The courts have handed down important decisions in a number of cases including on the rights of persons with HIV and AIDS. In July 2012, the High Court ruled in favour of three women who sued the Government after having been sterilized in State-run hospitals. In response to the outcome of the case the MoHSS has implemented measures to prevent the above mentioned from happening again. Patients are referred to social workers for counseling, after which they need to sign that they understand the implications of sterilization. Patients also have to sign an affidavit at the Police station indicating their permission to the sterilization before a doctor will conduct the procedure.

In an earlier case of **S v Ganeb 2001**, Mr. Ganeb was convicted in the Magistrate's court on charges of stock theft. He sought to have a Judges certificate in terms of section 309(4) (a) read with section 305 of the Criminal Procedure Act No. 51 of 1977. A judge's certificate was a requirement for any person behind bars and who did not have access to a lawyer to get an appeal or a review. His application was turned down. Mr. Ganeb, not content with this rejection made his views known to the judge president who in turn sought to have the matter weighed against the Namibian Constitution.

The main question the court had to answer was; can an inmate without legal representation seek to have an appeal or review of a lower court judgment without procuring a judges certificate.

The court found section 309(4)(a) to be against article 12 ( the right to a fair trial) and article 10 (all persons shall be equal before the law) of the Namibian Constitution.

There are still some challenges with regard to access to justice which is due to economic and geographic barriers, and shortage of State funded legal aid counsel. Court cases, especially in the lower courts, are often delayed because of capacity challenges in the court system.

## **6.2 Office of the Ombudsman**

The Office of the Ombudsman carries a dual mandate as both an Ombudsman in the classical sense and as the protector of human rights. During 2010 the Ombudsman, initiated the drafting of a National Human Rights Action Plan (NHRAP) to improve, respect and fulfil human rights in Namibia in line with Part 11, paragraph 71 of the Vienna Declaration on National Human Rights Action Plan of 1993. As part of this process, a baseline study on Human Rights in Namibia was completed in October 2013 with the NHRAP drafting proceeding in 2014. The tentative launch date for this plan is the 10<sup>th</sup> of December 2014. The plan has 7 thematic areas being access to health services, access to justice, access to education, right to water and sanitation, right to housing, access to land and right not to be discriminated against.

The Office of the Ombudsman is the only Ombudsman's Office in Africa that has been accredited with "A" status twice in succession according to the Paris Principles for the last three years.

The Ombudsman further assumed the responsibility of human rights education as an integrated part of the protection of human rights and had various projects towards public education on specific issues running. In 2012-2013 and 2013-2014 the Ombudsman embarked on a public education project aimed at school children with the theme "My rights, My responsibilities". This is in line with the approach followed in the African Charter on Human and Peoples' Rights. Various age appropriate booklets and posters were developed.



The Ombudsman reported that the budget allocated for the promotion of human rights was increased from N\$ 400 000 (US\$ 47058, 800) in 2004 to N\$ 1 200 000 (US\$ 120 000) in the year 2011/2012. The personnel complement of the Office of the Ombudsman was further increased in 2013 in order to capacitate the Ombudsman with the necessary staff to assist him in the execution of his mandates.

A specific division was created on the staff establishment of the office to provide for a Children's Advocate. Legal practitioners and a social worker will assist the Children's Advocate. This section will assist the Ombudsman in carrying out its constitutional human rights mandate.

The Northern Regional office of the Ombudsman was temporarily hosted in the Oshakati Magistrate's court until December 2013 when the personnel moved to a newly build office complex. There are currently 3 permanent regional offices for the Ombudsman with a further two offices planned to be established in the next 4 years. The personnel of the Office also conducts intake clinics throughout Namibia and have about 150 visiting points to take services to the people of Namibia. During these visits Correctional Service facilities and Police detention cells are also visited.

### **6.3 Ministry of Justice**

The Government established the Inter-Ministerial Committee on Human Rights and Humanitarian Law (IMC), a technical committee comprised of officials from line Ministries and Agencies who are charged with the responsibility to compile information for preparation of Namibia's periodic reports on the implementation of international human rights conventions/treaties to which Namibia is a State party. The objectives of the IMC is to advise and assist the Government in implementing and spreading knowledge on the international human rights and international humanitarian law (IHL), and to make recommendations for amendments to the existing law to give effect to the obligations of the State Party.

The Ministry of Justice also has a Directorate of Legal Aid which is established to administer legal aid scheme pursuant to the Legal Aid Act No 29 of 1990. This Directorate has an obligation to render free legal aid in both civil and criminal cases. The criteria for granting legal aid are the level of income and the merits of the case as determined by the regulations adopted by the Minister of Justice. A person can apply for legal aid if he/she cannot afford the services of private legal practitioners. An applicant may be provided

with the services of a legal aid counsel or a private legal practitioner may be instructed to represent the applicant.<sup>5</sup>

#### **6.4 The Namibian Police Force**

There are 132 police stations and substations in the country. Eight new police stations were built during the financial year 2012/2013, and 22 more police stations will be built during 2013/2014 financial year. The Government aims to build more police stations closer to people, in order to bring the functions and Police services closer to the people.

#### **6.5 Criminal justice system**

Article 12 of the Namibian Constitution provides for the rights to a fair trial. The State bears the burden to prove the guilt of an accused person beyond reasonable doubt.

The Criminal Procedure Act, Act No 51 of 1977 as amended (the CPA), is the principal piece of legislation which governs criminal procedure in the Namibian legal system including regulating search and seizure, arrest, the filing of charges, bail, plea, testimony of witnesses and the law of evidence, as well as appeal. In terms of section 73 of the CPA, an accused who is arrested shall be entitled to the assistance of his/her legal representative from the time of his/her arrest to the finalization of the case.

### **7. ARTICLE 4 AND 5: THE RIGHTS TO LIFE, LIBERTY AND RESPECT FOR DIGNITY**

Namibia has no death penalty in its statutes. Article 6 of the Namibian Constitution has expressly abolished the death sentence. Namibia also has an exclusionary clause in the Extradition Act, Act No. 11 of 1996 which prohibit the extradition of a Namibian citizen or any other person finding him/herself within the borders of Namibia in the event that such person might face the sentence of death upon conviction.

#### **7.1 Torture, inhuman and degrading treatment**

The Bill to criminalize torture has not yet been finalized and is still with the Law Reform and Development Commission. Consultations on final draft are ongoing and the LRDC will engage a specialist drafter to finalize the Bill.

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<sup>5</sup> See statistics of Legal Aid cases attached hereto marked as annexure "D"

In an earlier case of *Namunjembo and Others v Commanding Officer, Windhoek Prison and another*, the prisoners were chained because one of them was allegedly planning to escape from prison and the others had previously escaped from prison. They remained in chains for approximately six months. The prison authorities removed the chains after Namunjembo and the others applied to the High Court. The applicants said that being thus chained was contrary to Article 8 of the Constitution.

The Supreme Court noted that imprisonment necessarily affected some of a prisoner's rights, including the right to dignity. This did not, however, mean that a prisoner did not have the right to dignity. To chain a person "was a humiliating experience which reduces the person placed in irons to the level of a hobbled animal whose mobility is limited". It was also a strong reminder of the time when Africans were sold into slavery in chains. The court therefore decided that it was at least degrading treatment to put chains on prisoners and was therefore contrary to Articles 8(2) (a) and (b) of the Constitution. The effect of this ruling was that prison authorities could not in future chain prisoners.

## **7.2 Slavery and forced labour**

In terms of the Labour Act of 2007, forced labour amounts to a criminal offence. Forced labour is defined as-

- i) any work or service performed or rendered involuntarily by a person under threat of any penalty or punishment;
- ii) any work performed by an employee's child under the age of 18 years in terms of an agreement between employer and employee;
- iii) any work performed by a person because he/she is subject to the control or supervision of a traditional chief or headman.

However, Article 9(3) of the Namibian Constitution excludes certain labour from the expression "forced labour" e.g. any labour required to be performed in terms of a sentence or order of a Court, by members of the defence force, police or prison service, or labour required to be performed in a period of public emergency or calamity.

## **8. ARTICLE 6: RESPECT FOR CIVIL LIBERTY**

The Government still continues to observe and adhere to the implementation of the legal instrument. Our courts have held that detained person's rights as set out in Article 11(1) and (2) as well as Article 7 of the Namibian Constitution will be infringed if and such custody or their detention is unlawful, For example, if an accused is held in custody for more than 48 hours before being brought before a court.

In the case of *Iyambo v Minister of Safety and Security* (I 3121/2010) [2013], the Plaintiff's action was based on unlawful arrest and detention by defendant, the Ministry of Safety and Security. The Plaintiff was brought before a magistrate court four days after arrest and was detained in violation of Article 11(3) of the Namibian Constitution. In the assessment of damages the court took into account the circumstances surrounding arrest of the plaintiff and treatment of the plaintiff by arresting police officials, and the period of unlawful detention being four days, plaintiff's loss of freedom of movement and loss of esteem among members of the local community where plaintiff worked as a primary school teacher. The Court then awarded damages of N\$12 000, 00 (approx. US\$ 1 200, 00).

## **9. ARTICLE 7: THE RIGHT TO FAIR TRIAL AND ADMINISTRATIVE OF JUSTICE**

The courts have given effect to the right to a fair trial over the years and have also given a broader interpretation on the right to fair trial including the right of an accused person to be provided with the contents of the police docket. This right relates to Article 12(1)(e) of the Constitution.

In *State v Scholtz 1998 NR 207 (SC)*, the court considered the important of the principle of equality before the law in Article 10(1) of the Constitution and concluded that state disclosure is a principle of a fair trial. In that case the court held that the right to a fair trial embodied in article 12 (1) (e) of the Namibian Constitution includes disclosure of police dockets and statements of witnesses to the accused person.

In *S v Kau and Others*,<sup>6</sup> the defendants were convicted in a magistrate's court of illegally hunting a giraffe. The magistrate did not tell Mr Kau and the

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<sup>6</sup> S v Kau 1995 NR 1 (SC)

others that they had the right to be represented by a lawyer of their choice. The Supreme Court held that this meant that they did not receive a fair trial.

The Supreme Court further held that every person has the right guaranteed by Article 12(1) (e) of the Constitution to be represented by a lawyer of their choice. A person who appears in court should therefore be informed of this right. The only exception to this rule is when it appears that the person already knows that he or she has this right. For example, a lawyer appearing in court would know of this right. For this reason and other irregularities during the trial, the Supreme Court set aside the conviction and sentence of Mr Kau and the other persons.

In *S.v. Gadu*<sup>7</sup>, Manyarara AJ suggested a simple format to inform an accused person of his/her right to legal representation:

- a) that he has a right to be defended by a lawyer;
- b) that he has the right either to hire and pay a lawyer of his choice or, or alternatively apply to the legal aid officer for a lawyer to be provided by the State;
- c) that if he chooses to apply for a legal aid lawyer, the clerk of the court will assist him in completing the necessary forms; and
- d) that the legal aid office will consider his financial circumstances and, based on its findings, it will decide and inform him whether he will be required to make any contribution towards the cost of the legal aid lawyer to be provided to represent him. In this instance, as in the other matters, the failure by the magistrate to inform the accused of his entitlement to legal aid is fatal”.

The right to administrative of justice in Namibia is quite distinct in that it has been constitutionalized at independence. Article 18 of the Constitution provides that “*administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal*”

From the aforesaid it is clear that a positive duty is placed on the public administration to meet the requirements of legality, fairness and

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<sup>7</sup> S v. Gadu 2004 (NCLP 48 at 56

reasonableness in all their actions and grants persons aggrieved by administrative action the right to seek redress before the court of law.

In the case of *Government of the Republic of Namibia v Sikunda (2002)*, Sikunda senior was arrested and detained in terms of section 49 of the Immigration Control Act No 7 of 1993 pending his deportation for allegation of being a threat to the national security of the country. He brought an application to the High Court and obtained an order for his release. Both the minister and the Security Commission seem to have understood that these powers need to be exercised as a matter of urgency because national security was at stake.

The issues before the court were whether the exercise of powers of his arrest, detention, declaring him persona non grata and the decision of considering him being a security risk by the Minister of Home Affairs, acting on the advice of and in consultation with the Security Commission without granting him an opportunity to make presentation was fair in terms of Article 18 of the Namibian Constitution.

The Court held that the provision of Article 18 of the Namibian Constitution is implicit in that an administrative organ exercising discretion is obliged to give reasons for its decision. It was further held that an administrative tribunal, which deals with and decides on matters affecting the fundamental rights of a person as well as state security, must give explicit reasons for its refusal. The court further stated that there can be little hope for transparency if an administrative organ is allowed to keep the reasons for its decision secret. The court further held that Article 18 requires administrative bodies and officials to act fairly and reasonably.

The cost of litigation is relatively high in Namibia. In criminal cases, the complainant is represented by a public prosecutor who is paid by the State, while the accused may be represented by a private legal practitioner of his or her choice. If the accused person cannot afford a private legal practitioner of his or her own choice, he or she may apply to the State to be granted legal aid in terms of Article 95 of the Namibian Constitution.

Community Courts are established in terms of the Community Court Act 10 of 2003 to hear civil and minor criminal cases in areas over which they have jurisdiction on which they adjudicate. These courts only have jurisdiction to award compensation to the victims.

## **10. High treason case**

The Caprivi treason trial is on-going and all the defendants have been afforded State funded legal aid to mount their defences. During August 2012 and on February 2013, a total of 44 suspects were found not guilty and were acquitted. Sixty five (65) accused persons are still remaining and facing trial in the High Court. This case is in its final stages and, the State and the defense have closed their cases. .

However, the country is still facing some challenges regarding lengthy trials in general, and the high legal costs which are the most common barrier of access to justice for most people because they cannot afford to pay private legal practitioners.

## **11. ARTICLE 8: 10 AND 22 -RELIGIOUS AND SOCIO-CULTURAL RIGHTS**

The Government has established a Ministry of Youth, National Service, Sport and Culture with a mandate to preserve culture. The Ministry has five directorates including National Heritage and Cultural Programmes. The main purpose of the directorate of culture is to identify, develop and promote heritage and culture as well as the nurturing of national pride and identity. The directorate has culture offices in all the regions, to promote and preserve Namibia's diverse cultures through mutual understanding and tolerance. The ministry holds annual cultural festivals to promote Namibia's diverse cultures of different ethnic groups. The annual cultural festivals competitions rotate in all the regions and all cultural groups in the country are welcome to participate and compete for the overall winner. With regard to religious, Namibia is a secular state in terms of Article 1 of the Namibian Constitution; the country does not promote any particular religion.

The Government has in terms of the Traditional Authorities Act, Act No. 25 of 2000 recognized an additional 7 traditional authorities since the last report. These include the following 5 San traditional communities:

- Jul'haon Traditional Authority
- !Kung Traditional Authority
- Hai-//om Traditional Authority
- #Kao-//'aesi Traditional Authority
- !Xoo Traditional Authority

### **11.1 Freedom of Association**

Article 21 of the Namibian Constitution provides for freedom of association, including freedom to form and join trade unions and political parties. Government respects these rights in practice.

Article 17 of the Namibian Constitution further provides that all citizens shall have the right to participate in peaceful political activity intended to influence the composition and policies of Government.

## **12. ARTICLE 9: OF THE AFRICAN CHARTER- THE RIGHT TO INFORMATION AND PRESS FREEDOM**

No new development regarding this article. However, legislation or acts of parliament are readily available to all citizens. Laws in Namibia are published in the Government Gazette upon promulgation, and members of the public may obtain a copy at the Ministry of Justice or at Parliament for a minimum fee.

### **12.1 Media**

In 2013 Namibia was ranked 21<sup>st</sup> in the world and 1<sup>st</sup> in Africa on press freedom by Reporters Without Borders. Few more newspapers were launched namely *the Villager*, *Confidente*, *Prime Focus*, *Kundana (Oshiwambo)* and *Caprivi Vision (Silozi and English)*.

Moreover, Namibians are free to access social media networks such as facebook and twitter.

Independent newspapers operate freely, and many publications and organizations have websites that are critical of Government. In addition, freedom of expression is also enjoyed through radio call-in programmes and SMS text messages to the newspapers.



**13. ARTICLE 11: THE RIGHT TO ASSEMBLE FREELY**

Article 21 (1) (d) of the Namibian Constitution provides for freedom to assemble peacefully and without arms. Government is considering a new Bill to regulate public gatherings in terms of the recommendations of the Law Reform and Development Commission. The provisions of the Proclamation are also applicable to election campaigning, religious gatherings, celebrations and other demonstrations. It also gives the police powers to place conditions on gatherings and to disperse riots. The police have no powers to unreasonably refuse permission to assemble peacefully.

All persons in Namibia enjoy the right to freedom of peaceful assembly and to demonstrate.

**14. ARTICLE 12 AND ARTICLE 23: FREEDOM OF MOVEMENT, REFUGEES AND ASYLUM SEEKER**

Freedom of movement is restricted, but allowed if permits are obtained. It is a protection measure and a controlled manner of providing basic needs.

Voluntary repatriation of Angolan refugees started in May 2012; there were approximately 8 300 refugees and asylum seekers resident in Namibia. Since the voluntary repatriation programme started for Angolan refugees, 2 852 Angolan refugees were repatriated. In addition to these, 3 Rwandese and 4 Burundian refugees were also repatriated voluntarily. The Angolan refugees represent 75% of the refugee population.

**15. ARTICLE 13: DEMOCRACY AND GOVERNANCE**

Government business is conducted through the Executive, the President and Cabinet whose members are drawn from Parliament. The Executive is responsible for the daily management of the affairs of the State in the public interest. Article 27 (2) of the Namibian Constitution provides for an executive Presidency, with the President as the head of State and head of Government. There are three layers of Government namely: the central Government consists of the President and Cabinet of Ministers; the Regional Councils<sup>8</sup> and local authorities of which are 16 municipalities, 17 town councils and 18 village councils.

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<sup>8</sup> For purposes of administration and providing Government services to the people, Namibia has fourteen Regional Governments that administer the development plans and oversee the implementation thereof in the regions.

Namibia has a bicameral system of parliament consisting of the National Assembly, which has legislative powers subject to the Constitution and a National Council, which in terms of article 63 (1) and 74 (1) (a) of the Namibian Constitution is a house of review. Namibia conducts regular elections as a way of guaranteeing governmental activity and promotes democracy. The last election took place in November 2014. The Electoral Act, Act No 5 of 2014 makes provision for electoral challenges of election results through the judicial systems.

In the case of *Rally for Democracy and Progress and v Electoral Commission of Namibia and others (SA 12/202011)[2012}NASSC 21 (25 October 2012)*, the electoral process was subjected to court litigation and the outcome was that the errors made by presiding officers did not affect the outcome of the elections.

The court held that it was satisfied that no mistakes by the Electoral Commission have been made to detract from the final results of the election. The court further held that it was satisfied that the Electoral Commission of Namibia (ECN) proved that the final results were not affected by these mistakes.

### **15.1 Access to public property and services**

Government has implemented a decentralization policy in order to make public services available in all the regions, including the rural areas of the country. The aim of the decentralization policy is to ensure economic, cultural and social-economic development; to provide people at the grass-root level with opportunity and to give them the rights to participate in decision making at their level and extend democracy to them. The decentralization policy also provides the basis and a framework for Government to devolve functions, responsibilities, powers and resources to the lower levels of Government, namely Regional Councils and Local authorities.

The country has relatively well-established social infrastructures such as hospitals, schools, water points and postal services. Namibia's road infrastructures including gravel roads are well maintained by the Government which makes the movement of the people easier.

In terms of the National Policy on Disability, 2007 all physical infrastructure should be accessible to persons with disabilities, which currently poses a

challenge to some persons with disabilities who are not able to access some services.

## **15.2 Access to drinking water and sanitation**

In Namibia the main sources of drinking water are piped water, boreholes, protected wells, stagnant water and flowing waters from the rivers. The 2012 update on Progress on Drinking Water and Sanitation of the WHO/UNICEF Joint Monitoring Programme (JMT) listed Namibia amongst those countries that have met the MDG drinking water target. The Namibia Household Income and Expenditure Survey of 2009/2010 revealed that 72% of the households in the country have a distance of less than 1 kilometer to their source of drinking water. However, 24% of households have to cover 1-2 kilometers to fetch drinking water, and almost 1 % has to travel more than 5 kilometers to their source of drinking water.

In urban areas, 94% of the households have a distance of less than 1 kilometer to the source of drinking water, compared to 56% of rural households. In rural areas, 38% of the households travel a distance of 1-2 kilometers to fetch water.

There is a strong relationship between the income level of the household and the distance to source of drinking water. The higher, the income of the household, the closer the source of drinking water.

During July 2013, Cabinet granted approval to the Ministry of Agriculture, Water and Forestry to provide free water for human consumption to poor households in terms of the Water Supply and Sanitation Policy of 2008.

The Government has a National Sanitation Strategy for the period 2010 until 2015, in which it has committed itself to build improved sanitation or toilets in the rural areas. However, the 2009/2010 NHIES reveals that 49% of the households in the country have no toilets. Efforts are being made to build dry toilets in rural areas throughout the country. The programme to build toilets started during the financial year 2010/11.

## **15.3 Access to schools**

Generally, the Ministry of Education continues to receive the largest share of the national budget every year. During 2012/13, the Ministry of Education received N\$ 10 700 000 000 (approx. US\$ 588 million)

The NHIES of 2009/2010 reveals that about 49% of the households in Namibia are situated less than 2 kilometers to the nearest primary school, and 25% live within a distance of 2 to 3 kilometers. About 8 % of the households in the country still live more than 20 kilometers from the nearest primary school. The situation in urban areas is different, where 71% of the households live within 1 kilometer to a primary school compared to 31% of households in the rural areas.

The Ministry of Education, in collaboration with other line ministries and NGOs has implemented the Forum for African Women Educationalists in the country (FAWENA) project which aims to integrate the vulnerable children, including the San children, into the basic education system, with the special focus on the education of girls. The Office of the Prime Minister's Special Programme for Marginalized Communities also provide educational needs such as school uniforms, toiletries, transport, examination and hostel fees to these children.

In 2012, gender parity was largely achieved at both primary and secondary levels, with equal enrolment ratios in primary schools, and more girls than boys enrolled in secondary schools.

The "Education for All (EFA)" National Plan of Action of 2001-2015, aims at ensuring that by 2015 all children particularly girls and those from the marginalized groups have access to free and compulsory primary education. The Plan also addresses issues related to access to education and this means that all schools (primary and secondary) are built within 5km walking distance. Also access to education has been greatly improved by the adoption and implementation of the Education Sector Policy for Orphans and Vulnerable Children (2008), Education Sector Policy for the Prevention and Management of Learner Pregnancy (2009), Sector Policy on Inclusive Education (2013) and the implementation of Universal Primary Education (2013). Amongst others, the goals of this the Education Sector Policy on Prevention and Management of Learner Pregnancy is to promote the continued education of pregnant learners and to ensure the equal treatment of the female and male learners.

A National Conference on Education was held from 27 June – 1 July 2011 to discuss the many challenges in the education sector under the theme "Collective Delivery of the Education Promise; Improving the Education and training System for Quality learning Outcomes and Quality of Life". The

Conference aimed to provide a platform for the public and key stakeholders to scrutinize the current state of the education and training system in Namibia and develop strategies to address it. All recommendations made at the Conference were subsequently approved by Cabinet. Cabinet, inter alia gave a directive that free primary education must prevail in accordance with the provision of the Namibian Constitution. As from January 2013, free primary education was implemented. The government's commitment benefits most learners from socio-economic disadvantaged backgrounds, including those children belonging to marginalized communities.

The Namibia National Students Organization (NANSO) is the country's national student organization and is recognized by the Government. Learners at all Government secondary schools as well as students at tertiary institutions have the right to elect their Learner/Student Representative Councils to address educational issues at school level and with the Government.

#### **15.4 Access to health facilities**

All Namibians have access to health facilities and antiretroviral medicine is offered to them free of charge. Approximately 131 158 of infected people need ARV treatment in the country, and 75 681(69%) people were on ARV treatment as at March 2010 which increased to 113 486 (90%) people during 2012/13 financial year.

The Namibia Household Income and Expenditure Survey (NHIES) of 2009/2010 indicates that 30% of households in Namibia are situated 1 kilometers or less to the nearest hospitals or clinics and 36% live between 2 and 5 kilometers away. However, about 7% still have to travel more than 40 kilometers to reach a hospital or a clinic, especially in the rural areas.

