

## MEMORANDUM

### Proposed amendments to the Criminal Procedure Act, (Act No. 51 of 1977 (CPA))

#### Purpose

The purpose of this memo is to:

Provide the rationale behind the proposed amendments to the Criminal Procedure Act, 1977 (Act No. 51 of 1977)

#### Background

Under the powers of law enforcement and investigative authorities under FATF Recommendation 31, Namibia was rated partially compliant. The reviewers found that there is a lack of powers for law enforcement and other investigative authorities to do control delivery for investigative purposes and interception of communication for purposes of investigating ML and other high-risk/serious predicate offences, other than TF. Thus, there is a need to give law enforcement and investigative authorities the powers to make use of traps, conduct undercover operations and to provide for admissibility of evidence so obtained. The Mutual Evaluation Report identified a deficiency in that Under-cover operations and control delivery are only recognised by the courts in Namibia under common law and not in legislation.

In this regard, the following deficiency was identified by the reviewers with regard to Powers of Law Enforcement and Investigative Authorities: that there was a lack of powers to do control delivery for investigative purposes and interception of communication for purposes of investigating Money Laundering (ML) and other high risk/serious predicate offences, other than Terrorist Financing (TF).

Failure by Namibia to adequately address the above concerns in line with the Action Plan agreed upon will result in the grey listing of the country as a non-cooperative jurisdiction and one whose financial system pose a risk to the international financial system. The listing may result in the country being subjected to various sanctions, which may have a direct effect on the Namibian economy, correspondent banking

relationships, foreign direct investments and availability of funds to Namibian Foreign Missions.

Accordingly, it is proposed that the CPA be amended with the introduction of a new section 252A be to achieve this.

### **Methodology**

In coming up with the envisaged amendments, the Namibian Police Force Task Team (NamPol TT) considered the findings of the last Mutual Evaluation Report (MER) relating to Namibia and also compared the current provisions of the Police Act with Financial Action Task Force (FATF) methodology for assessing compliance with its recommendations. Comparative studies with other jurisdictions with closely related legal systems were also undertaken by the NamPol TT.

### **Suggested amendments**

#### **EXPLANATORY NOTE:**

\_\_\_\_\_ Words underlined with a solid line indicate insertions in existing provisions

[            ] Words in bold type in square brackets indicate omissions from existing provisions

### **BILL**

To **amend the Criminal Procedure Act, 1977 to provide for police powers to use traps and undercover operations and for the admissibility of evidence so obtained.**

**BE IT ENACTED** as passed by the Parliament, assented to by the President, of the Republic of Namibia as follows:

**Amendment of Chapter 24 of the Criminal Procedure Act No. 51 of 1977**

Chapter 24 of the Criminal Procedure Act, 1977 is hereby amended by insertion of the following section after section 252.

**“252A. Authority to make use of traps, undercover operations and control delivery and admissibility of evidence so obtained**

(1) A police official may make use of a trap or engage in an undercover operation to detect, investigate or uncover the commission of an offence, or to prevent the commission of an offence, and the evidence so obtained is admissible if that conduct does not go beyond providing an opportunity to commit an offence, but where the conduct goes beyond providing an opportunity to commit an offence a court may admit evidence so obtained subject to subsection (3).

(2) In considering the question whether the conduct goes beyond providing an opportunity to commit an offence, the court must have regard to the following factors:

(a) The nature of the offence under investigation, including-

(i) whether the security of the State, the safety of the public, the maintenance of public order or the national economy is seriously threatened thereby;

(ii) the prevalence of the offence in the area in question; and

(iii) the seriousness of the offence;

(b) The availability of other techniques for the detection, investigation or uncovering of the commission of the offence or the prevention thereof in the particular circumstances of the case and in the area in question;

(c) whether an average person who was in the position of the accused, would have been induced into the commission of an offence by the kind of conduct employed