Through the Fourth National Development Plan (2013-2017) the Government has identified access to quality health services as a key priority to increase the standard of living for people living in urban and rural areas.

The Government monitors the progress on maternal mortality through periodic Demographic Health Surveys (DHS). The latest DHS was carried out in 2013 and the report was issued in 2014. The maternal mortality ratio has increased from 225 deaths per 100,000 live births in 1992 to 449 deaths per 100,000 live births in 2006/2007. The Namibian Household Census of 2011

indicates that maternal mortality rate was 604 per 100,000 live births. Since then the Government has prioritized maternal mortality as matter of urgency by providing increased maternal healthcare services and a more equitable distribution of trained staff between urban and rural areas, amongst others.

The following major interventions and policies were put in place to reduce maternal mortality in Namibia:

- Road map for acceleration of reduction in maternal and neonatal mortality and revision of scope of practice for the health profession-Nurses and Mid-wives.
- Increase in capacity building (Establishment of Namibia School of Medicine and other regional nursing training centers)
- Information awareness campaign on health issues. Prevention of Mother to Child Transmission (PMCT) currently stands at 95%.
- Increased access to anti-retroviral drugs currently stands at 90%. HIV and AIDS was one of the major factors contributing to the high maternal mortality in the country.

The reduction in the malaria mortality rate from 7000 in 1990 to 10 in 2013, is an achievement as the incidence of malaria was also one of the contributing factors to high maternal mortality among expecting mothers.

The policy guidelines on reproductive health have been revised in order to create more awareness among couples to make informed decisions about reproductive health and births.

Guidelines for completing the maternal and perineonatal death review are in place and maternal audit committees are in place at national, regional and district levels to review and assist the quality of services provided to pregnant women.

There is a decline in new HIV cases amongst pregnant women attending antenatal clinics (ANC). <sup>9</sup> During 2011/2012, 18, 2% of women tested HIV positive, compared to 18, 8% 2009/2010. The prevalence of HIV and AIDS for adult from 15 years and older for 2013 is estimated at 12, 18%.

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<sup>9</sup> Source: 2012 report on the National HIV sentinel survey

The key health challenges the country faces include an HIV and AIDS epidemic, tuberculosis, malaria, emerging non-communicable diseases, maternal and child health and environmental health.

On 30 July 2012, the High Court ruled in favour of three women who sued the Government for alleged forced sterilization in State-run hospitals. It should be noted that the High Court held that those three women were not sterilized because of their HIV status, but rather that they did not give their informed consent<sup>10</sup>.

The Government has adopted a National Strategic Framework for HIV and AIDS Response in Namibia 2010/11 – 2015/16, through which community participation and involvement in scaling up the national response is being encouraged. The Government strategy focuses on strengthening the capacity and management of HIV response at community level.

The health sector is guided by the Ministry's Overall Health Policy Framework<sup>11</sup> which was revised in 2010 for the period 2010-2020. The policy is based on the tenets of primary health care approach, which include equity, inter-sectoral collaboration and community participation.

The country still faces some challenges with regard to shortages of skilled and experienced health workers (doctors, nurses, pharmacists, and social workers).

## **16. ARTICLE 14: THE RIGHT TO PROPERTY**

The Agricultural (Commercial) Land Reform Act, Act No 13 of 2002, provides for the acquisition of agricultural land by the State for the purpose of land reform and for the allocation of such land to Namibian citizens who do not own or otherwise have the use of any or of adequate agricultural land, and foremost to those Namibian citizens based on affirmative action.

To acquire fixed (immovable) property such as land and houses still remains a major challenge for the majority of people because of financial constraints.

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<sup>10</sup> L M v The Government of the Republic of Namibia Case No. 1603/2008, annexed and marked as annexure "E"

<sup>11</sup> 1990 revised in 1998

The majority of the population does not qualify for loans from financial institutions to finance the purchase of property.

However, ownership of fixed property is subject to the possibility of expropriation by the Government only if it is entitled to do so by a law which applies to everyone.

During the past two years, the National Planning Commission through its programme of Rural Poverty Reduction has been assisting the Namibia Housing Action Group (NAHAG) and the Shack Dwellers Federation of Namibia by providing them with grants to build low cost houses for their members in urban as well as rural areas. Since July 2009, approximately 3,600 members received support, 80% of whom were women.

#### **17. ARTICLE 15: ACCEPTABLE CONDITIONS OF WORK**

Section 128 of the Labour Act, Act No 11 of 2007 was by the Labour Amendment Act, Act no. 2 of 2012. The amendment of the Labour Act was necessary to prohibit discrimination between workers of labour hire companies and workers directly employed by the companies outsourcing services to labour hire companies. The new law protects labour hire workers against exploitative practices that they had endured over the past years.

The Labour Amendment Act further makes provision for a presumption as to who is an employee in terms of section 128 (A) and a presumption of indefinite employment in terms of section 128 (C). These presumptions protect employees against the principles of independent contractor and that of casual worker.

The Labour Act was translated in various indigenous languages and in Mandarin (Chinese language).

#### **18. ARTICLE 16: THE RIGHT TO HEALTH**

Access to health facilities, especially for the most marginalised communities has improved over the past two years. Special projects have been initiated under the Office of the Prime Minister's programme for San and other marginalized communities across the country. Access to health care and information about health and nutrition services for remote, rural and poor communities has also been improved through the introduction of a number of



outreach and community-based health service delivery vehicles as well as the introduction of mobile clinics in the regions.

In August 2012, following numerous complaints about poor health service delivery in the country, the President ordered a Commission of Inquiry to investigate the operations and the conditions of health facilities in the country. The report of the Commission was delivered to the President during the first quarter of 2013.<sup>12</sup> The President directed the Ministry of Health and Social Services to implement the recommendations of the report with immediate effect. The Ministry has incorporated the recommendations into its Strategic Plan for 2013-2017.

### **18.1 Physical and mental health of the citizens**

The National Policy for Mental Health which was launched in 2005 aims to achieve and maintain a high standard of mental health and well-being in the population of Namibia, as well as to reduce stigma against people with mental disorders. This is to be achieved through the development of a comprehensive community-based mental health service that is decentralized and integrated into the general health service.

There is currently only one mental hospital in Windhoek and one mental ward in Oshakati. The MoHSS envisages having fully functional specialized mental hospitals in Windhoek, Oshakati and Nankudu by 2018 and another one in Keetmanshoop by 2023.

## **19. ARTICLE 17: THE RIGHT TO EDUCATION**

In terms of Article 20(1) of the Namibian constitution “All persons shall have the right to education”. Article 20 (2) provides that primary education shall be compulsory and that the State shall provide reasonable facilities to render effective this right for every resident within Namibia, by establishing and maintaining State schools at which primary education will be provided free of charge.

New primary and secondary schools including the first ever vision school in the country has been built for the past two years. The 2012 statistics regarding the net school enrolment ratio shows that slightly more females

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<sup>12</sup> Report of the Presidential Commission of Inquiry – Ministry of Health and Social Services - 2013

than males are enrolled in Namibian schools, that is 91, 4% males compared to 94.8% females. In this regard access to education has improved during the last five years. More class rooms and teachers accommodation have been built, mainly in the rural areas.

**20. ARTICLE 18: FAMILY, DISCRIMINATION AGAINST THE RIGHT OF WOMEN, PROTECTION OF CHILDREN, AGED AND PERSONS WITH DISABILITY**

Article 14 (3) of the Namibian Constitution provides that the family is a natural and fundamental group unit of society and is entitled to protection by society and the State. The Marriage Act 25 of 1961 further provides for solemnization of civil marriages. Article 66(1) of the Namibian Constitution recognizes customary law to the extent that it does not conflict with the Constitution, but there is no specific statute dealing with the recognition of customary marriages. The Law Reform and Development Commission has recommended the enactment of a law for the recognition of customary marriages. In terms of Article 4(3)(b) of the Namibian Constitution, a marriage by customary law shall be deemed to be a marriage to enable a person to obtain Namibian citizenship by marriage. The right not to be a compellable witness against a spouse is extended to customary marriages in terms Article 12(f) of the Namibian Constitution.

The Children's Act, Act 33 of 1960, makes provision for the adoption or fostering of children that are left orphaned or became eligible for any of the two alternative care options available.

**21. ARTICLE 19 AND 20: PEOPLES RIGHTS TO SELF-DETERMINATION**

Namibia attained independence as a unitary State in 1990. As a result Namibia continues to protect its borders as recognized by the international community and the Constitution.

**22. ARTICLE 21 AND 22: NATURAL RESOURCES AND ECONOMIC, SOCIAL AND CULTURAL RIGHTS**

**22.1 All peoples shall freely dispose of their wealth or natural resources – rights to development**

Article 100 of the Namibian Constitution provides that land, water and natural resources below and above the surface of the land and in the

continental shelf and within the territorial waters and the exclusive economic zone of Namibia shall belong to the State if they are not otherwise lawfully owned.

Article 95 (1) of the Namibian constitution states that “maintenance of ecosystems, essential ecological processes and biological diversity of Namibia and utilization of living natural resources on a sustainable basis for the benefit of all Namibians, both present and future; in particular, the Government shall provide measures against the dumping or recycling of foreign nuclear and toxic waste on Namibian territory.”

The minerals industry in Namibia is administered by the Minister of Mines and Energy, assisted by the Mining Commissioner and the Minerals Board of Namibia.

Certain limitations exist on the export of materials or minerals. No person may, except with the written permission of the Minister, export any source material from Namibia. The exportation of diamonds is also strictly regulated in terms of the Diamonds Act 13 of 1999 and the Regulations passed in terms of this Act.

The Nature Conservation Ordinance no. 4 1975 deals with protection of wildlife. The Nature Conservation Amendment Act No. 5 of 1996 provides for an economically based system of sustainable management and utilisation of game in communal areas.

In terms of section 114 of the Minerals Act, Act No 33 of 1992, a holder of a mining claim, a non-exclusive prospecting licence or a mineral licence is required to pay royalties to the Commissioner for the benefit of the State Revenue Fund.

In Namibia, both Government and private institutions conduct many surveys on various issues of economic and social needs including the three major surveys which is being carried out by the Government, namely the National Housing and Population Census, Namibia Household Income and Expenditure Survey (on living conditions) which take place every 10 years. The Demographic Health Survey which looks at natural health level of the country such as child health, family planning, infant child and adult mortality, nutrition and maternal health, is conducted every 5 years. These

surveys help the Government to formulate better policies in order to address many challenges, including poverty reduction.

### **23. ARTICLE 23: PEACE AND SECURITY**

The Namibian Government, through the Ministry of Home Affairs and Immigration is empowered by sections 49 (1) and 39 (2) of the Immigration Control Act, no 7 of 1993 to approach the Security Commission to declare any refugee/asylum seeker or any foreign national as a security threat once such an individual engages himself/herself in subversive activities. It was in this regard that two American nationals, Paul Gremes and Fredrick Piry, were declared security threats in 2007 by the said Commission and were subsequently removed from Namibia by immigration officers for recruiting Namibian citizens to go and work as security guards in Iraq and Afghanistan.

Should it be a refugee/asylum seeker who engages in such activities or criminal activities the Ministry of Home Affairs and Immigration also follows the same procedures but when it comes to the removal of refugee/asylum seekers after they have been declared security threats, the principle of non refolement is always observed by requesting the affected individuals to choose the third country to which they want to be deported, where they will not be subjected to persecutions. A case in point is that of Mr. Lumbala Kalamba Alias known as Mr. Kalamba who was convicted of fraudulent offences and sentenced to a fine of ten thousand Namibian (10 000) (approx. US\$ 1000, 00) or one (1) year jail term, in default of payment of the fine in 2009, and was subsequently deported to a country of his choice.

Namibia is one of the few countries in Africa that has consistently enjoyed peace and stability .The country is ranked 51<sup>st</sup> in the world, 2<sup>nd</sup> in southern Africa according to Global Peace Index (GPI) of 2013, with virtually no civil strife resulting from political turmoil. Democracy has expanded to a level where the country now has 15 political parties, which all vied for votes during the last elections in 2009.

Political tolerance is visible in the various debates about important national programmes, while hate speech, racism or tribalism is discouraged and condemned by most institutions.

### **23.1 Foreign relations and peace keeping**

Namibia practices a policy of non-alignment as outlined in article 96 of the Namibian Constitution. Namibia also encourages the settlement of international disputes by peaceful means.

Since 1994, Namibia has participated in both regional and international peace keeping missions of the United Nations. During May 2013, Namibia deployed additional Namibian police officers to Sudan to be part of the UN peace keepers in that country where they have been serving for the past 8 years.

## **24. ARTICLE 24: PEOPLES RIGHTS TO SATISFACTORY ENVIRONMENT**

### **24.1 Protection of the environment in Namibia**

Namibia has one of the highest ratios of protected land to population in the world, at 65.1 sq km (25.1 sq ml) per 1,000 people. About 44 % of Namibia's land area is under conservation.<sup>13</sup> Namibia ratified and or acceded to the following international environmental agreements:

United Nations Convention to Combat Desertification (UNCCD), 1994; United Nations Framework Convention on Climate Change (UNFCCC), 1992; Kyoto Protocol to the UN Framework Convention on Climate Change, 1997; Convention on Biological Diversity (CBD), 1992; The Ramsar Convention on Wetlands; Basel Convention for the Control of Transboundary Movements of Hazardous Waste and their Disposal; Convention on International Trade in Endangered Species (CITES).

Apart from the Minerals Act, the exploitation of minerals is also affected by the enactment of the Environmental Management Act 7 of 2007 (EMA) and the Environmental Impact Assessment Regulations passed in terms of that Act. In terms of this Act, no person may undertake a listed activity without an environmental clearance certificate. Listed activities include mining and quarrying activities. The Minister of Mines and Energy may not issue a mineral licence before the applicant has obtained an environmental clearance certificate.

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<sup>13</sup> Source: Ministry of Environment and Tourism July 2013 newsletter.

Various other laws are also relevant to the operations of the mining industry. These include the Soil Conservation Act 76 of 1969, the Hazardous Substance Ordinance 14 of 1974, the Atmospheric Pollution Prevention Ordinance 11 of 1976, the Prevention and Combating of Pollution of the Sea by Oil Act, Act No. 6 of 1981, the Forest Act, Act No. 12 of 2001, and the Atomic Energy and Radiation Protection Act, Act No. 5 of 2005. The objectives/aim of the last mentioned Act is to:

- minimize the exposure of persons and the environment in Namibia to the effects of harmful radiation
- ensure that adequate control is exercised over the possession, production, processing, sale, export and import of radiation sources and nuclear material
- create the necessary mechanisms to facilitate compliance with the obligations of Namibia under international agreements relating to nuclear energy, nuclear weapons and protection against the harmful effects.

Although the laws are in place Namibia still faces serious challenges due to poor land use practices, in equitable land distribution and recurrent droughts and floods.

## **25. ARTICLE 25: DUTY TO PROMOTE AWARENESS OF THE CHARTER ENFORCEMENT, TEACHING AND DISSEMINATION OF HUMAN RIGHTS INFORMATION**

For the past two years, the Office of the Ombudsman compiled all the Concluding Observations, including that of the African Commission on Human and Peoples' Rights, which they distributed to Parliamentarians and members of the public.

## **26. ARTICLE 26: INDEPENDENCE OF THE JUDICIARY**

### **26.1 Duty to guarantee the independence of the courts**

Namibia enjoys a remarkably independent judiciary. No one thus far has complained about outside interference with the judiciary.

Judges of the superior courts are appointed on the recommendation of Judicial Service Commission (JSC) and are drawn from the senior legal practitioners. Magistrates are appointed on the recommendation of the Magistrates Commission.

**27. ARTICLE 27-DUTIES TO RESPECT FAMILY AND SOCIETY**

The duty to respect ones family and other people in the society is an obligation of every individual under common law. The Maintenance Act, Act No 9 of 2003 obliges a family member to maintain his/her family, particularly his/her biological children.

**28. ARTICLE 28: EVERYONE HAS THE DUTY TO RESPECT AND CONSIDER FELLOW BEINGS**

The individual also have the duty in terms of common law to respect his/her parents at all times and not to compromise the security of the State whose national or resident he is. An individual also has to work to the best of his/her ability and competence to contribute to the best of his/her abilities at all times and at all levels to the promotion and achievements of Africa.

Husbands and wives are responsible for each other's maintenance. The parents of a child share responsibility for the maintenance of that child, and children have a duty under certain circumstances, in terms of common law, to maintain their parents.

**29. ARTICLE 29: RESPONSIBILITY OF INDIVIDUALS TOWARDS THE STATE**

The Government of Namibia has a sound revenue management system, which is administered by the Ministry of Finance.

The following tax laws are in place to ensure that the State collects revenue from individuals and legal entities:

- i) Income Tax Act No 24 of 1981, as amended,
- ii) Value Added Tax Act No 10 of 2000
- iii) Petroleum Taxation Act No 3 1995,
- iv) Stamp Duty Act No 15 of 1993, as amended,
- v) Transfer Duty Act No 14 of 1993, as amended.

### **PART THREE**

#### **30. IMPLEMENTATION OF THE PROTOCOL TO THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS ON THE RIGHTS OF WOMEN IN AFRICA**

This is the initial report on the Protocol, under discussion. The Ministry of Gender Equality and Child Welfare gathered and compiled this part of the report based on information provided by other line ministries and relevant non-governmental organizations (NGO's) and Civil Society who were consulted and given the opportunity to comment on the draft report.

#### **31. ARTICLE 2: ELIMINATION OF DISCRIMINATION AGAINST WOMEN**

LEGAL FRAMEWORK AND ADMINISTRATIVE MEASURE ADOPTED IN RELATION TO WOMEN'S RIGHTS

#### **32. The Constitution**

Article 10 of the Namibian Constitution refers to equality and freedom from discrimination. Sub-article (1) provides that all persons shall be equal before the law. While Sub-article (2) provides that no persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.

Article 95 (a) of the Namibian Constitution mandates Parliament to promote the welfare of its citizens through the empowerment of women, by adopting legislation aimed at ensuring equality of opportunity for women, equal pay for equal work between men and women, and providing maternity benefits to women.

By virtue of Article 144 of the Namibian Constitution, the Charter and the Protocol is part of the Namibian domestic laws. The effect of Article 144 is that the rights and freedoms provided in the Protocol are enforceable within Namibia by the judiciary and quasi-judicial bodies.

#### **33. Legislation**

Parliament passed the following legislation to create an enabling environment for gender equality.



**The Affirmative Action (Employment) Act, Act No. 29 of 1998**, requires Government to take positive steps to promote women's equality and aims to achieve equal opportunity in employment in accordance with the provisions of the Constitution.

**The Married Persons Equality Act, Act No. 1 of 1996**, abolished marital power, which previously gave husbands in civil marriages all the decision-making powers. Men and women to a marriage shall be entitled to equal rights as to marriage, during marriage and at its dissolution.

**The Traditional Authorities Act, Act No. 25 of 2000**, places a duty on traditional authorities to promote equality between men and women, particularly by promoting women to positions of leadership.

**The Local Authorities Act, Act No. 6 of 1992, as amended**, contains an affirmative action provision which requires that all political parties participating in the local authority elections must include a specified number of women candidates on their lists of candidates, depending on the size of the council. For example; three women for a council of 10, and five women for a larger council.

**The Combating of Rape Act, Act No. 8 of 2000**, provides for a broad definition of rape, which criminalizes instances where women are subjected to harmful cultural or traditional practices in the context of rape.

**The Communal Land Reform Act, Act No. 5 of 2002**, governs the allocation of communal land, and provides for the equal rights of women to apply for land rights in communal areas. It further secures the rights of widows to inherit the communal land allocated to their late husbands, even if they remarry. It further provides that women must be represented on the communal land boards to monitor the implementation of the Act.

**The Combating of Domestic Violence Act, Act No. 4 of 2003**, contains an extensive definition of domestic violence, to include physical, sexual, economic, verbal, emotional and psychological violence, intimidation and harassment. It further provides for the issuing of protection orders and police warnings in domestic violence matters. It also has provisions which should give added protection to complainants that lay criminal charges against their abusers. The Act gives police specific duties in domestic violence incidents, including the duty to help complainants get access to medical treatment and collect their personal belongings.

**The Labour Act, Act No. 11 of 2007**, makes explicit provision for maternity benefits. It outlaws discrimination in workplaces on the basis of pregnancy and HIV and AIDS status, and prohibits sexual harassment.

**The National Land Policy of 1998 has been adopted to among others provide for equal access of women to land.** This policy inspired the enactment of the Communal Land Reform Act, as well as the Commercial Land Reform Act. Women who are applicants for land allocation are given preference in terms of this policy.

### **34. Administrative Measures**

The Government created the MGECW to promote women's rights and to make sure that women are involved in all Government related activities. The Ministry has Gender Liaison Officers in all the regions of the country who disseminate information, including to rural areas, to promote legal literacy and to sensitize traditional leaders and the community at large on gender equality.

In Parliament, women representation is 27%, and 12% in the Regional Councils and 42% in the Local Authority Councils.

All Ministries in government have appointed gender focal persons to liaise with the Ministry of Gender Equality and Child Welfare to ensure efficient gender mainstreaming.

In terms of the Affirmative Action (Employment) Act, employers are required to submit affirmative action plans. The affirmative action plans are intended to raise fair employment practices with regard to matters such as recruitment, selection, appointment, training, promotion, and equitable remuneration for previously disadvantaged people. Women have been identified as a previously disadvantaged group.

### **35. ARTICLE 3: AND 4 THE RIGHT TO DIGNITY, LIFE, INTEGRITY AND SECURITY**

Article 8 of the Namibian Constitution provides that the dignity of all persons shall be inviolable. In addition, the promotion and protection of women's dignity and rights are regulated and protected by the Combating of Domestic Violence Act, Act No. 4 of 2003; Combating of Immoral Practices Amendment

Act, Act No. 7 of 2000; Criminal Procedure Act, Act No. 51 of 1977 as amended; Affirmative Action (Employment) Act, Act No. 29 of 1998 and Labour Act, Act No. 11 of 2007.

A simplified version of the Combating of Domestic Violence Act, the Combating of Rape Act, as well as the Maintenance Act has been developed by the local NGO and was distributed throughout the country, through the Ministry of Gender Equality and Child Welfare.

**The Prevention of Organized Crime Act, Act No. 29 of 2004**, specifically criminalizes trafficking in persons, slavery, kidnapping, and forced labour, including forced prostitution, child labour, and smuggling of migrants.

The Combating of Rape Act, Act No. 8 of 2000, prescribes severe minimum sentences for rape. It gives the complainant (the rape victim) the right to participate in bail proceedings, and imposes bail conditions that will help to protect the rape victim. The Act requires in certain cases where minors are involved, that proceedings be heard in closed court and prohibits publication of information which could reveal the identity of the rape victim.

Death penalty is abolished under Article 6 of the Namibian Constitution therefore no court or tribunal has the right to impose any death sentence.

### **36. ARTICLE 5: ELIMINATION OF TRADITIONAL HARMFUL PRACTICES**

Article 66 of the Namibian Constitution provides that both the customary law and the common law of Namibia in force on the date of independence shall remain valid to the extent to which such customary law or common law does not conflict with this Constitution or any other statutory law.

Sporadic child marriages in some traditional communities remain a challenge in the country. However, in terms of the Combating of Immoral Practices Act, it is an offence for someone to impregnate or marry someone younger than sixteen years old. The Namibian Police and the Women and Child Protection Unit have a strict order to arrest and charge with the offence of statutory rape anyone who is accused of having impregnated or married a young girl.

### **37. ARTICLE 6: THE RIGHT TO MARRIAGE AND CHOICE OF SPOUSE**

Article 14 of the Namibian Constitution provides that marriage shall be entered into only with the free and full consent of the intending spouses between a man and woman of full age without any limitation due to race, color, ethnic origin, nationality, religion, creed or social or economic status.

Civil marriages in Namibia are regulated by the Marriage Act, Act No. 25 of 1961 and the Married Persons Equality Act, Act No. 1 of 1996. Both men and women of 18 years and older, have the right and are allowed by law to marry and found a family. The most important aspect of the Married Persons Equality Act is that it abolished the common law rule of marital power which was vested in the husband. With the abolition of marital power women have the rights to enter into contractual agreements and own property.

Intending spouses in civil marriages are free to choose on how their property would be managed when they get married in community or out of community of property. However Namibia, has inherited a marriage system which applies in some parts of the country in terms of which civil marriages are out of community by default. The Government is in the process of reforming the law to provide for a uniform system throughout the country.

Customary laws of various ethnic groups in Namibia do not set a minimum age for marriage, but marriage generally does not take place before puberty, or before the attainment of an acceptable level of social maturity. Family consent is generally required for a marriage to take place. In most communities the consent of both the intending spouses is generally necessary as well. A customary law marriage involves a series of negotiations between two groups and creates rights and responsibilities between all family members. A draft Bill on customary marriages, which provide for the registration of customary marriages as well as the capacity to marry, is still in consultation stages with different stakeholders.

There has been a concern in the country about possible abuses by foreigners who marry Namibians for the convenience of getting a foothold to permanently reside in Namibia or acquire citizenship. There seem to be inadequate controls on ascertaining free will and consent, in this regard.

**38. ARTICLE 7: SEPARATION, DIVORCE AND ANNULMENTS OF MARRIAGE**

Article 14 of the Namibian Constitution prescribes that all men and women shall be entitled to equal rights as to marriage, during marriage and at its dissolution.

Divorces are adjudicated in terms of common law in the High Court of Namibia based on proof of fault on the part of a spouse.

Divorces and annulments can only be final once the court has granted a final order which include decisions as to how their properties including the common home should be shared.

**39. ARTICLE 8: ACCESS TO JUSTICE, LEGAL AID AND TRAINING OF LAW ENFORCEMENT OFFICIALS**

Articles 10 of the Namibian Constitution prohibits any kind of discrimination. Women have the same rights as any other citizens in the country to approach any court or tribunal to seek justice if their rights are violated or threatened.

Article 10 of the Namibian Constitution provides that all persons “shall be equal before the law”. In addition, Article 12 of the Namibian Constitution provides that “all people” are entitled to “a fair and public hearing by an independent, impartial and competent Court or Tribunal established by law”, not only in criminal cases but also in “the determination of their civil rights and obligations”.

Article 25(2) of the Namibian Constitution states that “Aggrieved persons who claim that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled to approach a competent Court to enforce or protect such a right or freedom, and may approach the Ombudsman to provide them with such legal assistance or advice as they require, and the Ombudsman shall have the discretion in response thereto to provide such legal or other assistance as he or she may consider expedient.

In terms of the Legal Aid Act, Act No. 29 of 1990, as amended indigent persons (both men and women) may be assisted with free legal aid in criminal and civil matters including divorce matters.

However, the high cost of legal fees and the physical distance to the courts may compound other barriers for women for access to justice. A person in a

rural area whose rights are being violated may not be able to afford transport to town to file a lawsuit or the cost of staying there during the litigation.

Women are adequately represented in the legal profession judiciary and magistracy as indicated by the attached statistics.<sup>14</sup>

Law enforcement officers continue to receive human rights training offered by the tertiary institutions and the Legal Assistance Centre. Some officers attend training programmes with human rights component including human trafficking at the International law Enforcement Academy (ILEA), based in Gaborone, Botswana.

#### **40. ARTICLE 9: POLITICAL PARTICIPATION AND DECISION-MAKING**

In terms of Article 17 (1) of the Namibian Constitution, “All citizens shall have the right to participate in peaceful political activity intended to influence the composition and policies of the Government. All citizens shall have the right to form and join political parties and, subject to such qualifications prescribed by law as are necessary in a democratic society, to participate in the conduct of public affairs, whether directly or through freely chosen representatives.”

In terms of the Electoral Act, Act No 5 of 2014, everyone who is 18 years old has right to register as a voter and vote during Presidential, National, Regional and Local Authority elections including in national referendum on Constitutional issues.

During the period under review women continue to be under-represented in the management and decision making structures of Namibia’s Public Service, Regional Councils, parastatals and the private sector despite our country’s progressive law on affirmative action which positively discriminates in favor of women in appointments. Women are only 27% of Permanent Secretaries and 32% of Directors who constitute critical decision-makers in the country while in Parliament they constitute only 24% having reduced from 30% in the previous Parliament. The proportion is far below the 50/50 mark recommended by the SADC Protocol on Gender and Development by 2015.

While women’s empowerment initiatives in Namibia could be applied at various levels and in different areas such as family, community, national or

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<sup>14</sup> See attached statistics on women in legal profession and other Governments positions, marked as annexure “E”

in the public service and education institutions, this initiative specifically builds on two activities conducted at the Ministry of Gender Equality and Child Welfare (MGECW) in 2012 and 2013 namely: the support provided for women MPs to re-establish the Women's Parliamentary Caucus to strengthen their legislative efficacy and the training of women members of political parties that are currently represented in Parliament with the aim of achieving a 50/50 representation of women in Parliament by 2015, as stipulated in the SADC Protocol on Gender and Development.

Working with women MPs that are members of the newly re-established Women Parliamentary Caucus and members of political parties, represented in Parliament, the MGECW in partnership with UN Women and selected CSOs, and development partners aims to contribute to strengthening women's voices in the legislature and political parties through a holistic empowerment programme for women in leadership and decision-making.

The MGECW also held consultative workshops to improve the status of women in Namibia. The workshops were to sensitize women in decision making targeting political parties using the SADC Protocol on Gender and Development. The objectives of these workshops were to create a platform for a national dialogue that brings together experiences of various political party representation, in an attempt to promote economic empowerment, representation and participation as set out in the SADC Protocol on Gender and Development.

The workshops were also done to strengthen women's network for the promotion of gender equality in decision making and equip participants with skills in order to encourage them to willingly act and stand up against gender discrimination in decision making. The workshops also sensitized traditional leaders on gender related laws and policies and equipped them with knowledge on gender concepts, including the National Gender Policy.

#### **41. ARTICLE 10 AND 11: RIGHTS TO PEACE AND SEXUAL HARASSMENT IN EDUCATIONAL AND EMPLOYMENT INSTITUTIONS**

Personal liberty is guaranteed by Article 7 read together with Article 11 of the Namibian Constitution which prohibits arbitrary arrest and detention of any person. Deprivation of personal liberty has to be in accordance with procedures established by law.

The Education Act, Act No. 16 of 2001 prohibits sexual harassment. Section 5 (8) of the Labour Act, Act No. 11 of 2007 prohibits discrimination and sexual harassment in employment.

In terms of the Defence Act, the recruitment age in the Namibia Defence Force is 18 years and above. There is no military conscription in Namibia.

#### **42. ARTICLE 12: RIGHT TO EDUCATION AND TRAINING**

Article 20 of the Namibian Constitution provides that all persons in Namibia shall have the right to education. It further provides that primary education shall be compulsory and shall be provided free of charge at State schools. In 2001 Parliament passed the Education Act, (Act No. 16 of 2001) to give effect to the Constitution and other international instruments. For the past 7 years, more girls have been enrolled in schools than boys.

Section 5 (1) (g) of the Labour Act provides for work of equal value and pay for both men and women. The enactment of the Affirmative Action (Employment) Act of 1998 which had been promulgated in terms of Article 23 (2) of the Namibian Constitution is the actual realization of the principle of equal opportunity for promotion of women. The legislation favour women, people with disabilities and previously disadvantaged persons.

Employers are obliged to submit to a multipartite Employment Equity Commission plans and reports outlining how they intend to achieve a fair and balanced workforce, and how to implement equal opportunity for promotion, training and recruitment for women, people with disabilities and historically and racially disadvantaged persons.

The Directorate of Adult Education is dedicated to provide literacy and numeracy skills to disadvantaged adults and out-of-school youth to enable them to contribute more effectively to national development.

In September 2013, The United Nations Educational, Scientific and Cultural Organisation (UNESCO) on the recommendation of an international jury, has awarded the UNESCO Confucius Prize for Literacy 2013 to the Namibia National Literacy Programme.

The international jury, in making the recommendation to UNESCO highly commended the determination of the National Literacy Programme in Namibia to provide basic education to disadvantaged adults and out-of-school youth



with a view to improve their quality of life and to enable them to contribute to community and national development.

#### **43. ARTICLE 13: ECONOMIC, SOCIAL AND CULTURAL RIGHTS**

Parliament enacted the following legislation to guarantee equal rights for women and men in employment:

- **Affirmative Action (Employment) Act, Act No. 29 of 1998.** The aims and objectives of the Act are to redress the imbalances at the workplace, arising from the discriminatory socio-economic dispensation which had previously existed in the country. The Act is intended to foster fair employment practices with regard to matters such as recruitment, selection, appointment, training, promotion, and equitable remuneration for previously disadvantaged persons, such as blacks, women and persons with disabilities, referred to as designated groups in the Act. The Act is very specific about requirements, which must be met by employers to whom its provisions apply.
- 
- Amongst some of the requirements of the Act is the drafting of a three year Affirmative Action plan in close consultation with employees, which is submitted in the form of an Affirmative Action report to the Employment Equity Commission at prescribed intervals. The main purpose of submitting Affirmative Action Plan/Reports to the Employment Equity Commission is to enable the commission to assess the extent to which employment equity through the elimination of employment barriers against persons in designated groups are achieved and to ensure that all categories of employment within the workforce of every relevant employer reflect the national demographic profile of the citizens in the country.
- **The Labour Act, Act No 11 of 2007.** The aim of the Act is to ensure that all employees enjoy the same basic rights and protections. This includes the need to prevent unfair discrimination against women and to ensure that both male and female employees are able to care for family members.

The Ministry of Trade and Industry has established a directorate of Small-and-Medium-Sized Enterprises (SME). The directorate disseminates SME information to Namibians all over the country. The aims and objectives of the SME Portal Site are to develop local economy through sales promotion of SMEs, facilitating the establishment business to enhance the livelihoods of the local communities.

In addition, the Business Support Service Programme (BSSP) developed by the Ministry of Trade and Industry (MTI) is a comprehensive package of business support to assist entrepreneurs to conduct feasibility studies, develop business plans, enhance business skills through hands-on training including business monitoring and mentoring. BSSP is available to all entrepreneurs country wide with special focus to be given to Small and Medium Size Enterprises (SMEs) to be developed into success ventures as an alternative source of productive income. In the meantime, creating job opportunities for Namibians and the success of this entrepreneurship development programme will contribute to national development.

There is a financial literacy programme in place in the country for SME. The Financial Literacy Initiative (FLI) is a national platform initiated by the Ministry of Finance. The main objective of the Financial Literacy Initiative is to enhance financial education for individuals and micro-, small- and medium-sized enterprises. More than 30 partners from the Namibian public, private and civil society sector strive to address the needs in the area of financial literacy and consumer protection in a coordinated effort. The Initiative aims at creating awareness on good and responsible practices both for private and business financials.

#### **44. ARTICLE 14: HEALTH AND REPRODUCTIVE RIGHTS**

The goal of the National Policy for Reproductive Health (2001) is to promote and protect the health of individuals and families through the provision of equitable, acceptable, accessible and affordable quality reproductive health services.

The long-term goal is to promote and protect the health of individuals and families through the provision of equitable, acceptable, accessible and affordable quality reproductive health services. The Government has committed itself to the ICPD (International Conference on Population and Development) principles on reproductive health. The policy is guided by the following principles:

- a) Reproductive Health is a basic human right for every Namibian.
- b) Namibians should have equal and equitable access to reproductive health services whenever required.

- c) Adolescents have the right to all information on sexual and reproductive health, and access to quality adolescent friendly services.
- d) All stakeholders should have the necessary knowledge and skills to be able to offer the required quality services.
- e) People should not be denied services based on prejudice or biased tendencies.
- f) Community involvement in the planning, provision and monitoring of RH services is crucial and will be encouraged.

### **Maternal Mortality**

- . In 2000, there were 220 deaths for every 100 000 live births,
- . In 2005, there were 240 deaths for every 100 000 live births,
- . In 2008, there were 180 deaths for every 100 000 live births and
- . In 2013, there were 130 deaths for every 100 000 live births.

Infant mortality (less than 1 years who die for every 1 000 live births); in 2012 there were 45 deaths for every 1 000 live births.

Neonatal mortality (babies of less than 28 days who die for every 1 000 live births); in 2011 there were 19 deaths for every 1 000 live births.

Under five mortality; in 2011 there were 42 deaths for every 1 000 live births.

Ante natal clinic (ANC) coverage (Percentage of women who utilized antenatal care provided by skilled health personnel for reasons related to pregnancy at least once during pregnancy as a percentage of live births in a given time period): 2011: 95%.

PMTCT coverage (% of HIV positive women who receive at least some antiretroviral drugs to prevent mother-to-child transmission): 2011: 91%. Birth deliveries in health facilities (2011): 81%. HIV ANC prevalence: 18.2%

With regard to financing of Reproductive Health (RH) in Namibia a submission in 2011 by the MoHSS indicates that expenditure per woman of

reproductive age was US\$ 148 and US\$ 126 in the 2007/08 and 2008/09 financial years respectively. This is far higher than what is observed in most African countries. RH expenditure constituted more than 10-12% of the total expenditure on health. Out-of-pocket payment for RH was minimal (less than 4% of the RH spending in both years). Government is the key source of RH spending (89%). Moreover, the public sector is the main financing agent with programmatic control of RH funds and also the main provider of services. Most of the RH expenditure is spent on services of curative care (both in- and out-patient). The proportion allocated for preventive and public health services was not more than 5% in the past two financial years.

#### **45. ARTICLE 15: RIGHT TO FOOD SECURITY**

The revision of customary laws for communities in terms the Communal Land Reform Act is playing a major role in making the land rights of widows more secure. The Act provides that upon the death of the land rights holder, the land may be reallocated to a spouse or another dependant. The Act gives a widow security to stay on the land she and her late husband has been cultivating for years.

The Government has a Resettlement Programme, which targets five principal categories of people: the San community; ex-combatants; displaced, destitute and landless people; people with disabilities; and people in overcrowded communal areas. In terms of the resettlement policy, women are given preference if and when they apply through the Ministry of Land and Resettlement.

In addition, the Agricultural Bank Amendment Act, Act No. 27 of 1991, and the Agricultural Bank Matters Amendment Act, Act No. 15 of 1992 introduced the Affirmative Action Loan Scheme (AALS), among other things, with the main aim of resettling well-established and strong communal farmers on commercial farmland so as to minimise the pressure on grazing in communal areas. The AALS involves granting subsidised Agribank loans to full-time and part-time communal farmers possessing over 150 head of large livestock or 800 head of small livestock. Many women have been assisted by the bank in terms of the Scheme.

Furthermore, the National Land Policy on the other hand, made specific reference to women's rights based on Article 95(a) of the Namibian Constitution. The Policy accords women the same status as men with regard

to all forms of land rights, either as individuals or as members of family land ownership trusts.

**46. ARTICLE 16: RIGHT TO ADEQUATE HOUSING**

The Government through the Build Together Social Housing Sub-programme is facilitating housing provision for welfare cases including the disadvantaged groups on an economically sustainable basis through a cross subsidization system. The houses are rented out for welfare cases at a very low interest rate while renting to non-welfare cases at market related interest rates to subsidize it. The Government also provides financial support of N\$ 1 million (approx. US\$ 117 647-00) annually to the Shack Dwellers Federation of Namibia, a community savings group, as a recognition and encouragement for their efforts in the provision of housing for the poor. The Majority of members of the Shack Dwellers are women.

The Build Together Housing Programme is heavily subsidized by Government with fixed interest rates of between 4 to 7%. The maximum housing loan is N\$ 40 000-00 (approx. US\$ 4 000) repayable over a period of 20 years.

**47. ARTICLE 17: RIGHT TO POSITIVE CULTURAL CONTEXT**

The Traditional Authorities Act, Act No. 25 of 2000 provide for establishment and recognition of traditional leaders. There are women who are recognized as traditional leaders in some communities as Chief and senior Councillors. These traditional leaders lead their community and participate in Government decision making process including the issues to influence policies as well as determining cultural policies.

**48. ARTICLE 18: RIGHT TO A HEALTHY AND SUSTAINABLE ENVIRONMENT**

Article 95(l) of Namibian Constitution provides that “maintenance of ecosystems, essential ecological processes and biological diversity of Namibia and utilization of living natural resources on a sustainable basis for the benefit of all Namibians, both present and future; in particular, the Government shall provide measures against the dumping or recycling of foreign nuclear and toxic waste on Namibian territory.”

Detailed information in this regard was provided in PART TWO (paragraph 24) above.

#### **49. ARTICLE 19: RIGHT TO SUSTAINABLE DEVELOPMENT**

The Article 95 of the Namibian Constitution emphasises the need for sustainable development and human rights. As stated in paragraph 24 of PART TWO above, Government has enacted a number of laws and policies intended to protect fragile ecosystems, manage mining operations, and ensure that all commercial development projects eliminate or, at the very least, mitigate adverse impacts on the environment, people and wildlife. These laws establish clear mandates in some cases.

Section 6 of the Environmental Management Act provides for the establishment of Sustainable Development Advisory Council, to advise the Minister on development of policy strategy for the management; protection; and use of the environment; conservation of biological diversity and access to genetic resources.

In terms of Section 32 of the Environmental Management Act, the Ministry of Environment and Tourism has established the Environmental Impact Assessment, Pollution Control and Waste Management Unit. The Unit fulfills a crucial function of the Ministry by playing a central role in guiding sustainable development in Namibia. It ensures that the environmental impact of all proposed development projects, including mining activities and other initiatives, are assessed before any development can be approved. The Unit facilitates reviews of Environmental Impact Assessment reports and recommends whether environmental clearance certificates should be issued with or without conditions.

However, many challenges and gaps remain in the enforceable regulatory structure. For example, parks are established under the pre-independence Nature Conservation Ordinance of 1975 for the purposes of conservation and tourism by the Ministry of Environment and Tourism (MET), yet the post-independence Policy on Mining in Protected Areas allows prospecting and mining in protected areas under certain circumstances, which undermines conservation and tourism objectives and policies.

**50. ARTICLE 20 AND 21: WIDOWS, INCLUDING THEIR RIGHTS TO INHERIT**

Women who are legally married have the right to inherit from their deceased husband's estate either through a Will or the last Testament of her deceased husband, and or if she got married in community of property in terms thereof.

The Communal Land Reform Act has also resolved the issue of land rights to women who are married under customary law. Section 26(2) of the Act provides that: *Upon the death of the holder of a right referred to in subsection (1) such right reverts to the Chief or Traditional Authority for re-allocation forthwith:-*

- a) *To the surviving spouse of the deceased person, if such spouse consents to such allocation; or*
- b) *In the absence of a surviving spouse, or should he or she not consent as contemplated in paragraph (a) ,to such child of the deceased person as the Chief or Traditional Authority determines to be entitled to the allocation of the right in accordance with customary law.*

**51. ARTICLE 22: SPECIAL PROTECTION OF ELDERLY WOMEN**

There is no separate law which protects elderly women. The information provided in paragraph **xii** of PART ONE above regarding protection of elderly person applies to both men and women.

**52. ARTICLE 23: SPECIAL PROTECTION OF WOMEN WITH DISABILITIES**

The information provided in paragraph **xii** above regarding the protection of persons living with disabilities applies to both men and women.

**53. ARTICLE 24: SPECIAL PROTECTION OF WOMEN IN DISTRESS**

Section 62 of the Correctional Service Act provides that a female offender may be admitted into a correctional facility for custody with her infant. The infant must be supplied with clothing and other necessities by the State until such infant attains the age of two years, in which case the officer in charge must, on recommendation of the medical officer and on considering the best interests of the infant, on being satisfied that there is a relative or friend of the infant able and willing to support such infant.

#### **54. ARTICLE 25: REMEDIES FOR VIOLATION OF RIGHTS**

Article 5 read together with Article 25 (2) of the Namibian Constitution, gives aggrieved persons the right to approach a competent court for a remedy. In addition, Article 25(4) of the Namibian Constitution empowers the courts to award monetary compensation to the victims.

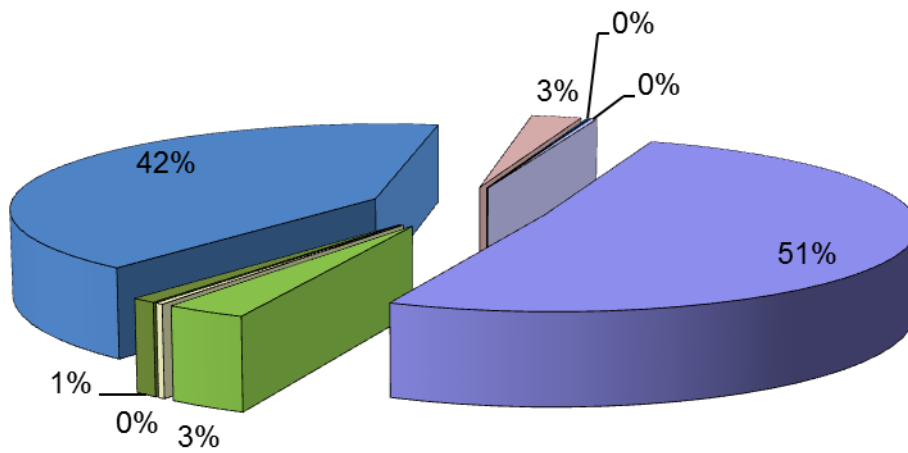
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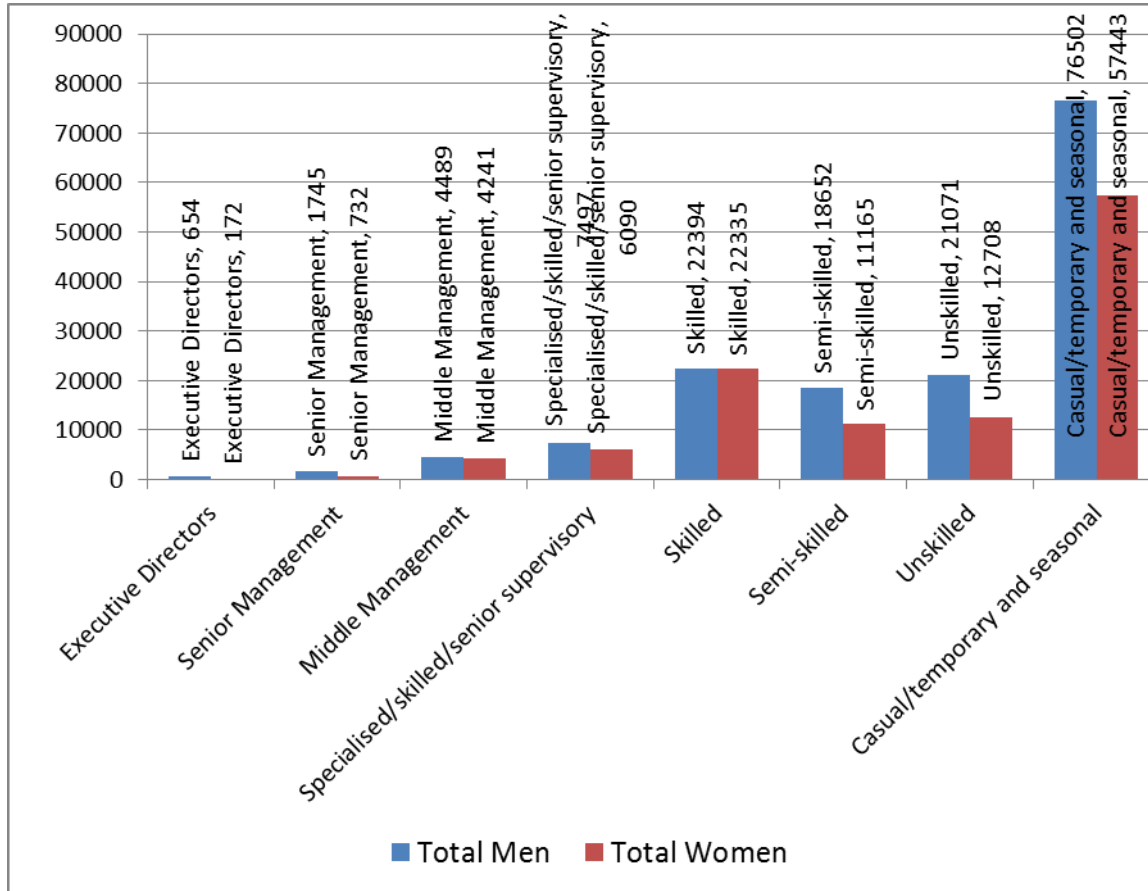
**ANNEXURE "A"**

**Figure 1: Cumulative Workforce Profile- Representation by Race, Gender, Disability status and Expatriate employees**

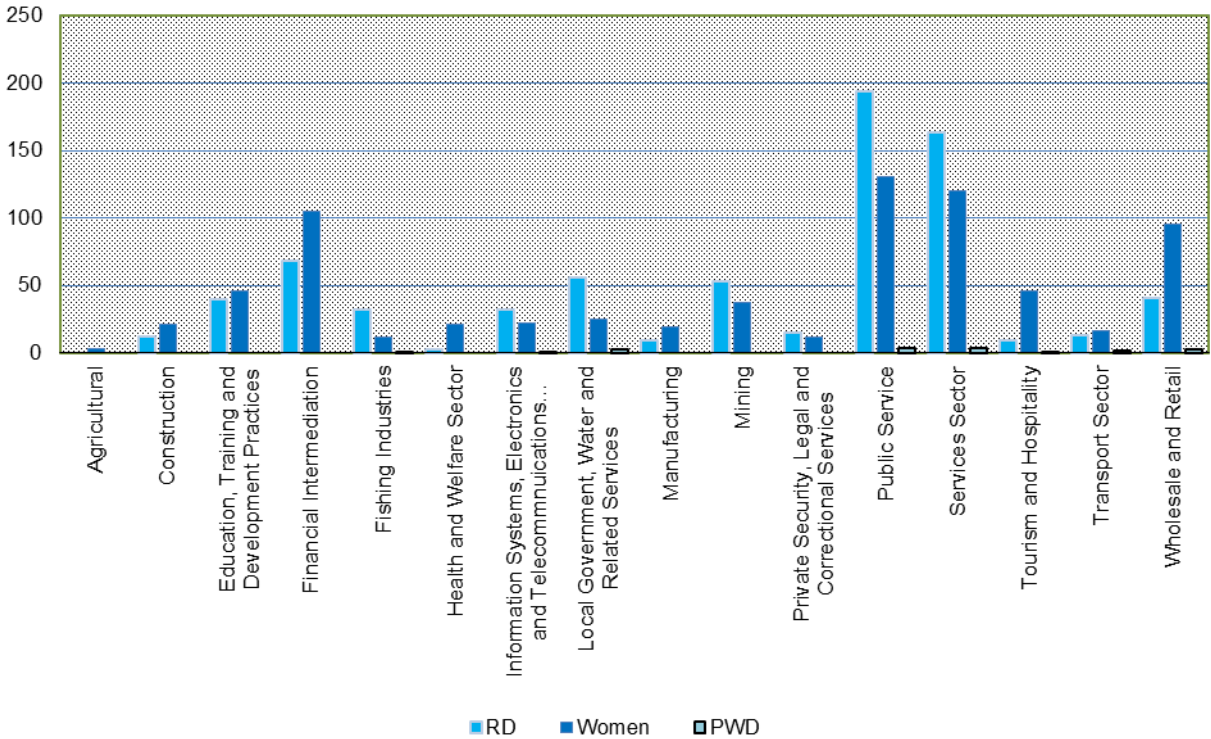


- Racially disadvantaged men
- Racially advantaged men
- Persons with disabilities men
- Non-Namibian(s) men
- Racially disadvantaged women
- Racially advantaged women
- Persons with disabilities women
- Non-Namibian(s) women

**Figure 2: Cumulative Workforce Profile Total Men and Women by job category**

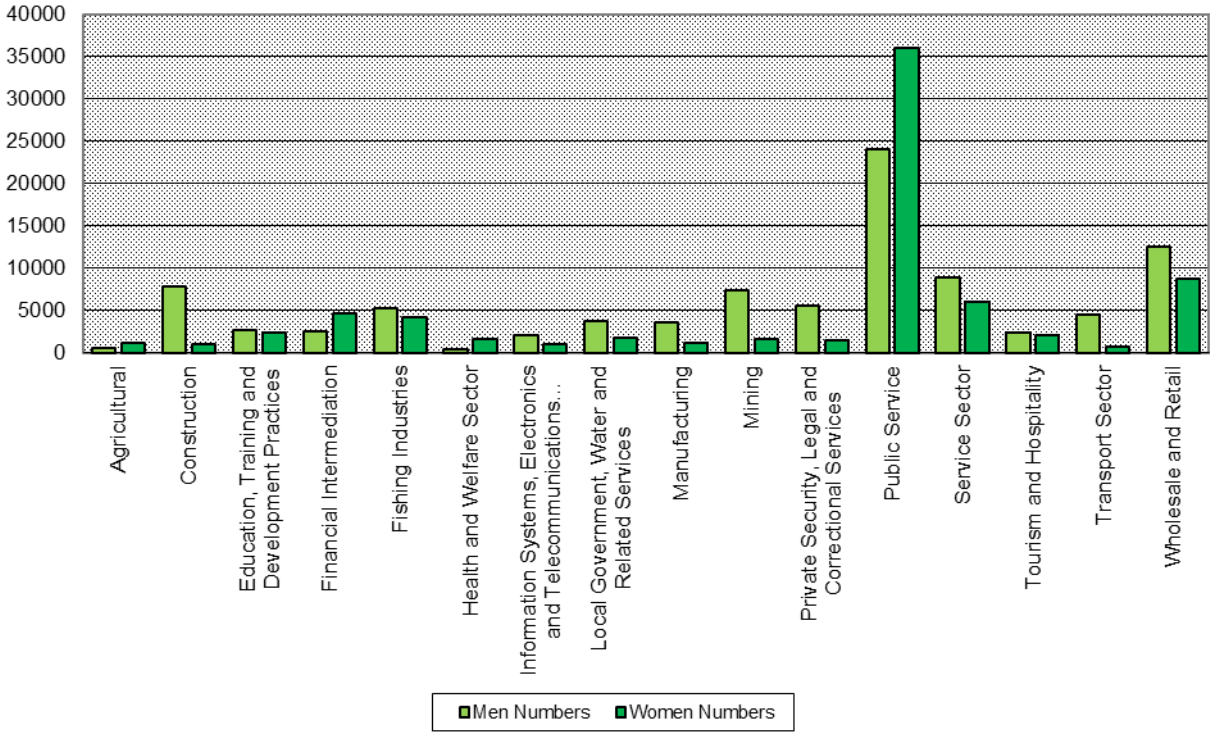


**Figure 3: Distribution of Designated Groups by Industry - Senior Management (Cumulative)**



**Figure 4: Distribution of Designated Groups by Industry – Middle Management (Cumulative)**

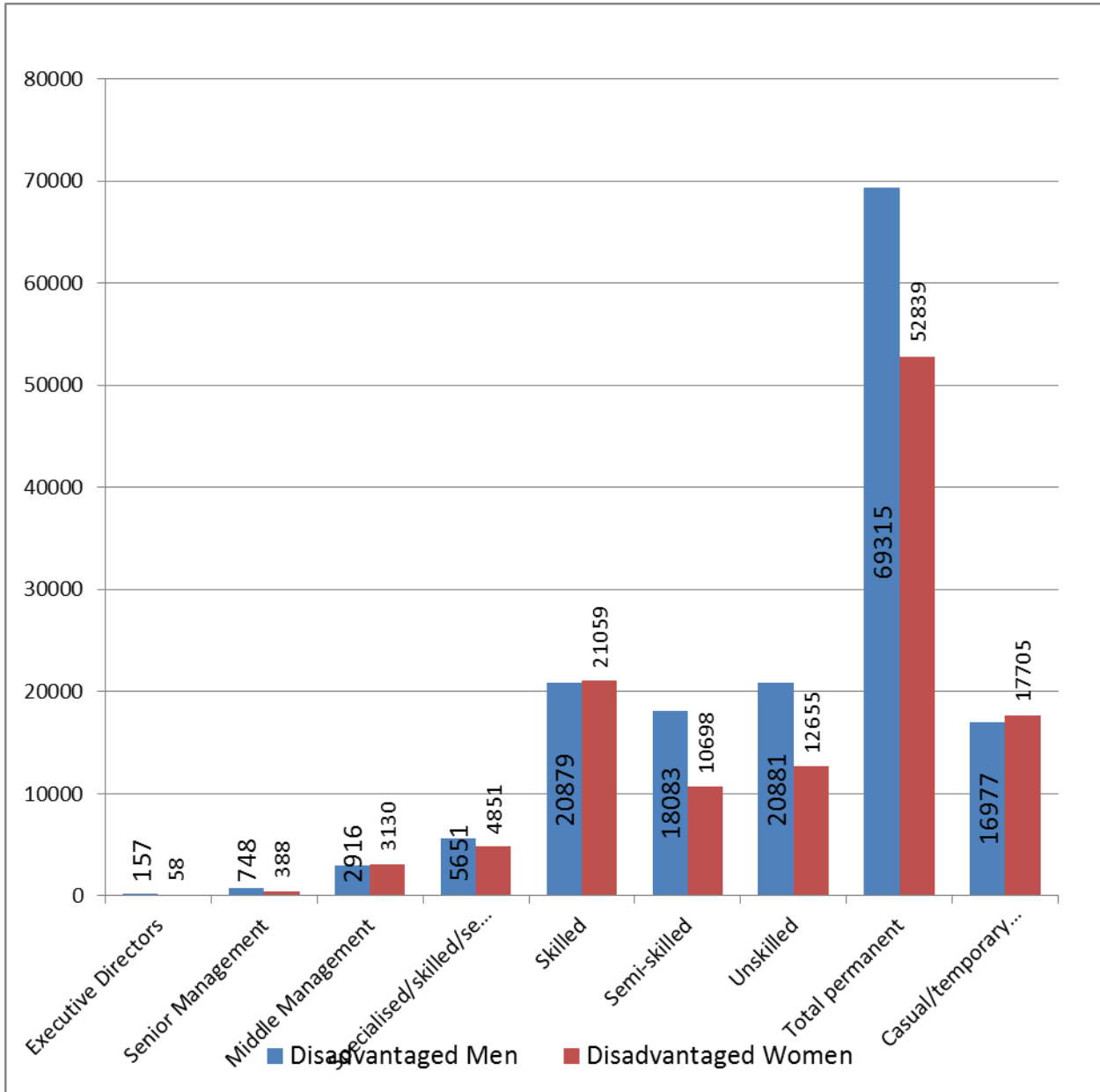
**Figure 5: Distribution of Men and Women by Industry (Cumulative)**



**Disadvantaged Men and Women by Job Category (Cumulative)**

	<b>Disadvantaged Men</b>	<b>Disadvantaged Women</b>
Executive Directors	157	58
Senior Management	748	388
Middle Management	2916	3130
Specialised/ skilled/ senior supervisory	5651	4851
Skilled	20879	21059
Semi-skilled	18083	10698
Unskilled	20881	12655
<b>Total permanent</b>	<b>69315</b>	<b>52839</b>
Casual/temporary and seasonal	16977	17705

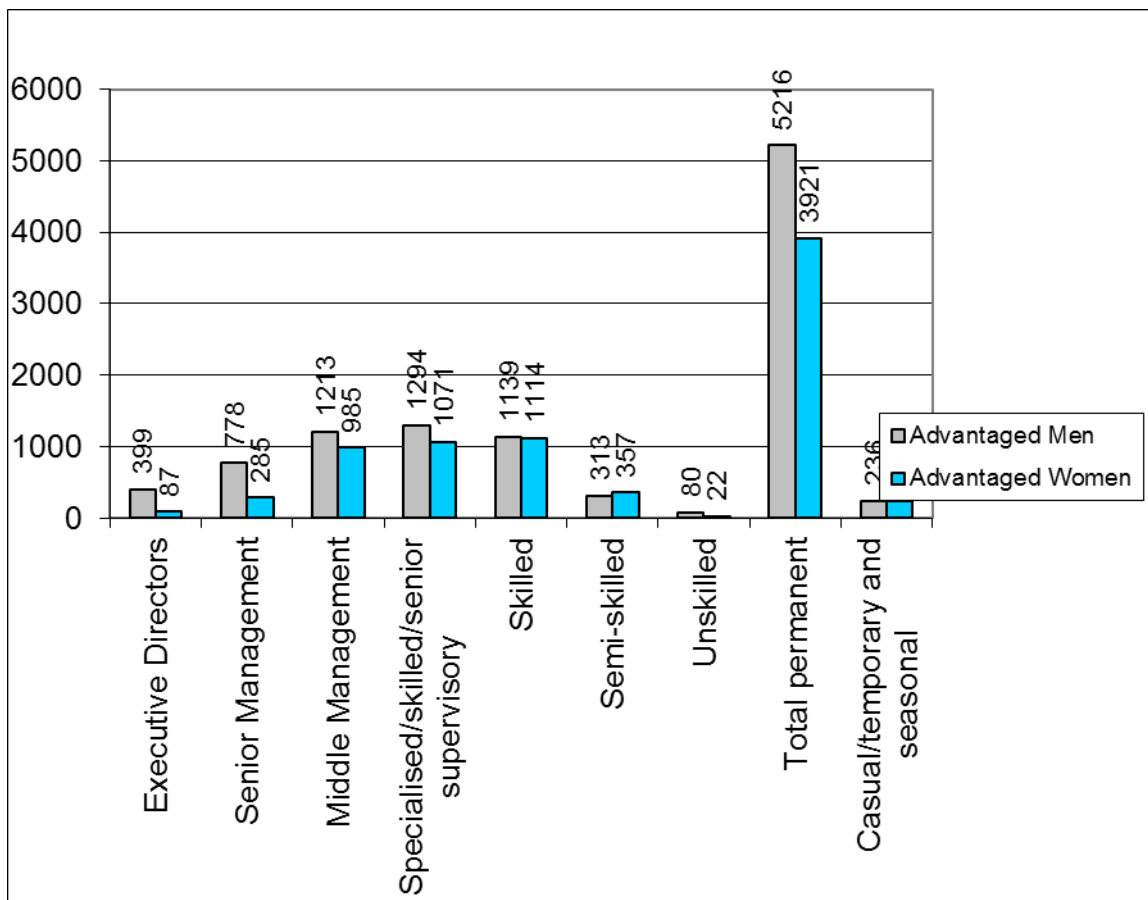
**Figure 6: Disadvantaged Men and Women by Job Category**



**Advantaged Men and Women by Job Category (Cumulative)**

	<b>Advantaged Men</b>	<b>Advantaged Women</b>
Executive Directors	399	87
Senior Management	778	285
Middle Management	1213	985
Specialised/skilled/senior supervisory	1294	1071
Skilled	1139	1114
Semi-skilled	313	357
Unskilled	80	22
<b>Total permanent</b>	<b>5216</b>	<b>3921</b>
Casual/temporary and seasonal	236	235

**Figure 7: Advantaged Men and Women by Job Category**

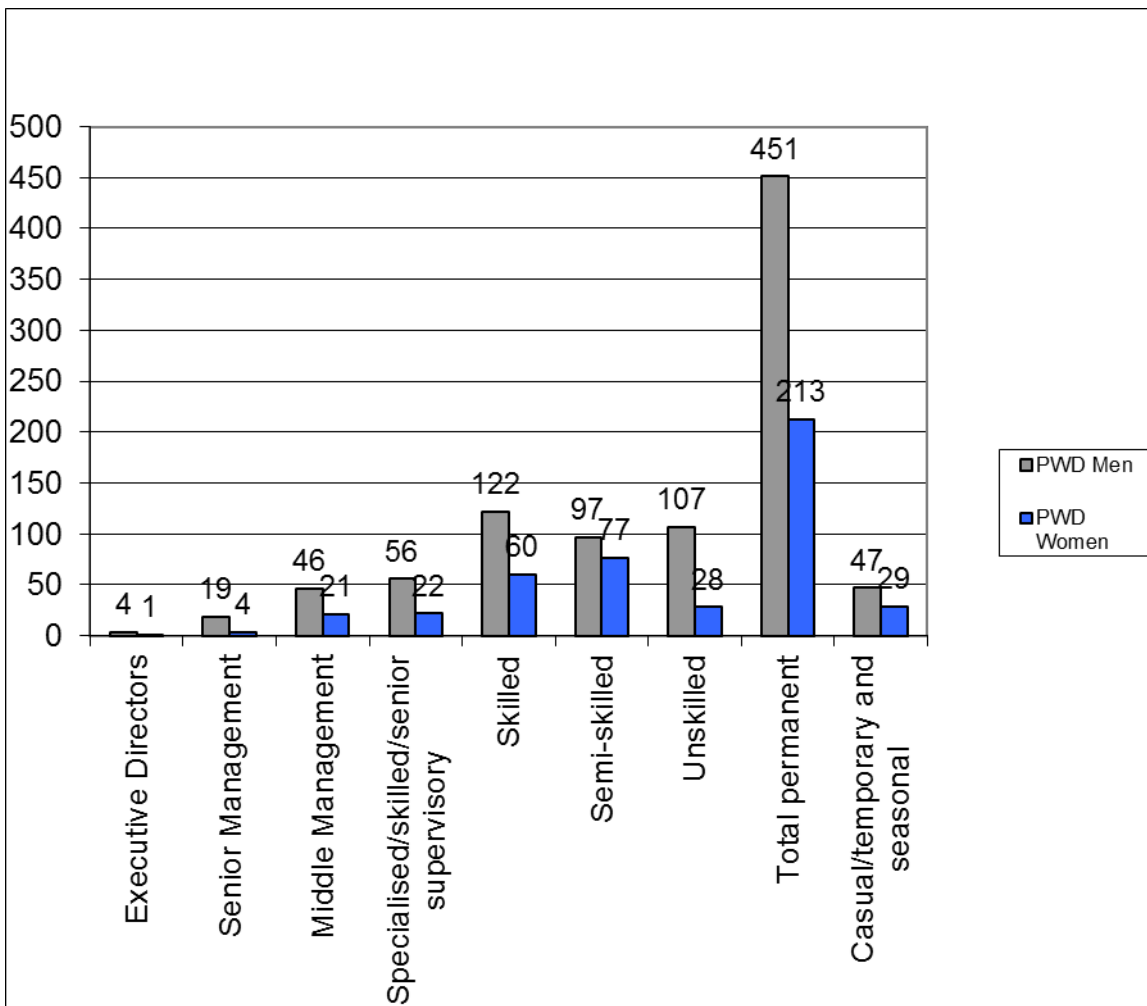




**Persons with Disabilities by Job Category (Cumulative)**

	<b>PWD Men</b>	<b>PWD Women</b>
Executive Directors	4	1
Senior Management	19	4
Middle Management	46	21
Specialised/skilled/senior supervisory	56	22
Skilled	122	60
Semi-skilled	97	77
Unskilled	107	28
<b>Total permanent</b>	<b>451</b>	<b>213</b>
Casual/temporary and seasonal	47	29

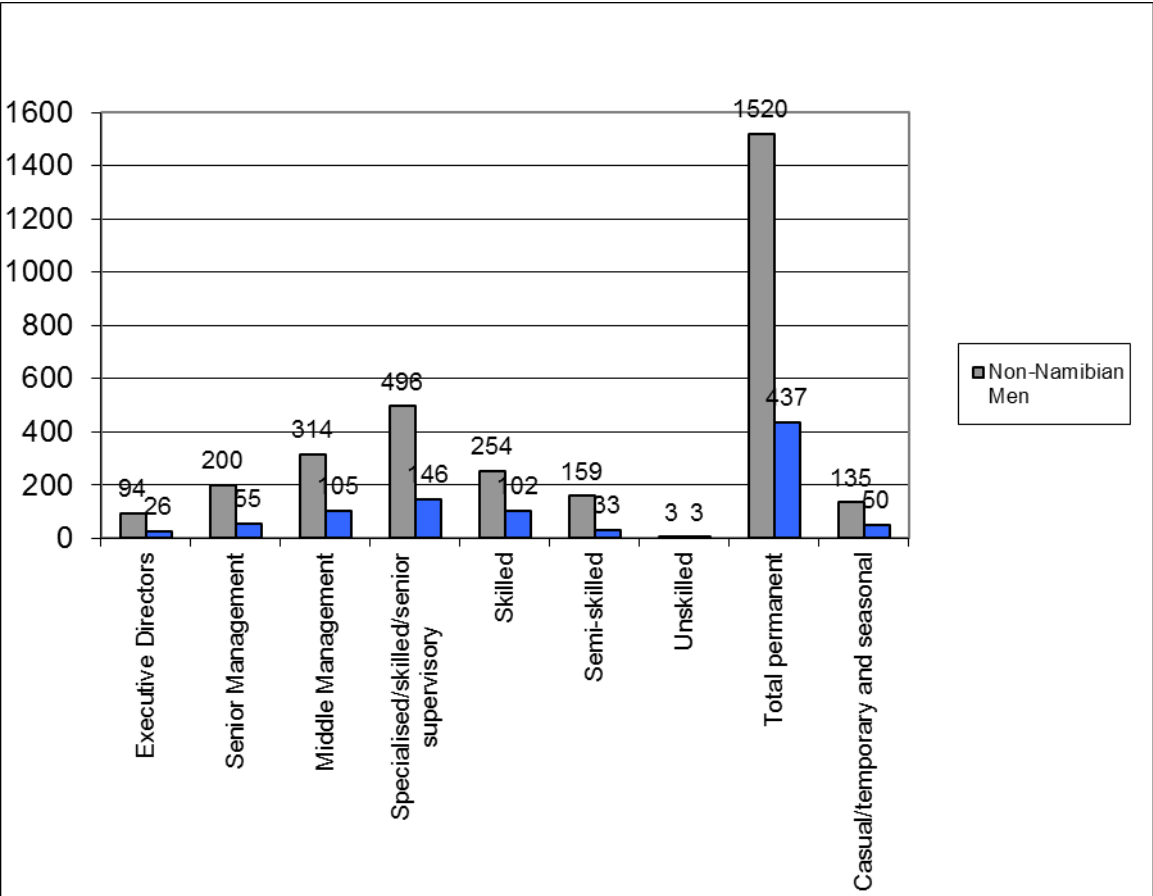
**Figure 8: Persons with Disabilities by Job Category**



**Non Namibian Men and Women by Job Category (Cumulative)**

	<b>Non-Namibian Men</b>	<b>Non-Namibian Women</b>
Executive Directors	94	26
Senior Management	200	55
Middle Management	314	105
Specialised/skilled/senior supervisory	496	146
Skilled	254	102
Semi-skilled	159	33
Unskilled	3	3
<b>Total permanent</b>	<b>1520</b>	<b>437</b>
Casual/temporary and seasonal	135	50

**Figure 9: Non-Namibian Men and Women by Job Category**



## ANNEXURE “B”

**Information relevant to the statistical data of rape cases is illustrated in the tables below:**

**Table 1.  
Reported Cases  
of Rape, 2012**

<b>Month</b>	<b>Adults</b>		<b>Juvenile s</b>		<b>Total s</b>
	<b>Male</b>	<b>Femal e</b>	<b>Male</b>	<b>Femal e</b>	
January	1	52	0	36	<b>89</b>
February	1	65	3	29	<b>98</b>
March	0	71	0	43	<b>114</b>
April	0	57	1	39	<b>97</b>
May	1	50	0	28	<b>79</b>
June	0	66	1	35	<b>102</b>
July	1	45	0	27	<b>73</b>
August	0	58	1	26	<b>85</b>
September	1	57	3	31	<b>92</b>
October	2	64	1	31	<b>98</b>
November	0	58	0	25	<b>83</b>
December	3	67	14	23	<b>107</b>
<b>Total</b>	<b>10</b>	<b>710</b>	<b>24</b>	<b>373</b>	<b>1117</b>

Source: NAMPOL Crime Prevention Unit, 2012

**Table 3.**  
**Reported cases**  
**of assault with**  
**intent to rape,**  
**2012**

	<b>Adults</b>		<b>Juvenile</b>		
<b>Month</b>	<b>Male</b>	<b>Femal</b>	<b>Male</b>	<b>Femal</b>	<b>Total</b>
		<b>e</b>		<b>e</b>	<b>s</b>
January	0	0	0	0	<b>0</b>
February	0	0	0	0	<b>0</b>
March	0	0	0	0	<b>0</b>
April	0	0	0	0	<b>0</b>
May	0	0	0	0	<b>0</b>
June	0	0	0	0	<b>0</b>
July	0	0	0	0	<b>0</b>
August	0	1	0	0	<b>1</b>
September	0	1	0	0	<b>1</b>
October	0	0	0	0	<b>0</b>
November	0	0	0	0	<b>0</b>
December	0	0	0	0	<b>0</b>
<b>Total</b>	<b>0</b>	<b>2</b>	<b>0</b>	<b>0</b>	<b>2</b>

Source: NAMPOL Crime  
Prevention Unit, 2012

**Table 3:  
Reported cases  
on sexual  
offences with  
youths, illicit  
canal  
intercourse,  
2012**

<b>Month</b>	<b>Adults</b>		<b>Juvenile s</b>		<b>Total s</b>
	<b>Male</b>	<b>Femal e</b>	<b>Male</b>	<b>Femal e</b>	
January	0	0	0	1	<b>1</b>
February	0	0	0	0	<b>0</b>
March	0	0	0	0	<b>0</b>
April	0	0	0	0	<b>0</b>
May	0	0	0	0	<b>0</b>
June	0	1	0	0	<b>1</b>
July	0	0	0	0	<b>0</b>
August	0	1	0	2	<b>3</b>
September	0	0	0	0	<b>0</b>
October	0	0	0	2	<b>2</b>
November	0	0	0	1	<b>1</b>
December	0	0	0	0	<b>0</b>
<b>Total</b>	<b>0</b>	<b>2</b>	<b>0</b>	<b>6</b>	<b>8</b>

Source: NAMPOL Crime  
Prevention Unit, 2012

Parliament enacted the Combating of Rape Act which came into force in June 2000. The new law defines rape as the “intentional commission of a sexual act under coercive circumstances”. The Combating of Rape Act has a new definition of rape that gives greater protection against rape to women, men, girls and boys. It provides severe minimum sentences for rapists and stricter bail.





## **ANNEXURE “C”**

### **NAMIBIAN CORRECTIONAL SERVICE**

2008/9 - 2010/11

Annual Reports

#### 5. Offender Population Profile

This section of the report indicates the statistics pertaining to the number and profile of offenders admitted in the NCS facilities in each of the financial years 2008/9, 2009/10 and

2010/11. The emphasis is on providing information of the profile of offenders and the impact this has on resources. For example, the admission of short term or non-serious offenders (sentence length under 2 years) into the NCS facilities is a costly exercise for government in maintaining daily basics such as food, water and clothing. Considering that the daily cost per offenders is N\$ 25.15 per day for a daily average amount of offenders at 4500, it means that the NCS is spending approximately N\$113 200.00 per day on offenders with this cost excluding medical and transport costs. For the period under review, short-term offenders made up between 84% and 87% (see Table 26).

Over the three years under review, the annual admission of offenders decreased by 230 (4.9 from the 2008/9 financial year to 2009/10 and by 67 (1.5%) from the 2009/10 to 2010/11. The current offender population profile in correctional institutions is in a diverse scenario whereby the general outlook of accommodation in bed space appears not to be overcrowded but in reality 34 in those areas where the country is densely populated, the prison overcrowding is alarming particularly in the North.

Table 17: Total Admission per Prison Facility

44

Figure 1: Total admission per prison institution and gender: 2008/09

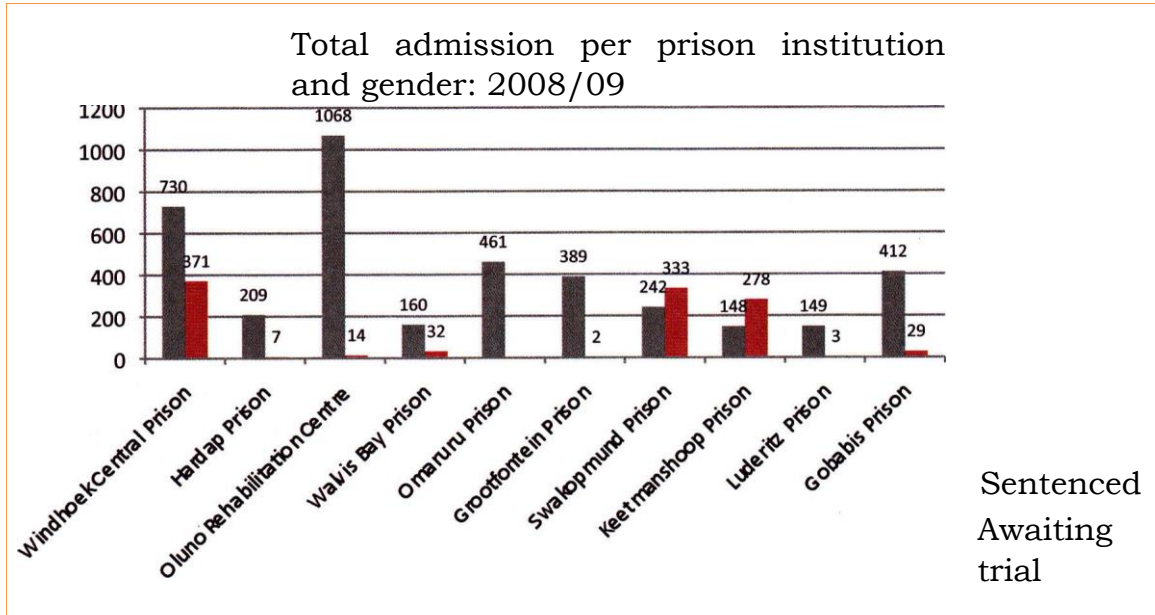


Figure 2: Total admission per prison institution: 2009/10

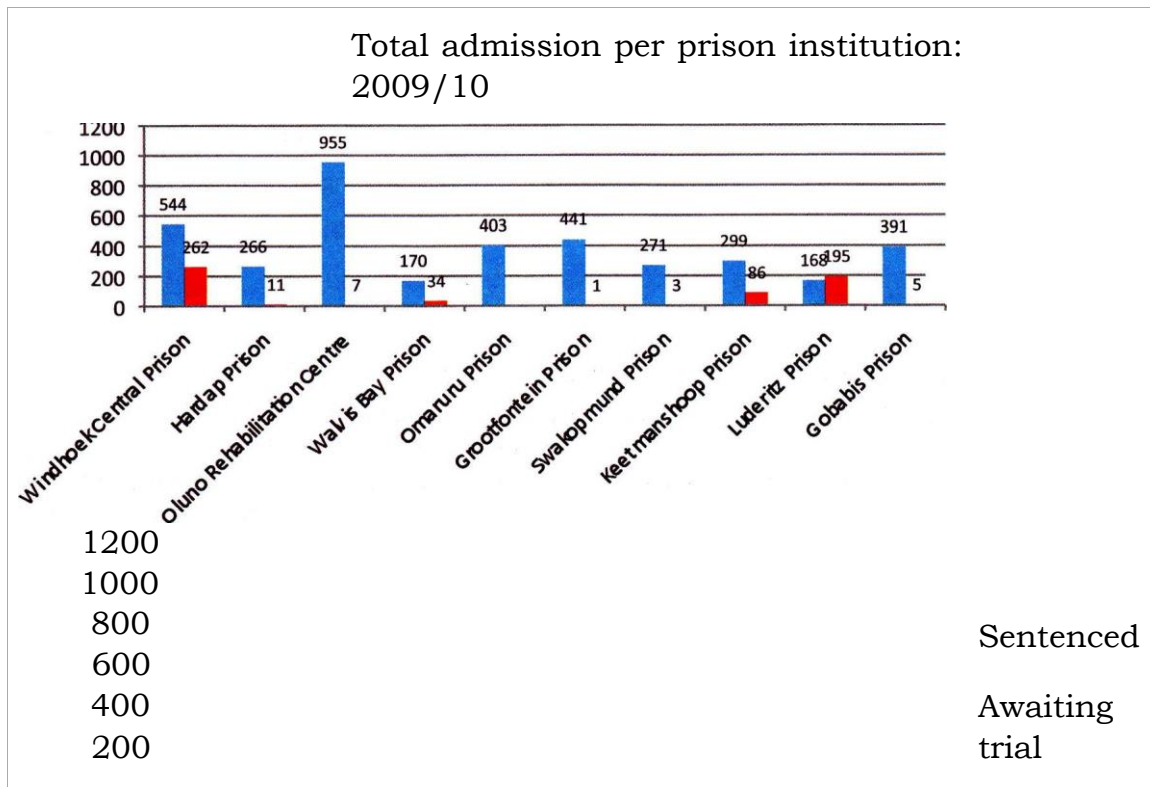
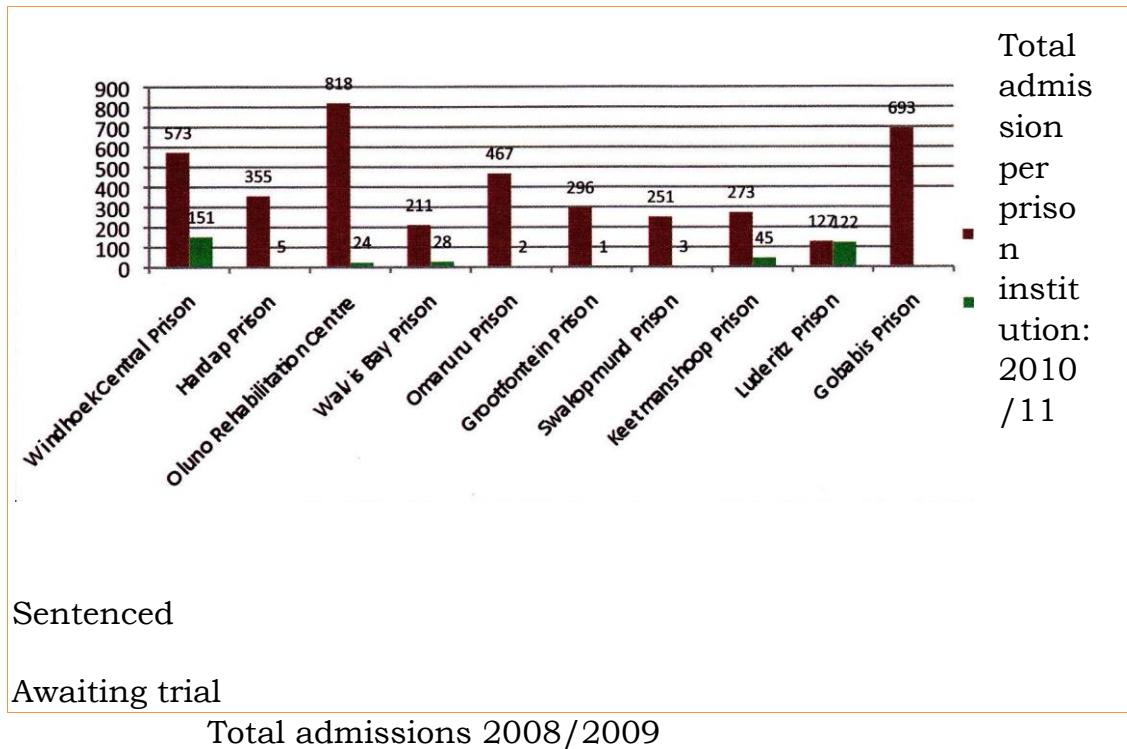


Figure 3: Total admission per prison institution: 2010/11



In this financial year, the NCS admitted a total of 4751 offenders including remands. The majority of offenders were admitted at the Windhoek Central Prison (1101) followed by Oluno Rehabilitation Centre (1082) and Omaruru Prison (461). Awaiting trials made up a total of 562 (12%) of the overall admission with most of them admitted at Windhoek Central Prison and Keetmanshoop Prison. Female offenders including awaiting trials were 272 (6%).

#### Total admissions 2009/10

In this period, the NCS admitted a total of 4512 offenders including awaiting trials. The majority of offenders were admitted at the Oluno Rehabilitation Centre (962) followed by Windhoek Central Prison (806) and Grootfontein Prison (442). Awaiting trials made up a total of 604 (13%) of the overall admission with most of them admitted at Windhoek Central Prison and Luderitz Prisons. Female offenders including remands were 211 (5%).

**Total admissions 2010/11**

During this financial year, the NCS admitted a total of 4445 offenders including awaiting trials. The majority of offenders were admitted at the Oluno Rehabilitation Centre (842) followed by Windhoek Central Prison (724) and Gobabis Prison (693). Awaiting trials made up a total of 381 (9%) of the overall admission with most of them admitted at Windhoek Central Prison and 36 Luderitz Prisons. Female offenders including awaiting trials were 230 (5%).

Table 18: Sentence duration for sentenced offenders

Figure 4: Sentence duration for sentenced offenders: 2008/09

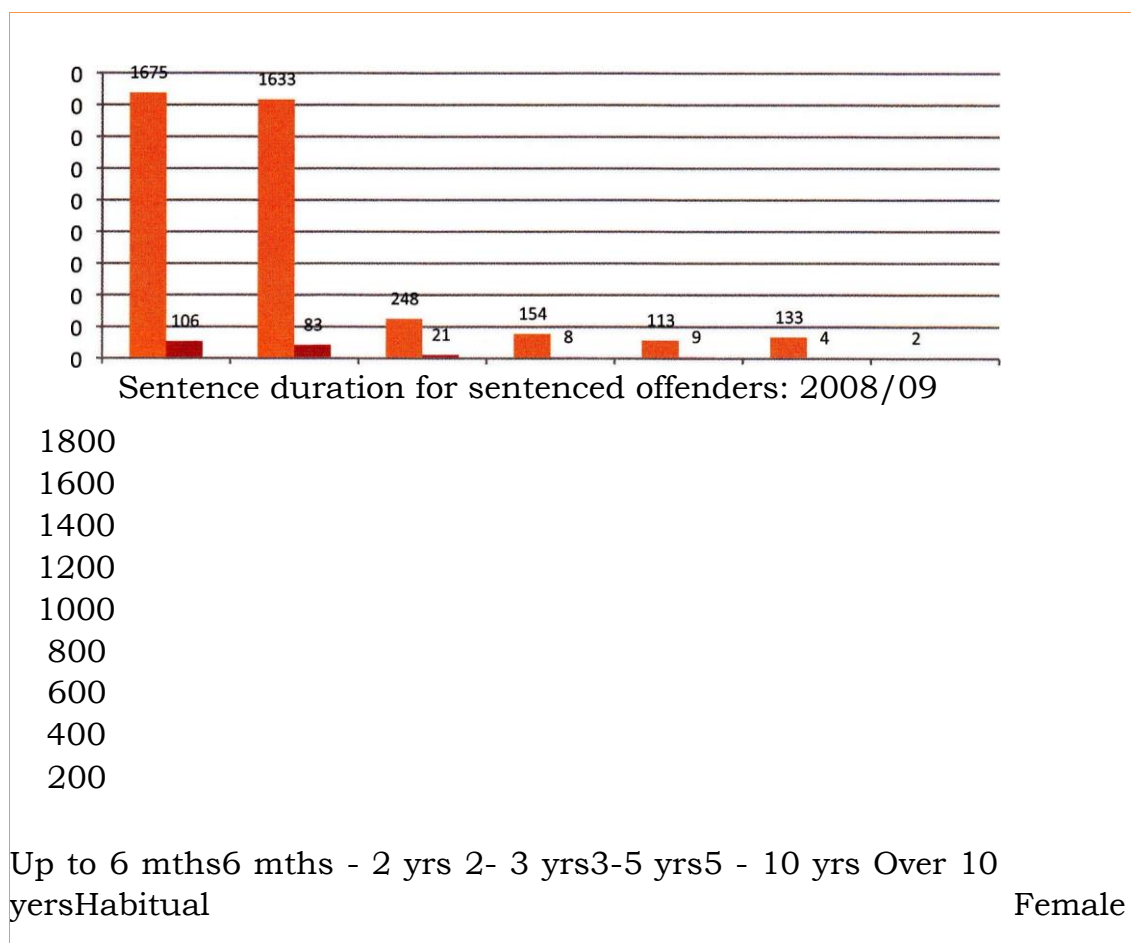


Figure 5: Sentence duration for sentenced offenders: 2009/10

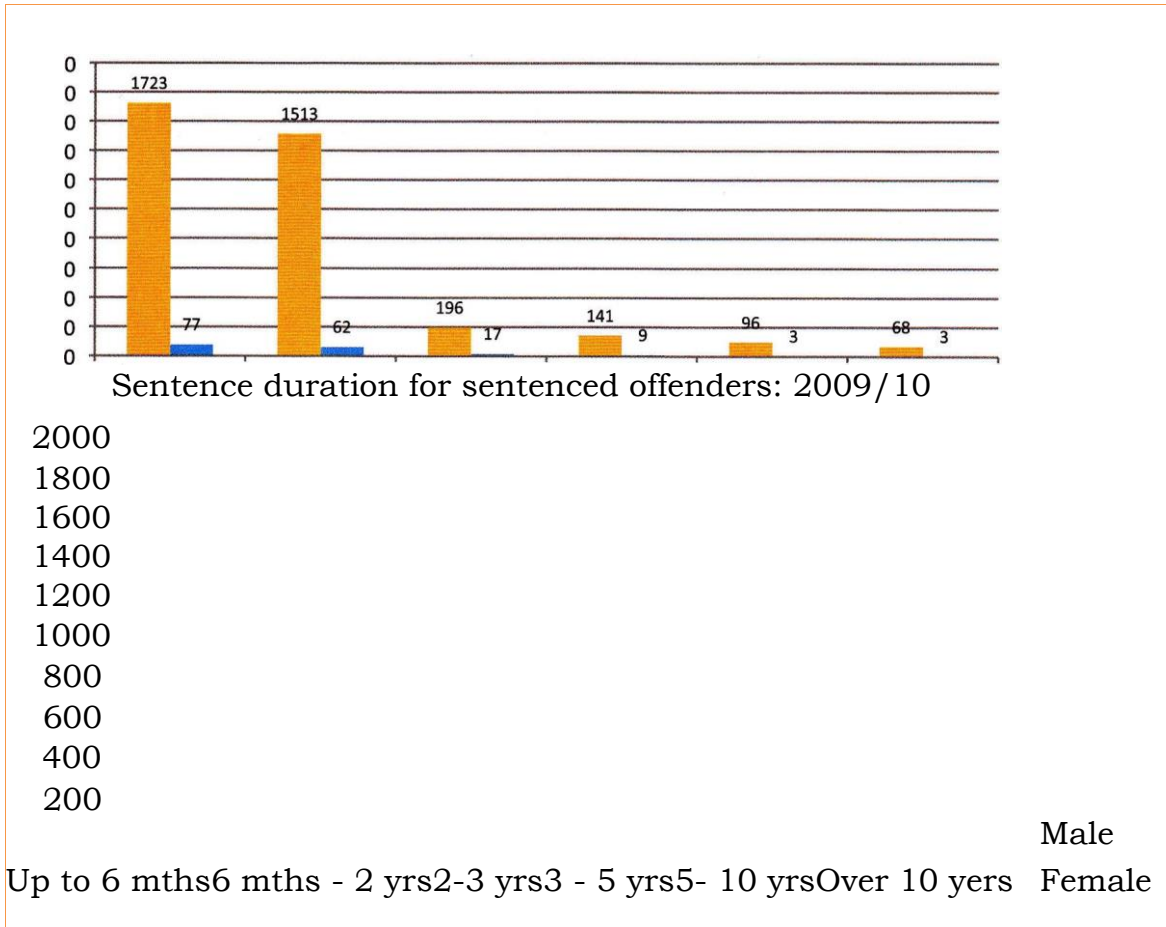
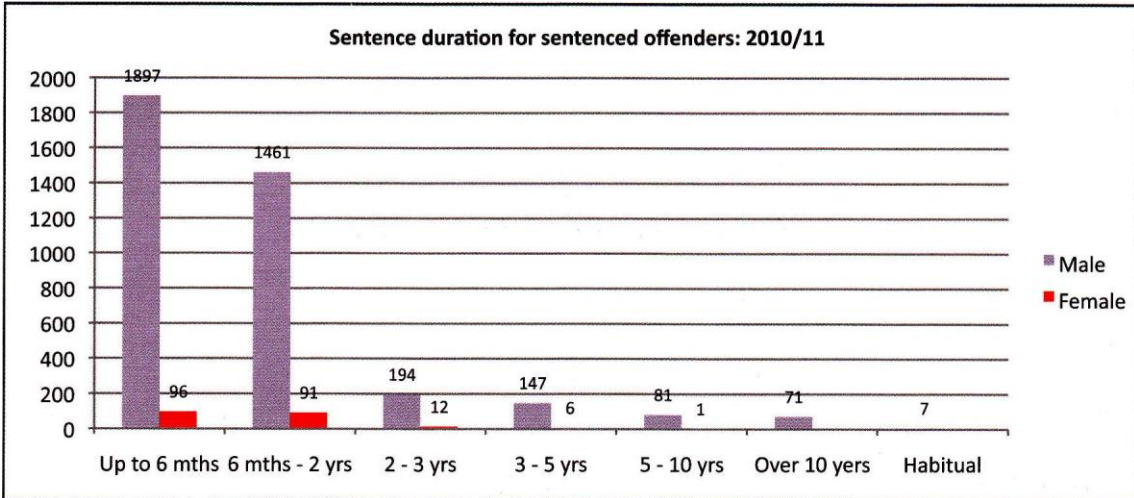


Figure 6: Sentence duration for sentenced offenders: 2010/11



g 1 Short term offenders (sentence length under 2 years) are over-represented in the NCS facilities.

As illustrated in the figures above, the short term offender population made up 83.5% in 008/9, 86.4% in 2009/10 and 87.2% in 2010/11. This pattern of admitting short term offenders makes it imperative to introduce more alternative sanctions other than incarceration and to ensure that most offenders go through the current community sanctions in order to reduce the number of offenders in correctional institutions. Currently, the alternative sentence in place for this type of offenders is Community Service Orders (CSO). However, this is not as yet introduced in other regions other than the northern regions. Alternative sanctions have benefits for government in terms of cost saving on resources to maintain daily needs of offenders who are incarcerated. Conversely, incarceration of non-serious offenders may lead to these type of offenders being exposed to serious or hardcore offenders which will ultimately turn them into becoming serious offenders and an even more serious threat to society.

**Table 19: Age group of sentenced offenders in the NCS**

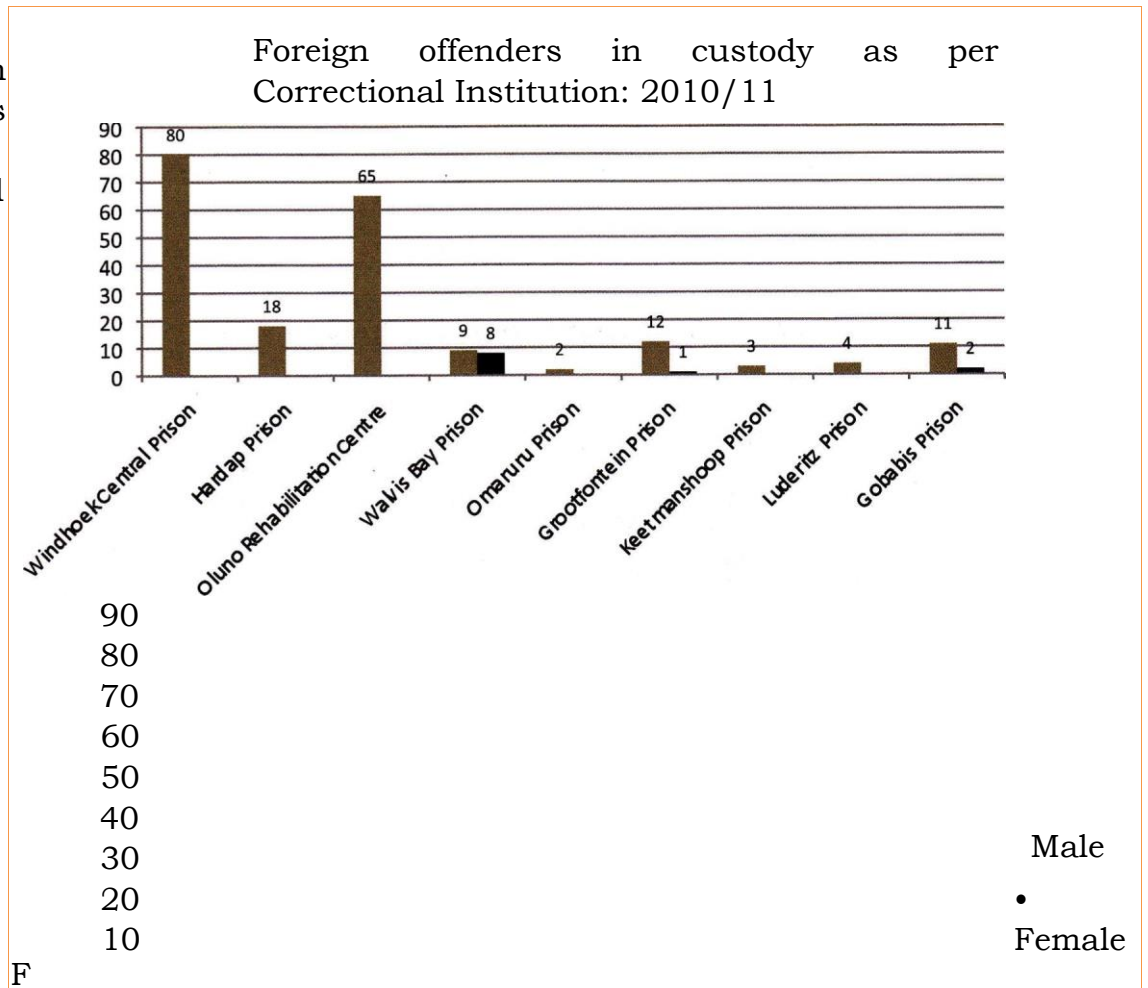
Length of sentence	Number of offenders per duration											
	2008/9				2009/10				2010/11			
	Male	Female	Total	%	Male	Female	Total	%	Male	Female	Total	%
Up to 18	258	21	279	7%	194	7	201	5%	229	7	236	6%
18 - 21	588	57	605	14%	593	27	620	16%	539	27	566	14
21 - 29	1660	84	1744	42%	1641	78	1719	44%	1636	82	1718	42%
29 - 39	1119	52	1171	28%	961	34	995	25%	1043	68	1111	27%
39 - 49	313	16	329	8%	289	16	305	8%	317	17	334	8%
49 - 59	48	-	48	1%	43	8	51	1%	77	8	85	2%
Over 59	12	1	13	-	16	1	17	-	14	-	14	-
<b>Total</b>	<b>3958</b>	<b>231</b>			<b>3737</b>	<b>171</b>			<b>3855</b>	<b>205</b>		
<b>Grand Total</b>		<b>4189</b>				<b>3908</b>				<b>4064</b>		

From the above figures, there is an indication that offenders between the age of 21-29 (aver. 42%) make up the majority of offenders, followed by those in the age group of 29-39 (aver. 27%) and 18-21 (aver.14%). Juveniles (under 18 years) only made up an average of 6% over the three years under review.

Foreign offenders made up 5% of the total admission in the year 2008/9, 6% in 2009/8 and 5% in 2010/11 or an average of 5% over the three years under review. Most of the foreigners admitted in the 2008/9 period are Angolans, followed by Zimbabweans and thirdly, Zambians. In the 2009/10 and 2010/11 years, Angolans were still the majority followed by Zimbabweans and thirdly South Africans. Most of the foreign offenders come to prison to serve sentences related to the Immigration Control Act and most are admitted in the Windhoek Central Prison and Oluno Rehabilitation Centre.



Figure 10:  
Foreign  
offenders in  
custody as  
per  
Correctional  
Institution:  
2010/11



40

Figure 11: Education level in the Namibian Correctional Service:  
2008/09:

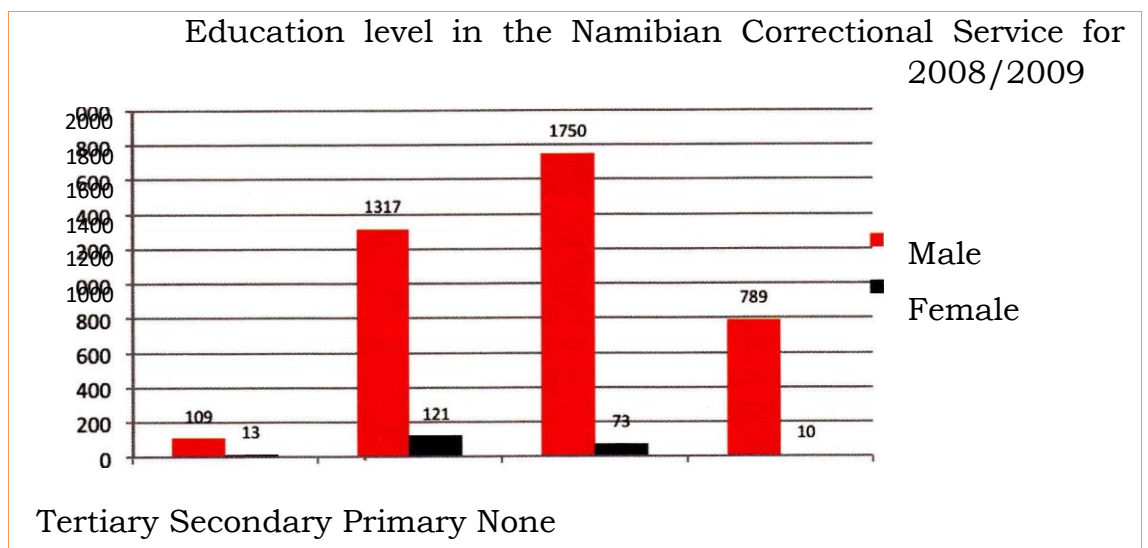


Figure 12: Education level the

2009/10

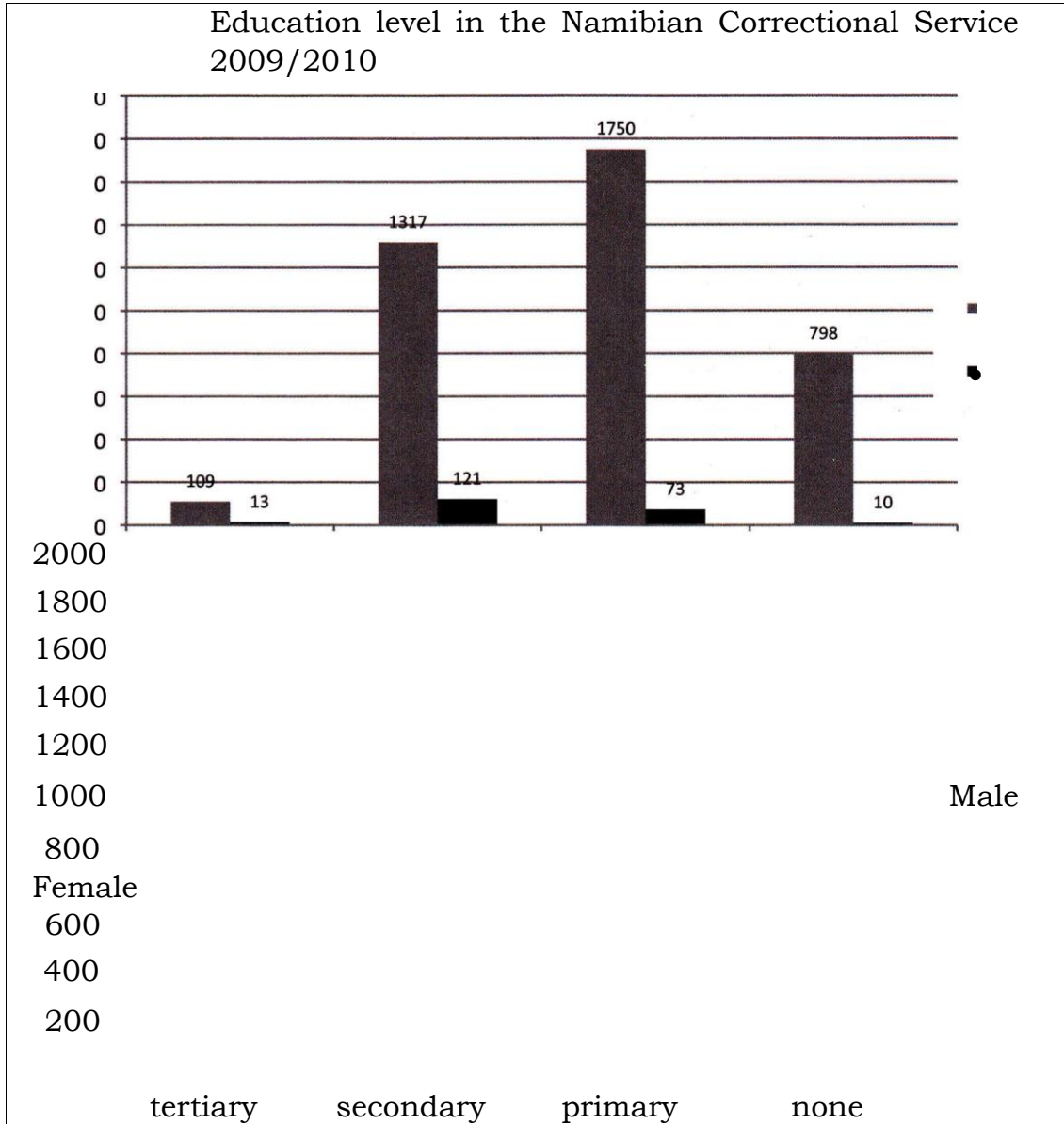
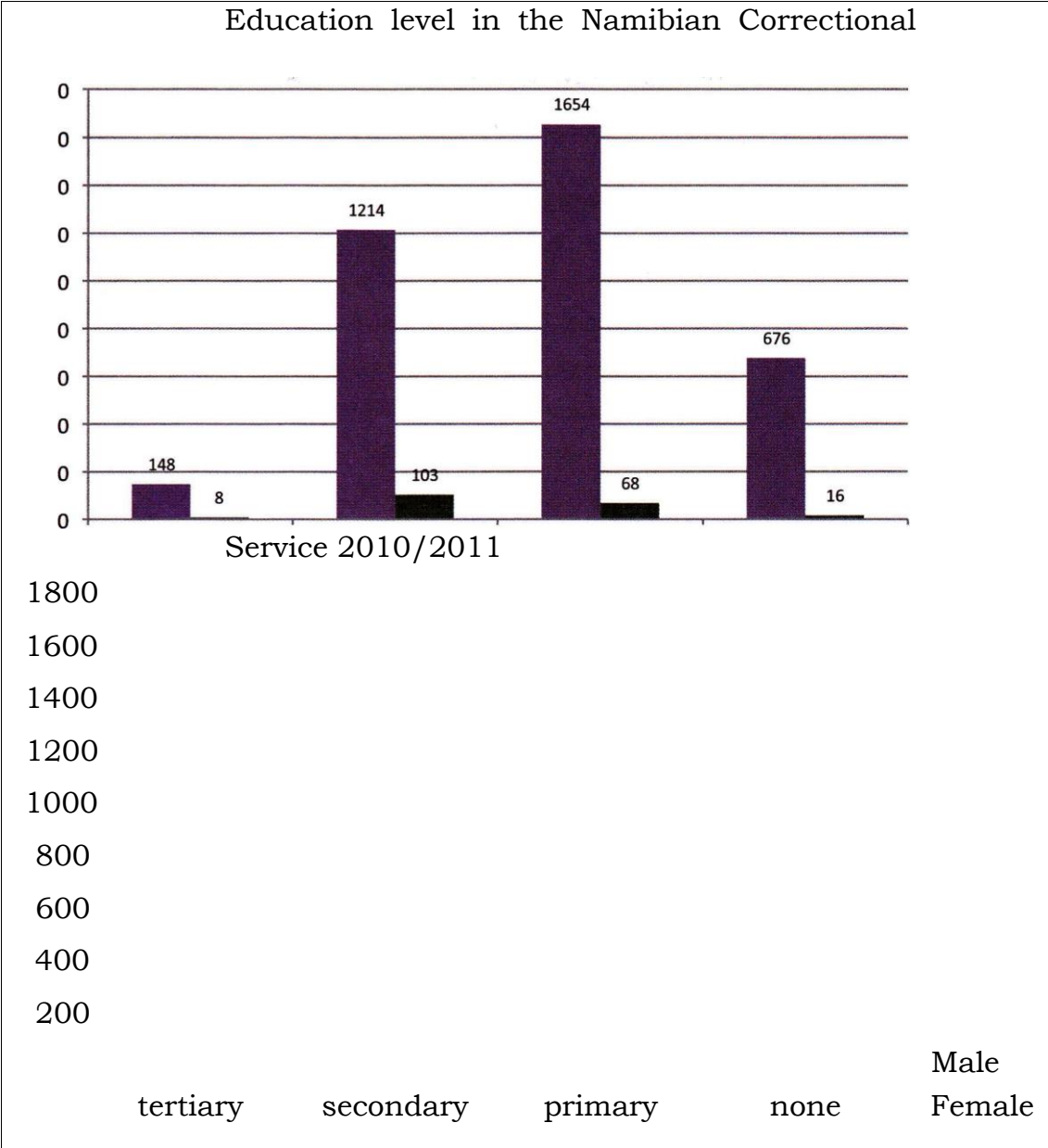


Figure 13: Education level in the Namibian Correctional Service: 2010/11



The Figures above indicate that the majority of offenders admitted in the NCS have little or no education. Considering that most offenders that are admitted in the NCS institutions are of the young age group, it becomes critical that offenders are provided with educational skills as a measure of addressing their criminogenic needs. In addition, for offenders to be rehabilitated, they will need basic writing and reading skills through literacy programmes. The NCS will require resources to be able to address the educational shortcomings of offenders, prepare offenders for the job market and thereby enhance public safety.

Figures 15-17 all indicate that the majority of offenders admitted committed Theft, followed by Housebreaking in second place and Assault with Intent to do Grievous Bodily Harm standing at third place.

This is an indication that most offenders in the NCS have committed offences against property. Crimes against persons are also alarming considering the nature of commission of the crime and the high number of Assault with Intent to do Grievous Bodily Harm as illustrated above. This is an illustration that Domestic Violence is still a cause of concern in Namibia as most of the Assaults derive from it. The other cause of concern is the evident increase in Drug Offences and Stock Theft. This calls for a need to establish programmes that target drug and alcohol abuse as most of the offences, particularly domestic violence offences, are often linked to substance abuse.

## **ANNEXURE “D”**

*REPORTABLE*

**CASE NO: I 1603/2008**

**CASE NO: I 3518/2008**

**CASE NO: I 3007/2008**

**IN THE HIGH COURT OF NAMIBIA  
MAIN DIVISION, HELD AT WINDHOEK**

In the matter between:

**L M 1ST PLAINTIFF**

**M I 2ND PLAINTIFF**

**N H 3RD PLAINTIFF**

and

**THE GOVERNMENT OF THE REPUBLIC OF NAMIBIA DEFENDANT**

**CORAM: HOFF, J**

**Heard on:** 01 – 03 June 2010; 01 – 03 September 2010; 06 – 08 September 2010; 10 September 2010; 18 – 20 January 2011; 27 January 2011

**Delivered on:** 30 July 2012

**JUDGMENT**

**HOFF, J:**

[1] The plaintiffs instituted actions against the defendant for damages which arose from what they allege in their respective pleadings to be an unlawful sterilisation performed on them without their consent by medical practitioners in the 2 employ of the State at State Hospitals, alternatively on the grounds of a breach of a duty of care that these medical practitioners owed to each of the plaintiffs.

[2] In a second claim each of the plaintiffs alleged that the sterilizations were done as part of a wrongful practice of discrimination against them based on their HIV status and that it amounts to a breach of their basic human rights as

guaranteed by the provisions of the Constitution of the Republic of Namibia. It is not disputed that the HIV status of all three plaintiffs are HIV positive.

[3] The first claim is pleaded by the plaintiffs in similar terms and it is necessary only to refer to the first plaintiff's particulars of claim. The first plaintiff's particulars of claim reads, *inter alia*, as follows:

"3. On or about 13 June 2005 and at Oshakati State Hospital, Oshakati, the plaintiff was wrongfully and intentionally assaulted, alternatively wrongfully and negligently caused harm in that she was subjected to a sterilization procedure, alternatively a sterilization procedure without her consent, by employees of the defendant, which caused her injury.

4. In the alternative to paragraph 3 *supra*,

4.1 At all relevant times the employees of the defendant referred to in paragraph 3 *supra*, had a duty of care to:

4.1.1 Execute their duties without negligence;

4.1.2 Not subject plaintiff to a sterilisation procedure, alternatively a sterilisation procedure without her consent and without explaining to her the concomitant or resultant risks and consequences flowing from, or incidental to, a sterilisation procedure;

4.1.3 Take all reasonable steps to safeguard the plaintiff from being injured or from any loss or damages being occasioned to her; 3

4.1.4 Would take due and proper care of the plaintiff after her admission to, and at all relevant times whilst being a patient at, the Oshakati State Hospital, Windhoek.

4.2 On or about 13 June 2005 and at the Oshakati State Hospital, Windhoek, plaintiff was subjected to a sterilisation procedure;

4.3 The aforesaid sterilisation procedure constituted, or resulted, from a wrongful and negligent breach of one or more or all of the duties of care set out in paragraph 4.1 above, which defendant as well as defendant's aforementioned employees at all relevant times had to and in respect of the plaintiff;

4.4 As consequence of the negligent breach of duty of care as aforementioned, plaintiff suffered injuries.

5. At all relevant times hereto, the aforementioned employees of the defendant acted within the course and scope of their employment with the Ministry of Health and Social Services and with the defendant, alternatively within the ambit of the risk created by such employment. The names and further particulars of such employees are unknown to plaintiff, save to state that they at all material times were personnel employed at, or attached to, the Oshakati State Hospital, Oshakati, Namibia.

## **CLAIM 1**

6. As a result of the aforesaid sterilisation procedure and the conduct of defendant's employees referred to in paragraph 3, alternatively 4 *supra*, the

plaintiff suffered the following violation and infringements of her common law rights and without derogating from the generality thereof, her common law and personality rights and more particularly

- 6.1 will be unable to bear children in future and found a family;
- 6.2 lost marriage prospects;
- 6.3 suffered and continues to suffer ongoing mental and emotional anguish;
- 6.4 endured and continues to endure shock, pain and suffering; 4
- 6.5 suffered and continues to suffer infringement of her rights to bodily and psychological integrity;
- 6.6 was subjected to torture or to cruel and inhuman or degrading treatment or punishment;
- 6.7 suffered and continues to suffer a violation of her dignity.

7. Alternatively to paragraph 6 *supra*, and as a further consequence of the aforesaid wrongful and unlawful conduct by defendant's aforementioned employees as set out in paragraph 3, alternatively 4 *supra*, plaintiff suffered a violation and an infringement of her rights guaranteed and protected under the Namibia Constitution, particularly:

- 7.1 Her right to life in terms of Article 6 of the Constitution;
- 7.2 Her right to liberty in terms of Article 7 of the Constitution;
- 7.3 Her right to human dignity in terms of Article 8 of the Constitutions;
- 7.4 Her right to found a family in terms of Article 14 of the Constitution.

8. As a result of the facts and circumstances as set out in paragraph 6 *supra*, alternatively paragraph 7 above, plaintiff suffered loss or damages (both past and contingent) in the amount of N\$1 million. It is not reasonable nor practical to apportion the aforementioned globular amount of N\$1 million to any of the numerous and particular infringements, violations and invasions of plaintiff's rights suffered by her as referred to in paragraph 6 and 7 above.

9. In as much as the aforesaid claim for loss or damages is based on what is set out in paragraph 7 above, plaintiff claims such loss or damages as monetary compensation in terms of Articles 25 (3) and 25 (4) of the Namibian Constitution.

## **CLAIM 2**

10. The aforesaid sterilisation of the plaintiff by the defendant's aforementioned employees was a consequence of her being a woman who is HIV-positive.

11. As a result, the aforesaid sterilisation was a wrongful and unlawful practice of impermissible discrimination against the plaintiff. 5

12. As a consequence of the aforesaid wrongful and unlawful conduct, and particularly the impermissible discrimination as set out in paragraphs 10 and 11 *supra*, plaintiff suffered a violation and an infringement of her rights guaranteed and protected under the Namibian Constitution, particularly;

12.1 Her right to life in terms of Article 6 of the Constitution;

12.2 Her right to liberty in terms of Article 7 of the Constitution;

12.3 Her right to human dignity in terms of Article 8 of the Constitution;

12.4 Her right to equality and freedom from discrimination in terms of Article 10 of the Constitution;

12.5 Her right to found a family guaranteed in terms of Article 14 of the Constitution.

13. As a result of the foregoing, plaintiff suffered loss or damages and is entitled to monetary compensation in terms of Article 25 (3) and 25 (4) of the Constitution in respect thereof.

14. In the premises plaintiff is entitled to an award of monetary compensation by the defendant in the amount of N\$200,000.00.

**WHEREFORE** plaintiff claims from the defendant:

**Ad claim 1**

1. Payment in the amount of N\$1 million.

**Ad claim 2**

2. Payment in the amount of N\$200,000.00.

**Ad claims 1 and 2**

3. Interest on the amounts as set out in prayers 1 and 2 above, at the rate of 20% per annum *a tempore morae* from date of judgment to date of payment.

4. Costs of suit.

5. Further or alternative relief.”

[4] Although the claims had been consolidated each of the different claims instituted by the plaintiff's has to be decided on its own merits as they relate to separate incidents.

[5] The defendant pleaded that in each case the plaintiff's written consent was obtained after the procedure was explained fully to the plaintiffs together with the risks and consequences thereof and also after alternative contraception methods had been explained.



[6] The issue in each claim is whether the defendant had obtained not only the plaintiffs' written consent but the plaintiffs' informed consent prior to the respective sterilisation procedures performed on them.

[7] It is common cause that all three plaintiffs underwent a sterilisation procedure which has rendered them incapable of bearing children.

[8] It was agreed between the parties that the question of liability be decided first by this Court and that the issue of quantum would stand over for adjudication at a later stage.

### **Applicable law**

[9] The defendant's defence is the defence of *volenti non fit iniuria* in that the plaintiffs signed consent forms which signified consent to the sterilisation procedures.

[10] In *Castel v De Greef* 1994 (4) SA 408 (C) is regarded as a leading judgment on the issue of informed consent wherein Ackermann J (as he then was) with Friedman JP 7 and Farlam J concurring, made a paradigm shift from medical paternalism to patient autonomy. At 420A the doctrine of informed consent was placed within its common law context where the following appears:

"It is important, in my view, to bear in mind that in South African law (which would seem to differ in this regard from English law) consent by a patient to medical treatment is regarded as falling under the defence of *volenti fit non iniuria*, which would justify an otherwise wrongful delictual act. (See, *inter alia*, *Stoffberg v Elliot* 1923 CPD 148 at 149 – 50; *Lymbery v Jeffries* 1925 AD 236 at 240; *Lampert v Hefer* NO 1955 (2) SA 507 (A) at 508; *Esterhuizen's case supra* at 718 – 22; Richter's case *supra* at 232 and *Verhoef v Meyer* 1975 (TPD) and 1976 (A) (unreported), discussed in Strauss (op cit at 35 – 6) ).

It is clearly for the patient to decide whether he or she wishes to undergo the operation, in the exercise of the patient's fundamental right to self-determination."

[11] With reference to *Rogers v Whitaker* (1993) 67 ALJR 47, a decision of the High Court of Australia, the court in *Castel* stated the following at 426B:

"Of particular importance is the conclusion of the Court in *Rogers v Whitaker* at 52 that: 'The law should recognise that a doctor has a duty to warn a patient of a material risk inherent in the proposed treatment; a risk is material if, in the circumstances of the particular case, a reasonable person in the patient's position, if warned of the risk, would be likely to attach significance to it or if the medical practitioner is or should reasonably be aware that the particular patient, if warned of the risk, would be likely to attach significance to it. This duty is subject to the therapeutic privilege.'"

[12] Therapeutic privilege referred to serves the purpose of protecting the patient's health not necessarily ensuring patient autonomy. 8

[13] In *Castel* at 425 the Court stated the following:

“For consent to operate as a defence the following requirements must, *inter alia* be satisfied:

(a) the consenting party must have had knowledge and been aware of the nature and extent of the harm or risk; (b) the consenting party ‘must have appreciated and understood the nature and extent of the harm or risk; (c) the consenting party ‘must have consented to the harm or assumed the risk; (d) the consent ‘must be comprehensive, that is extend to the entire transaction, inclusive of its consequence’.” (See also *Louwrens v Oldwage* 2006 (2) SA 161 (SCA) at 173). [14] It should be obvious that the required consent must be given freely and voluntarily and should not have been induced by fear, fraud or force. Such consent must also be clear and unequivocal. [15] Carstens and Pearmain in *Foundational Principles of South African Medical Law* at 687 postulate that the “lack of informed consent amounts to an assault (in the context of wrongfulness/unlawfulness) and not negligence (in context of the element of fault). The concept of assault should not be assessed in its strict literal sense, but as a violation of a patient's right to bodily or physical integrity”. These authors at 879 are of the view that since the patient is usually a layperson in medical matters, knowledge and appreciation on his or her part can only be effected by providing appropriate information. Adequate information becomes a requisite of knowledge, appreciation and consent and therefore also of lawful consent. [16] In deciding whether or not the plaintiffs given informed consent prior to the surgical procedures this Court must consider whether plaintiffs had been provided with adequate information in order to enable them to make informed decisions. 9

[17] In *Castel*, with reference to *F v R* (1983) 33 SASR 189, a decision of the Full Court of the Supreme Court of South Australia, the following appears at 427A: “AJ King CJ considered in *F v R* at 192 (a passage approved in *Rogers v Whitaker* at 51): ‘What a careful and responsible doctor would disclose depends upon the circumstances. The relevant circumstances include the nature of the matter to be disclosed, the nature of the treatment, the desire of the patient for information, the temperament and health of the patient?’ ”

### **Expert evidence**

[18] Matti Kimberg testified that he is a qualified gynaecologist and obstetrician practicing in Windhoek. He holds an MB, B.Ch medical qualification being a fellow of the College of Obstetricians and Gynaecologists in South Africa and a fellow of the Royal College of Obstetricians and Gynaecologists in the United Kingdom. He has been practicing as a gynaecologist and obstetrician for more than 30 years. Prior to this he had

been practicing as a general practitioner for eight years. He is Vice-President of the Medical and Dental Council of Namibia and serves on the Executive Committee of the Medical Association of Namibia.

[19] He testified that he regularly performs procedures at the Central State Hospital but do not work at the Katutura State Hospital and is not acquainted with the facilities at Katutura Hospital. In respect of the Central State Hospital there is an acute shortage of theatre space for a number of reasons and that the staff work under tremendous pace and pressure. He testified that he examined and consulted each one of the plaintiffs in his consulting rooms. Each one of the plaintiffs had given birth by way of a caesarean section, and a surgical procedure of bilateral tubal ligation (BTL) (performed on women to bring about sterilisation) had been performed on the plaintiffs. 10

[20] In respect of the first plaintiff the witness testified that he had on 20 April 2010 consulted with the plaintiff and a laparoscopy was done on 26 April 2010 at the Central Hospital. He found that the plaintiff had been sterilised and that the prognosis for a future reversal was poor. It was the plaintiff's third pregnancy at the age of 26 years of which the first child one was stillborn. The two previous pregnancies resulted in normal deliveries. From a perusal of the antenatal and maternity records there was little in the hospital records indicating what type of information was given to the plaintiff regarding the tubal ligation procedure and whether alternative methods of contraception were offered to her.

[21] It appears from form "consent" that the plaintiff had signed and had given her consent for a "C/S due to CPD + BTL (ON HAART)" on 13 June 2005. Dr Kimberg testified that C/S means caesarean section and CPD is cephalic pelvic disproportion which means that the head of the child is either too big or in a wrong position or the pelvic too small to allow for a normal vaginal delivery. HAART means highly active antiretroviral therapy which means that the plaintiff was on treatment for her HIV condition. On the reverse side of this consent form is the doctor's report of the operation with a reference *inter alia* to the name of the patient and the signatures of two doctors and a nurse. This consent form is the standard hospital consent form and was the only form signed by the first plaintiff.

[22] In respect of the second plaintiff she was seen by him on 16 April 2010 at his consulting rooms and a laparoscopy was performed on her on 19 April 2010 at the Central Hospital. He found that the tubal ligation operation had severed the fallopian tubes very close to the fimbrial ends which gave a very poor prognosis for a reversal of the sterilisation. She gave birth to three children, two of whom were by way of caesarean section. The second plaintiff signed the standard consent form for an operation on 8 December 2007. On this form it is indicated that she gave consent for a "caesar + BTL 11 due to

previous caesar". She also signed a second "consent form for sterilisation" in which she consented to undergo the "operation of tubular ligation, the nature of which has been explained to me. I have been told that the object of the operation is to render a patient sterile and incapable of parenthood". The form further states that plaintiff understands that if successful the procedure may be irreversible. At the bottom of this form there is a statement to be completed by a doctor to the effect that the doctor declares that he or she has explained the procedure and related aspects of sterilisation to the patient. This part of the form was not completed and not signed. This form also contains a section for a statement by the spouse of the patient which is optional. He testified that one would have expected the doctor to have signed this form, preferably earlier on in the pregnancy and in order to give the patient time to consider all her options. The witness testified that it is normally regarded that three caesarean sections are permissible because of the risk of the rupture of the uterus, bleeding and various complications with increasing caesarean sections. He also testified that on perusal of the hospital notes there is no record of the type of counseling that was provided and if alternative forms of contraception were offered. It further appears from the hospital records that a caesarean section was done due to prolonged labour which is a perfect valid reason for performing the caesarean procedure since prolonged labour in an HIV positive patient increases the incidence of mother-to-child transmission.

[23] In respect of the third plaintiff consultation was done on 27 April 2010 at his consulting rooms and a laparoscopy was carried out on 3 May 2010 in the Central Hospital. The third plaintiff was 46 years old and had 6 normal deliveries and one caesarean section. The witness testified that from a surgical point of view the prognosis for reversing the sterilisation was good but the chances of another pregnancy would not be good at all due to the age of the plaintiff. The third plaintiff signed the standard form of consent to an operation on 13 October 2005. It appears from this form that she consented to a caesarean section due to prolonged first stage and BTL. The third plaintiff 12 also signed a second consent form for sterilisation on the same date. The statement at the bottom of this form was completed and signed by Dr Sichimwa on 13 October 2005. It appears from the hospital records that when she was in labour for natural birth, there was no booking for her for a sterilisation procedure. There was nothing in the health passport of the plaintiff that she was to have a sterilisation procedure.

[24] The witness testified that the pain experienced during labour by women can be extremely intense and can become so overwhelming that they virtually lose sense of reality. They are not aware of anything else except this awful pain. He testified that the circumstances under which to secure the consent of a patient in respect of a sterilisation procedure is when the patient is rational and not in pain, has time to consider it, time to discuss it with her partner and

relatives and thereafter come to a reasoned conclusion. It is not a decision to be taken under the duress of extreme pain.

[25] Dr Kimberg testified that in reaching informed consent certain factors should be taken into account:

- (a) understanding the information relevant to the decision and being able to retain and assimilate that information;
- (b) being able to weigh that information as part of the process of making that decision;
- (c) being able to properly communicate that decision;
- (d) being aware of the short and long term possible repercussions of the decisions;
- (e) being aware of and able to evaluate the alternative options available, if any, and after having been duly informed of such alternatives;
- (f) not being subject to undue influence by the situation, environment and coercion by medical personnel (commonly referred to as medical paternalism) and/or other parties; and 13 (g) being advised of the ability to withhold consent, even if it might not be in her best interest to do so and the need to respect that decision.

[26] In *Foundational Principles of South African Medical Law supra* the authors with reference to *van Oosten LLD Thesis 458* stated that the patient's right to informed consent is not absolute and that the needs and contingencies of medical practice sometimes, depending on the circumstances, place restrictions on the duty to disclose information. One of such restrictions is where the patient is already in possession of the requisite information.

[27] The onus of establishing the defence of *volenti non fit iniuria* rests on the defendant. (See *Santam Insurance Co. Ltd v Vorster* 1973 (4) SA 764 (A) at 779 A – B). In the law of delict the onus to prove the existence of a ground of justification (*in casu, volenti non fit iniuria*) rests on the defendant. (See *Mabaso v Felix* 1981 (3) SA 865 (A); *Ntamo v Minister of Safety and Security* 2001 (1) SA 830 (TK) at 833 A; *Ferreira v Ntshingila* 1990 (4) SA 271 (A) at 273 A).

[28] Whether or not informed consent was present is a factual issue and not a legal one.

[29] Dr Kimberg testified that it is important to record the fact that alternative contraception methods have been discussed especially in a hospital situation because a patient may be seen by different doctors at different times, by different nurses and one does not have the advantage of getting to know the patients and their circumstances. In these instances the patient would be responsible to take the decision herself and needs to be fully informed as to what her options are. 14

[30] It was his evidence that assuming the three plaintiffs had received counseling and options had been explained he would have hesitated to do a sterilisation in those circumstances because there are very acceptable long term methods of contraception which can be instituted at the same time of the caesarean section without any problems e.g. an intra-uterous device, and that it was not necessary to do what could be an irreversible operation if there is doubt at all in the mind of the physician. Such doubt would be present where the patient signs the consent form under the duress of a painful, unstable, disturbing condition, which is the painful labour. Sterilisation could be done around the six week check-up when the patient comes back, through a laparoscope, which is a one-day procedure. According to Dr Kimberg it has the disadvantage that the patient would be subjected to two operations, but it would at least ensure that by the time the patient actually signs for the sterilisation, she is in a rational state of mind and has had the time to think about it.

[31] Dr Kimberg agreed with certain guidelines contained in literature discovered by the defendant to the effect that the principle of informed consent must be applied as an ongoing process; that it is compulsory in keeping proper record and the prescribed information which needs to be recorded; that in the case of litigation no record equals no defence; that records should be complete, but concise and in chronological order; that the disadvantages of tubal ligation is that it is very expensive to try to reverse; that tubal ligation is not the best method for a woman who is single and has not had a child or still wishes to have more children; that there should be unhurried and skilled counselling as an essential prerequisite to any sterilisation procedure, it should take place without pressure in a language that is clearly understood; that woman aged 30 years or less at the time of the operation are more likely than an older woman to be dissatisfied and would seek a reversal often because their domestic circumstances have changed; that a record should be kept of what the patient was told of possible risks and the instructions given to the patient; and that the decision to be sterilised should have been taken before or during pregnancy to avoid the risk of a rushed decision that may be regretted later.

[32] Dr Kimberg conceded during cross-examination that mistakes certainly occur during the recording process and are more likely to occur if somebody is overworked, stressed and working under a lot of pressure but that there are certain vital information that have to be recorded such as the details of counseling and information that has been given to a patient. Dr Kimberg, when it was put to him that State patients do not sign consent forms when they consult with doctors (as is the accepted practice testified by Dr Kimberg in private practice) but *sign* a consent form when such a patient is being prepared for surgery at the State Hospital, replied that it seems to be an acceptable procedure as long as there has been a prior explanation. It was put to Dr Kimberg during cross-examination that it is the defence's case that every

pregnant woman who goes to Katutura Antenatal Clinic is provided with antenatal care and as a subsidiary of that antenatal care, family planning is provided when contraception is discussed with patients in groups and in the language of their respective preferences, including sterilisation and alternatives. He replied that patients should or actually need individual counselling.

### **First Plaintiff**

[33] It is common cause that the first plaintiff gave birth by way of an emergency caesarean section on 13 June 2005 at the Oshakati State Hospital because she was diagnosed with a condition known as cephalic pelvic disproportion (CPD). A sterilisation procedure was performed at the same time on the plaintiff. At the time the procedures were performed the first plaintiff was 26 years old. She had two previous pregnancies and delivered normally though her second child was stillborn. She completed Grade 10. Her home language is Oshiwambo. The first plaintiff tested HIV positive in 2004 when she attended a health facility in Grootfontein. Her first of several antenatal care visits to 16 the clinic was on 5 January 2005. According to her there was no discussion about the concept of sterilisation and its applicability to her. On 9 June 2005 she went to a clinic at Ongwediva for an antenatal care visit where she discovered that she was discharging blood in the waiting room. She was taken to Oshakati State Hospital where she was informed that there was no dilation and was told to come back 4 hours later. On 10 June 2005 at about 20h23 she had pain, not severe and there was dilation. On 11 June 2005 she had contractions and stayed in the vicinity of the hospital in the waiting area. On 12 June 2005 her contractions were severe and she was in pain. On 13 June 2005 she experienced severe pains. She told the hospital personnel that she was unable to walk and was told to lie down. She was then seen by a male doctor who examined her and told her that she cannot deliver because she was very exhausted. The doctor instructed a nurse that plaintiff be taken to the theatre to undergo a caesarean section. The doctor spoke English. A nursing student translated. The doctor did not mention anything about sterilisation to her. She testified that before she could be taken to the theatre a nurse came into the delivery room and told her that she will be sterilised since all women who are HIV positive go through that procedure. The nurse then brought documents for her to sign. She did not know whether the documents were in respect of her consent to undergo the operation or whether it was in respect of consent for sterilisation. She was given these forms when she was on a stretcher just before she went into the theater. The nurse did not explain anything about the procedures she would be undergoing. It is common cause that she signed only one document where she consented to “c/s due to CPD and BTL”. She did not know what caesarean section or the other acronyms on the consent form meant. She testified that the way the nurse conveyed the information to her sounded forceful, and that it was “a compelling thing”. She

testified that she was in severe pain and no alternatives to the procedure were explained to her by the hospital personnel. She did not ask the nurse any questions since it sounded that the nurse was forcing her. She only discovered afterwards that she had been sterilised. She testified that she felt very bad as a result of the procedure 17 because in her culture if a woman is unable to give birth then her in-laws might tell her that the husband should divorce or desert her.

[34] When it was put to her during cross-examination that both Dr Mavetera and nurse Angula will testify that she requested sterilisation and was made aware at that stage that the procedure is irreversible and that she would be unable to bear any children, it was denied by the plaintiff. She disputed that she actually used the Oshiwambo word for sterilisation when she requested it. She denied that Dr Mavetera explained to her that the reason for the cesarean section was because of her condition namely that the baby's head was too big to pass normally through her pelvis. The plaintiff denied that a nurse translated to her stating that it was a student nurse. She testified that she could read English but was not asked to read the consent form but believed that she signed the form to consent only to the removal of her child. She testified that it was not her intention to be sterilised and that she did not give consent for sterilisation.

[35] Innocent Mavetera testified that he qualified as a general practitioner in 1995 and as a specialist in obstetrics and gynaecology in the year 2000. He testified that he was called by nurse Angula to review the plaintiff. He examined her and found that the membranes were ruptured and the head of the baby could not fit the pelvis and that she would not have a normal delivery. He established that the plaintiff was on highly active antiretroviral treatment (HAART) after talking to her. He ordered a caesarean due to CPD plus BTL. He testified that he explained to the plaintiff that since she cannot deliver on her own she was going to the theatre to be operated on and to remove the baby. He testified that after he had explained this the plaintiff decided that "she also wants to be closed". Since "closing patients" is not a routine, especially when they come for caesarean section he explained what sterilisation means and what her future chances are of having children. The nurse would be translating and the patient would later give consent after she has understood what was explained and the patient would then sign the 18 consent form. He testified that the plaintiff was there for 14 to 15 hours in the hope that she would deliver normally. According to him he would not have performed a sterilisation if the plaintiff had no previous children, but since it was her second live birth he thought it reasonable enough to do the procedure. He testified that plaintiff would normally have decided on sterilisation during antenatal care because sterilisation is a method of contraception and normally contraception is discussed at the antenatal clinic. He stated that the plaintiff did not sign the consent form in his presence. In respect of a second consent form dealing



specifically with sterilisation he testified that at that stage they never had it at the hospital and that the consent form signed by the plaintiff was the standard form they used for all procedures. He agreed that under normal circumstances it is highly undesirable to use acronyms on consent forms but the circumstances under which people work at State Hospitals are not normal e.g. a doctor would see 50 to 90 patients a day. In respect of the acronyms he testified that they are used in the health passport because it is for fellow health workers to read and understand. He further testified that because of their workload and shortage of personnel “most of the things what we talk to our patients ... we do not write down”. He testified that he had no independent recollection of the plaintiff given the large number of patients he dealt with and because of the effluence of time, and gave his evidence only with reference to his notes. He conceded during cross-examination that even though the use of acronyms on hospital records, like health passports, may be primarily for the benefit of health officials, the use of acronyms on *consent forms* is highly undesirable even more so in the case of an invasive procedure such as a sterilisation. The witness conceded that nothing appears in the health passport of the plaintiff to suggest that the sterilisation procedure had been canvassed.

[36] Victorina Uuso Angula a registered nurse and midwife who worked in the maternity ward for over 18 years prepared the plaintiff and signed as a witness on the consent form. She confirmed the plaintiff was informed of the reason why the plaintiff had to undergo a caesarean section and testified that it was at that stage that the plaintiff said 19 she wanted to be sterilised after the doctor had explained it to her. She testified that she herself had also explained the contents of the consent form to the plaintiff. She conceded that her notes did not record this explanation and that it was a mistake made, and that due to the urgency of the operation did not complete fully the medical record of the plaintiff.

[37] It is clear from the evidence of both Dr Mavetera and nurse Angula that they *assumed* that the plaintiff knew what sterilisation was and that she understood the consequences because she had attended antenatal classes where they also *assumed* plaintiff was informed of all aspects concerning sterilisation.

[38] It was submitted by Mr Smuts who appeared on behalf of the plaintiffs, that this assumption relied on was plainly for the purpose of dispensing with the need for a proper explanation of the procedure and its risks and alternatives to it.

[39] Dr Mavetera conceded during cross-examination that he should rather have advised the plaintiff to come back for sterilisation after 6 weeks. He stated that that is what they would normally do but couldn't recall whether it was done in this case. Nurse Angula's response to the same question was that a

sterilisation can be done at any time and asked why should the plaintiff be sent away just to be operated on for a second time. It must, in the light of this response be accepted that plaintiff was not advised to return after six weeks. If this was indeed normal procedure nurse Angula would have said so.

## **Second Plaintiff**

[40] The second plaintiff gave birth by way of a caesarean section on 9 December 2007 at Katutura State Hospital, Windhoek. At the same time a sterilisation procedure was performed on her. She completed Grade 12 in Ondangwa and is able to read, speak and understand the English language. She has three children aged 17 years, 9 years and 3 years respectively. She was diagnosed HIV positive in 2007 when she fell pregnant. She testified that the counselling that she received was given by volunteers at the Red Cross, but none from the nurses. The counselling related to pregnant women knowing their HIV status and the importance of the unborn baby be protected against the virus. She testified that no further counselling was done but she continued to attend the antenatal care clinic – only to check the progress of the pregnancy. She testified that on 6 December 2007 she went to an antenatal care session and that the nurse who examined her found that the head of the baby had not turned downwards and referred her to a doctor. The doctor confirmed that the foetus was in a breach position. It appears that the doctor who examined her was Dr Gurirab. The doctor advised her that she gives birth by way of caesarean section because she had given birth to her second child through a caesarean section and because of her HIV positive status. The doctor also informed her that she would be sterilised and that she should agree to that. She was informed that she would not be able to give birth in future. The doctor did not ask her whether she wanted more children or whether she wanted to consult with family members or friends. She did not receive any counselling about sterilisation and was not informed of the advantages and disadvantages of sterilisation. She testified that she was not asked whether she wanted to be sterilised and was told by the doctor that she was going to be sterilised whether she wanted it or not. The manner in which the doctor spoke made her afraid since he spoke in a “forceful manner”. She testified that although she did not want to be sterilised she did not ask questions because she was informed that if she did not agree to the sterilisation he would not book her for the caesarean section. On 8 December 2007 plaintiff started having contractions. Between 19h00 and 20h00 these contractions became severe and she asked her boyfriend to take her to hospital. She was admitted about 23h00. She was in severe pain. She was laid on a bed. Nurses came to observe her and later a nurse came to her with papers or documents and with an intravenous drip. When she enquired about the purpose of the document the nurse 21 informed her that the doctor had already explained it to her and that she only had to sign. The nurse hurried her to sign the documents. In respect of the second consent form, plaintiff denied that she wrote her name on

the consent form. She confirmed that she signed both consent forms at the same time. She testified that she knew what a caesarean section was but that she did not know what BTL meant, and that none of the contents on the form was read to her. She was only told to sign. She testified that the nurse was in a hurry and she herself did not read the contents of this form. She did not know or understand that she was sterilised but only became aware of it six weeks after the operation when she came for a check-up. She testified that when the doctor told her she was going to be sterilised she knew the meaning of the word because she had read about it but that it was not explained by either the doctor or the nurse. She testified that she was made to understand that there is a policy in place that women who are HIV positive should be sterilised. No basis was provided for this understanding.

[41] Quincy Gurirab a medical practitioner graduated at the end of the year 2006 from the University of Pretoria and started working for the Ministry of Health and Social Services in January 2007. He did not have an independent recollection of who the patient was and relied on his notes made in the antenatal care passport. He saw the patient on 6 December 2007. He recorded certain information and that the patient was booked for elective caesarean section due to a breach presentation and this was also recorded. He testified that he *would have* explained to her what caesarean section was, the advantage, and disadvantages, and would have made sure that she understood it. He would have explained to her that sterilisation is a surgical procedure with its own inherent risks with regard to anaesthesia and the procedure itself. This explanation is however not reflected in the antenatal care record. During cross-examination he conceded that there was no inscription in the passport that alternatives to sterilisation had been explained to the patient. He testified that since he did not note BTL in the passport 22 he was of the view that he did not mention it to the patient. He testified that it was unlikely that he would have raised the issue of a sterilisation with the patient.

[42] Even Maria Ndjala is registered nurse who qualified as a midwife in the year 1986. She testified that she prepared the second plaintiff for her operation and also obtained her signature on the two consent forms. She testified that she would have explained to the plaintiff that she was going to be sterilised and would be unable to have any children in the future and that it was irreversible. She would have asked the plaintiff whether she understood and once she had agreed she would have given her the forms to complete after she had given an explanation to her. She testified that plaintiff wrote her name on the forms and signed the forms. Her response to a question why she has given the explanation whilst the plaintiff was in labour, was that labour is not continuous and that she would have explained during the intervals when there were no contractions and would stop when the patient was having a contraction.

[43] Nurse Ndjala admitted during cross-examination that she read the plaintiff's antenatal care record and when she saw the inscription "BTL" and another inscription where there is reference to "Family plan: BTL" she assumed that the plaintiff wanted to be sterilised and that plaintiff had already been counselled. She admitted that the instruction given to her by the doctor on 9 December 2007 was to prepare the patient for a caesarean section only. She testified that because of her assumption that the plaintiff had already been counselled she did not consider it necessary to counsel her again. She testified that she needed to obtain confirmation from the plaintiff that she would still want to have a sterilisation. She denied that she compelled or coerced the plaintiff into having a sterilisation. It was put to her that the plaintiff's evidence was that she was told that she would have to have a sterilisation because she was HIV positive, to which nurse Ndjala responded that she has never heard of a person being sterilised because she is HIV positive. 23

[44] Celest de Klerk a general practitioner qualified at the medical school of the University of Cape Town in the year 2003. She worked as a medical officer in the Katutura Anti-Retroviral Clinic from 2004 until the year 2009. On 26 October 2007 she saw a female patient, the second plaintiff. She testified that she made notes, *inter alia*, one on the outer cover of the antenatal care record card where there is an inscription "BTL". She describes that a description "Family plan - BTL" indicated that the plaintiff "opted" for a sterilisation as a method of family planning after the birth of her child. She testified that she would have discussed family planning in general in layman's terms and would have referred to different options including sterilisation. If the patient opted for sterilisation she would have made the inscription as it appears on the antenatal care record of the plaintiff. She wrote "BTL" on the cover of the antenatal care record to draw the attention of personnel at the antenatal care clinic because the two clinics are different and there for different purposes. She testified that she made it clear that the plaintiff would still have time to go home and consider the chosen option.

[45] It was put to Dr de Klerk during cross-examination that the inscription may be interpreted differently by another health official as meaning that it is something which was merely raised with the patient or recommended to her and would not necessarily be read as an accepted option. Dr de Klerk, after much debate, conceded that an indication regarding family planning would not necessarily be considered as final consent by the patient. She also acknowledged and accepted the fact that the patient may have opted at the time for sterilisation as a family planning method cannot be relied on for purposes of claiming that she had given her informed consent to the sterilisation procedure.

[46] Dr de Klerk testified that she gave the patient information about family planning, and that issues like how the procedure for bilateral tubal ligation is

done, what the risks are involved, what the consequences of the procedure would be, the possibility of a reversal, would not have form part of the discussion with the patient 24

### **Third Plaintiff**

[47] The third plaintiff was born on 10 October 1964. She is not married and has six children from eight pregnancies. She reached standard 5 at school. She has three children with her current partner, a married man, with whom she has had a relationship since 1990. The plaintiff was diagnosed with the HIV virus in the year 2002.

[48] On 10 March 2005 when she was about three months pregnant she was experiencing severe pain to the extent that she felt like she was going to die as a result of the pregnancy. She was unable to walk and had to be carried by her partner to the car and thereafter had to be wheeled into the hospital on a stretcher.

[49] She testified that she requested that the pregnancy be terminated (“removed”) because she feared that she was going to die. It is not clear what she meant by the removal of the pregnancy because she also testified that her “intention was not really for the child to be removed from my stomach, only for that to be rectified by the doctors”.

[50] She was examined by more than one doctor and was also taken for a sonar. She testified that the conversation that took place between the health professionals amongst themselves and at some point between the health professionals and her partner was conducted in English which she could not understand. Her partner eventually told her, pointing to the sonar, that the doctors said that the baby is too big, that they cannot terminate the pregnancy, and that she had to come for treatment.

[51] In a referral note written by Dr Ithete on 10 March 2005 it was stated that plaintiff, 40 years old, requested a termination of her pregnancy on medical grounds. 25

[52] The plaintiff testified that she attended the antenatal care clinic on 4 May 2005. In respect of an inscription “elective c/s + BTL” plaintiff stated that it was not discussed with her and that she did not consent to it. On 12 October 2005 contractions started, and she took a tablet called Neverapine, as instructed, and went to Katutura State Hospital where she was examined by a nurse who wrote something in her passport. She was in pain. She was informed to go somewhere and walk but was unable to do so because of severe pain. The nurse later returned with a doctor who examined her. After the doctor left a nurse returned with a paper in her hand and told her to write. The

nurse told her in Oshiwambo to write her name (“shanga”) and repeated in Afrikaans “skryf, skryf”. The plaintiff testified that she put her name on the piece of paper whereafter she was told to get onto a stretcher and was wheeled into a white room with big lamps. She testified she did not understand anything contained in the documents. She confirmed that she wrote her name on the two consent forms and that she signed one but because the writing on the second form (consent form for sterilisation) was faint she did not acknowledge that it was her signature but did not exclude the possibility that she signed it. She testified that she contemplated normal delivery because she gave birth to her other children naturally. At some stage after the operation she overheard two nurses speaking in Oshiwambo that she had been closed.

[53] Erica Kamberipa Tjimbundu a registered nurse qualified as a midwife during the year 2004 and started working at Katutura State Hospital, the next year. She admitted the plaintiff to hospital and recorded certain information. The plaintiff complained of severe backache. She was not sure which language was used but thought that they communicated in Oshiwambo. She made an inscription “patient prepared for caesarean section and BTL, consent signed by patient herself after the doctor explained the operation to her and she signed”. She explained that the consent for sterilisation form is explained to the patient by the doctor and the doctor and patient would sign the form. The standard procedure is that if a patient does not understand a certain language an 26 interpreter would be used. She testified how antenatal care is provided at the State Hospital and that it is done in different languages.

[54] She testified that the next set of inscriptions made in the maternity record were made by a doctor. The plan was to allow the labour to progress and keep the membranes intact for sterilisation at a later stage. It appears from subsequent evidence by Dr. Sichimwa and Dr Kronke that the doctor who made these inscriptions was Dr Fong who was on duty during that evening. He was not called to testify.

[55] Nurse Tjimbundu testified that inscriptions made on 13 October 2005 at 08h35 were made during a ward round with the consultant who was Dr. Kronke. It appears from the notes that she was diagnosed as being in prolonged first stage of labour and the plan decided by the doctor was for her to undergo a caesarean section due to the prolonged first stage and sterilisation. Dr Sichimwa testified that Dr. Fong made these inscriptions and also confirmed that it was decided by the *doctors* that she must have a caesarean section and a sterilisation.

[56] Nurse Tjimbundu testified with reference to the consent form for sterilisation that her experience was that the standard procedure was that the doctors are the ones taking decisions. The procedures would first be explained to the patient before she signs for the operation. She confirmed during cross

examination that it was the decision of the doctor as to what was going to happen to this patient. She further testified that the doctor should also sign the consent form to sterilisation. She testified that when the plaintiff was admitted she assumed, based on the notes contained on the front page of the ante-natal case record, that the plaintiff had already agreed to a sterilisation and that she did not have to discuss this issue with the plaintiff since it was indicated on the ante-natal case record that the plaintiff had accepted to be sterilised. She testified that it must have been 27 Dr. Sichimwa who explained the sterilisation procedure since he signed the declaration at the bottom of the consent form for sterilisation.

[57] The notes in the maternity record do not explain which doctor explained the sterilisation procedure to plaintiff or what was explained to her. Nurse Tjimbundu testified during cross examination that family planning provided at group sessions at ante-natal classes would not constitute counseling in any proper sense and individual counseling is still required. She testified that during these sessions the patients are only shown the different methods which are available and if a patient indicates during an ante-natal care class that she wants a sterilisation, she would be referred to a doctor for proper counseling. This she confirmed during re-examination.

[58] Godfrey Sichimwa qualified in the year 2004 from St Georges University in the West Indies as medical practitioner and thereafter pursued post graduate studies at the University of Witwatersrand in 2009 with the aim of becoming a specialist obstetrician and gynaecologist. During August 2005 he took up the post of medical officer within the Ministry of Health and Social Services at Katutura State Hospital. On 13 October 2005, he was on duty as medical officer. From inscriptions in the maternity record it appears according to his testimony that the plaintiff had a planned operation for a caesarean section and bilateral tubal ligation but somehow did not turn up to be given a date for the operation. She was in early labour and the plan was to allow labour to progress and for a bilateral tubal ligation to be done at a later stage.

[59] On 13 October 2005 at 08h35 when ward rounds were done by Dr. Krönke, he was present. He testified that due to the prolonged first stage of labour a caesarean section would have been offered to the plaintiff and that in view to her age, the number of children she had, and her retroviral status, a bilateral tubal ligation would have been offered again since it had already been offered in terms of the health records of the 28 plaintiff. He testified how he would have explained a caesarean section and a sterilisation procedure to a patient, the risks involved, the nature of the operations, how the procedures are done and that sterilisation is one of the most effective contraceptives available. These would have been explained in layman's terms and in a language which the plaintiff understands.

[60] In respect of the consent to sterilisation, he confirmed that he signed the declaration at the bottom of the form and stated that by virtue of his signature it means that he would have been the doctor who had explained the procedure to the plaintiff. He testified that the patient would sign this form in the presence of the doctor but that it is possible that a nurse will obtain the signature of the patient after the doctor had explained everything to the patient. Once a patient has signed the form the patient would be prepared for the theater.

[61] During cross examination, Dr. Sinchinwa conceded that he is not able to state precisely what he did with the plaintiff and that for recollection he relied on his notes due to the large number of patient that are seen at the state hospital (roughly 500 deliveries per month). He does not have any recollection apart from his notes what specifically was said to the plaintiff. He testified that he himself, Dr. Fong, and an intern were present with Dr Krönke at 08h35 when an assessment was made by the consultant, Dr. Krönke. Nursing staff were also present. He testified that when the inscriptions were made at 08h35 by Dr. Fong, would have been the time the explanation had been received by the patient from the doctors. He testified that though prolonged labour may be the underlying reason why a caesarean section would be performed, a sterilisation would not be effected for that same reason. He disputed that the plaintiff did not understand what was explained to her and stated that he himself explained the procedure to the plaintiff. Dr. Sichimwa admitted that from the medical record of the plaintiff, no reason was indicated why she had to undergo a sterilisation procedure. He further admitted that as the 29 surgeon who performed the operation that it was his responsibility to be satisfied that the plaintiff had properly consented to the operation and that a proper note should have been kept in this regard by him. His explanation for failing to make any notes was that the stationery used by the health professional at the State hospital did not provide space for pre-operational notes, only for post-operational notes but added that it is not a requirement for a surgeon to make notes before doing the operation. He admitted that there was no note by a medical officer that the plaintiff had consented to a caesarean section. He however stated that there is a note on the consent form for an operation for caesarean section, which form was signed by Dr Fong and that it was Dr Fong who had explained the procedure to the plaintiff even though Dr Fong did not perform the operation. He admitted that Dr Fong doesn't speak Oshiwambo. Dr Sichimwa stated that the possibility was that Dr Fong explained the caesarean section procedure to the plaintiff and that he explained the sterilisation procedure. He also admitted that there was an obligation on him to explain alternative contraceptive methods to the plaintiff. He agreed that a patient should have been provided with an explanation regarding the sterilisation procedure, the alternatives and that this should have been recorded. The reasons given for the sterilisation were that the plaintiff was at that stage over 40years old, her retroviral status and her multiple



pregnancies. These reasons according to Dr Sichimwa were provided to the plaintiff which he covered within a period of ten minutes with the aid of an interpreter. He admitted that informed consent is an ongoing process of which an important aspect is to inform the patient that she may withhold consent. He however could not recall whether he informed the plaintiff that she may withhold her consent to the sterilisation procedure. Dr Sichimwa agreed that in terms of Ministerial policy unhurried and skilled counselling is an essential prerequisite to any sterilisation procedure. Dr Sichimwa agreed during cross-examination that the decision that the plaintiff undergoes a caesarean section was a “sudden decision”. It was also agreed that the decision that the plaintiff should undergo a caesarean section was a collective decision taken by himself, the consultant Dr Krönke and Dr Fong. It was put to Dr Sichimwa that 30 the caesarean section might have been *offered* to the plaintiff but that it was the *decision* of the medical professionals what should happen to the plaintiff. He responded that the plaintiff was part of the decision making process.

[62] Tshali Iithete a medical doctor and a medical superintendent of the Ongwediva Medical Park in Ongwediva in northern Namibia testified that he qualified as a medical doctor in the year 200 from the University of Natal, Durban, in South-Africa. He is Oshiwambo speaking. During the year 2005 he was employed by the Ministry of Health and Social Services as a medical officer at Windhoek Central Hospital as well as Katutura State Hospital. He testified in respect of a referral letter written by him on 10 March 2005 regarding the third plaintiff. The letter was addressed to his colleagues and *stated inter alia* the following:

“I have discussed at length with both patient and partner about current legislation (Namibia) on termination of pregnancy and suggested PMTCT (which stands for prevention of mother to child transmission) and possible elective hysterectomy; also discussed for them to practice barrier method contraceptive as husband still negative. Could you please kindly assist whether T.O.P (termination of pregnancy) on medical grounds is an option at all and ... regards Dr T Iithete.”

He recalled the case because plaintiff was one of the first patients with HIV requesting termination of pregnancy on medical grounds. He testified that he spoke to the plaintiff in Oshiwambo. He testified that what appears in the referral letter was discussed with the plaintiff. He stated that he referred the patient to the department of gynaecology to be seen by the health officials there on 30 March 2005. The plaintiff was booked for this date. He testified that the plaintiff did not express anything about feeling unwell. He testified that the plaintiff came there with her partner related her past experience and requested a termination of pregnancy based on her past “pregnancy experiences” and the previous loss of a baby due to HIV, and that the plaintiff did not necessarily request the termination of pregnancy on the basis of her medical condition. Dr Iithete testified 31 that both the plaintiff and her partner spoke to her. Dr

lithete testified that the issue of elective hysterectomy was raised because of the plaintiff's previous history of severe bleeding.

[63] Dorothea Maria Krönke, a witness called by the defence qualified as a medical doctor in 1985 in Germany. She started to work in Namibia at the State Hospital from 1987 until 1992. She returned to Germany where she qualified as a specialist gynaecologist and thereafter returned to Namibia where she worked at the Central Hospital as well as Katutura State Hospital.

[64] She testified that in 2005 the antenatal clinic was run by sisters and nurses who were specially trained for antenatal care and that there were regular group counselling. During the group counseling different forms of contraception are discussed including sterilisation. When she has a discussion with a patient who does not understand English she would make use of an interpreter. The third plaintiff arrived at the hospital on 13 October 2005 at 18h50 when she was in early labour. The plaintiff previously requested a termination of pregnancy on medical grounds. The plaintiff has previously been observed by Dr Kheiseb, the Head of the Department. The pregnancy was too advanced for the termination thereof. The plan was to have an elective caesarean section and a sterilisation. Her experience was that the maternity ward at Katutura State Hospital was very busy with around six thousand deliveries annually. In respect of the antenatal care record of the plaintiff it was indicated in front of the document: "wants BTL". The third plaintiff was seen by Dr Fong the previous evening who still had the hope that she might deliver normally. The next morning this plan was reviewed and it was decided that she had to undergo a caesarean section. It was recommended to the plaintiff that a sterilisation be done simultaneously and that this was discussed with the plaintiff. She testified that a patient should not be counselled for the *first* time while she is in active 32 labour regarding the option of sterilisation. She testified that in her capacity as a consultant she herself was not involved in obtaining informed consent from the plaintiff.

[65] Dr Krönke, in response to a statement during cross-examination that when it comes to sterilisation counselling it must be done on a one-on-one basis, stated that such sterilisation counselling is being done during group counselling where all types of contraception are discussed, where each and every contraception method is presented and this is regarded as sufficient if a patient understands what has been conveyed to her. Should a patient need further individual counselling that would be arranged. She testified that there are simply too many patients at the antenatal care clinic to counsel each and every one on a one-on-one basis. Dr Krönke, in response to a statement during cross-examination that the people who attend the group counselling and the antenatal clinic would be at different levels of education and experience, stated that at these group counselling sessions the health officials presume that the patients are at a low educational level (since that was their experience) and

counselling is being done in very clear and simple words for everyone to understand. She further testified that the health officials are experienced in dealing with the group counselling on this basis. Her testimony in respect of the third plaintiff was that she requested a termination of her pregnancy and never mentioned acute pain or other problems as the reason for wishing to terminate the pregnancy. If this had been the case she would have examined the third plaintiff, would have recorded it and would have changed the management immediately and completely. Apart from being HIV positive, being elderly and being a high risk pregnant patient, third plaintiff was found to be otherwise stable and healthy. A caesarean section and a sterilisation was recommended to the patient when she was three months pregnant and had plenty of time to weigh her options. It was put to Dr Krönke that if third plaintiff had understood that what was involved was a sterilisation she would have made a booking for such a procedure. Dr Krönke disagreed. She testified that under these circumstances a booking would normally have to be made for a 33 caesarean section, the sterilisation being additional to that but the fact that a booking was not made does not necessarily indicate that the patient did not want the sterilisation since from her experience there are a number of reasons why patients do not make bookings. Dr Krönke further testified that it is not the common practice, and it is impractical to send out reminders to patients when they do not adhere to their appointments due to the sheer number of patients that are seen. She testified that it often occurs that no booking has been made but a patient would come at a time when it is necessary to do the surgical procedure. The third plaintiff was booked for an elective caesarean section due to her advanced age, the number of her previous deliveries, her HIV status, and because of her prolonged labour. Dr Krönke conceded during cross-examination, that there was no consent given for sterilisation by the third plaintiff in discussion with herself (i.e. Dr Krönke) and that there is no indication in all the hospital records that plaintiff had given consent at any time before she was in hospital and shortly before her surgery.

### **Evaluation of Evidence**

[66] It is common cause that the plaintiffs underwent sterilisation procedures and it is not disputed that the required consent is more than just written consent, but *informed* consent. It is furthermore also not disputed what information should be made available to a patient in order to put such a patient in a position to make an informed decision.

[67] The defendant's medical personnel accepted that it is a surgeon's legal duty to obtain informed consent from a patient although a registered nurse may be requested to procure the patient's signature on the consent form. This is also in accordance with the ethical standards governing health professionals, as set out in the guidelines for them issued by the professional councils. 34

[68] In respect of the first plaintiff it is common cause that the plan was that she would deliver naturally. The plan changed when she was diagnosed with CPD. The first plaintiff's case is that she had no intention to have a sterilisation. It is common cause that the plaintiff did not signed any form dealing specifically with sterilisation. Dr Mavetera had no independent recollection of what was said to the plaintiff and had to rely on his contemporaneous notes. Dr Mavetera conceded that there was no contemporaneous record of any request by the first plaintiff or any expressed intention on first plaintiff's part to have a sterilisation in any of her medical records. Registered nurse, Angula who had testified that she herself also explained the contents of the consent form to the plaintiff also conceded that her notes did not record that she had given this explanation. Both Dr Mavetera and nurse Angula assumed that plaintiff was informed of all aspects concerning sterilisation because she attended ante-natal classes. It was also conceded by Dr Mavetera that it is highly undesirable to use acronyms on consent forms. It is not disputed that the first plaintiff had been in labour for 14 to 15 hours. It must be accepted as testified by the plaintiff that she was in severe pain. It was Dr Mavetera's evidence that when he explained to the plaintiff that he had to perform a caesarean section she decided that she wanted to be closed i.e. wanted to be sterilised. The consent obtained from the plaintiff for the sterilisation procedure was obtained under circumstances (testified to by Dr Kimberg) under which no consent should be obtained from a patient by a surgeon. It was obtained at the height of labour, there could not have been any proper counselling in the absence of any record of what information had been provided to the plaintiff, and it certainly, in view of the circumstances, was not obtained in an unhurried fashion. Dr Krönke unequivocally accepted that consent should not be obtained during labour – at least not obtained for the first time. Dr Mavetera was of the view that it was reasonable to do a caesarean section on the plaintiff aged 26 years at that stage due to the fact that it was her second live birth. In view of the undisputed testimony of Dr Kimberg that a woman aged 30 years or less at the time of the operation is more likely to be dissatisfied with a sterilisation and would seek a reversal, the decision taken by Dr Mavetera appears to me not to be so reasonable as it was made out by Dr Mavetera under those circumstances and sounded more like an afterthought, an *ex post facto* rationalisation. Dr Mavetera correctly conceded, in my view, during cross-examination that he should rather have advised the first plaintiff to return after six weeks for the sterilisation procedure.

[69] It is apparent from the authorities referred to *supra* that knowledge of the nature and extent of the harm and risk and an appreciation thereof do not necessary equal consent. Even though the evidence of the first plaintiff had been criticised by Ms Schimming-Chase who appeared on behalf of the defendant such criticism cannot detract from the circumstances under which the first plaintiff's consent had been obtained, namely in circumstances in

which the first plaintiff could not have given informed consent in the sense referred to by the authorities (*supra*).

[70] Dr Kimberg testified that one of the factors which should be taken into account in reaching informed consent is for a patient to be aware of and be able to evaluate alternative options available after having been duly informed of such alternatives. In this regard it would appear to me that where sterilisation, as one of the methods of contraception, is considered the patient should be informed of advantages and disadvantages of alternative contraception methods. This in my view would enable such a patient to truly make an informed decision. In respect of the second plaintiff Dr Gurirab who testified that he would have explained what a caesarean section was to the second plaintiff including the advantages and disadvantages, conceded that such explanation was not reflected in the ante-natal care record. He also conceded during cross-examination that there was no inscription on the passport that alternatives to sterilisation had been explained to the second plaintiff. It should in my view be accepted (as testified by Dr Gurirab) that he did not raise the issue of sterilisation with the second plaintiff. In view of an inscription on the medical record of the plaintiff it is likely that the 36 doctor who performed the caesarean on the plaintiff, raised the issue of sterilisation with the plaintiff. Nurse Ndjala who testified that she would have explained to the plaintiff that plaintiff was to be sterilised significantly testified that the consent was given by the plaintiff while she was in labour. She also assumed that the plaintiff wanted to be sterilised in view of an inscription on the ante-natal care record and that it was not necessary to counsel her again. Nurse Ndjala also significantly testified that she would have given the explanation to the plaintiff during intervals when there were no contractions. She also admitted that the instruction which was given to her on 9 December 2007 by the doctor, according to the notes recorded on the maternity record, was to prepare the plaintiff for a caesarean section *only*, there being no reference to a sterilisation. This was another example of consent being obtained from the plaintiff by a health official professional under circumstances where the patient was in the height of labour. Dr de Klerk conceded that the inscription on the ante-natal record made by herself would not necessarily be read as an accepted option by the plaintiff. Dr de Klerk also accepted that the fact that the plaintiff may have opted for sterilisation as a family planning method cannot be relied on for purposes of claiming that plaintiff had given her informed consent to the sterilisation procedure. Dr de Klerk when asked if she had been the surgeon performing the sterilisation procedure would she have been satisfied if a patient signed a consent form at their discussion, stated that she would not have been satisfied

[71] Ms Schimming-Chase submitted that the second plaintiff's version was unreliable since she had contradicted herself and that the testimony was not in line with various inscriptions on her health passport and differ markedly from

the testimonies of defence witnesses. Even if it is accepted that she was not an entirely satisfactory witness and her version should be disregarded, the question remains, namely, did the defendant on the version of the defence witnesses, having regard to the concessions made, discharged its onus to prove informed consent was given by the plaintiff on a preponderance of probabilities ? I think not. 37

[72] In respect of the third plaintiff it appears from the notes made on 13 October 2005 that the third plaintiff was in a prolonged first stage of labour and the plan decided by the doctors was for her to undergo a caesarean and a sterilisation. Dr Krönke testified that in her capacity as a consultant she would not have obtained any consent from the third plaintiff.

[73] Dr Sichimwa testified that he must have explained the sterilisation procedure to the plaintiff. He further testified that he had assumed from the notes made by Dr Krönke on 30 March 2005 that the sterilisation procedure was canvassed with and explained to the plaintiff on that day. This was an incorrect assumption based on the evidence of Dr Krönke. Dr Sichimwa conceded that he had no independent recollection of what was specifically said to the plaintiff and had to rely on his notes. There is no reason apparent from the medical records why a sterilisation procedure was performed. His reason for failing to make notes is a poor excuse.

[74] Nurse Tjimbundu testified that the *doctors* would decide the required treatment in respect of a specific patient. The impression which is gained from the evidence of defence witnesses who had testified regarding what information is conveyed during group sessions in respect of family planning and regarding the different contraception methods appear to sufficient information and that individual counselling is not only unnecessary but also impractical. Nurse Tjimbundu's evidence contradicted this impression where she testified that family planning at group sessions would not constitute counselling in any sense and that individual counselling is still required.

[75] The importance of proper and complete record keeping is best demonstrated if one has regard to what happened in respect of the third plaintiff. As conceded by Dr Krönke during cross-examination there is no indication in all the hospital records that the plaintiff had given consent at any time before her surgery. 38

[76] Regarding the consent forms signed by the plaintiff this was another demonstration where a patient was required to sign consent forms during the height of labour. It was accepted, for the reasons mentioned by the witnesses, that such a practice is highly undesirable.

[77] I am not convinced even should I have regard only to the evidence of the witnesses called on behalf of the defence that the defence has discharged its onus on a preponderance of probabilities that the third plaintiff has provided informed consent in respect of the sterilisation procedure done on her.

[78] It must be stated that one has an appreciation of and sympathy for the abnormal circumstances, as testified by the witnesses, under which physicians and other health professionals must work at State Hospitals.

[79] Regarding the issue of group counselling when family planning is discussed Dr Kimberg testified that individual counselling is required. In view of the testimony of Dr Krönke and other health professionals individual counselling due to the large number of patients is simply impractical. I agree that even though individual counselling may be an ideal situation in which to do proper and skilled counselling one should not close one's eyes (figuratively speaking) to the realities encountered at State Hospitals. I can see no reason why group counselling cannot be adequate and sufficient, provided that skilled counsellors are engaged and information is conveyed in languages which are understood by the patients requiring such counselling.

[80] In respect of the first claim I am of the view that the defendant has failed to discharge its onus to prove that all three the plaintiffs had given informed consent in respect of their respective sterilisation procedures and that the plaintiff's should succeed in respect of this claim. 39

[81] In view of this finding I deem it unnecessary to deal with the alternative claim.

[82] In respect of the second claim the plaintiffs allege that the sterilisation procedures were performed on them because of their HIV status and that this resulted in an unlawful practice of impermissible discrimination against them. Since the plaintiffs claim that they were sterilised because they were HIV positive I am of the view that the *onus* is on them to prove this to be the case on a preponderance of probabilities.

[83] I am of the view that there is no credible and convincing evidence that the sterilisation procedures had been performed on the plaintiffs due to the fact that they are HIV positive. The second claim stands accordingly to be dismissed.

[84] In the result the following orders are made:

1. The first claim in respect of each of the plaintiffs succeeds.
  2. The second claim in respect of each plaintiff is dismissed.
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**HOFF J**

**ON BEHALF OF THE 1st – 3rd PLAINTIFFS: ADV. D SMUTS SC  
ASSISTED BY ADV. N BASSINGTHWAIHTE  
Instructed by: LEGAL ASSISTANCE CENTRE**

**ON BEHALF OF THE DEFENDANT: ADV. E SCHIMMING-CHASE  
Instructed by: GOVERNMENT ATTORNEY**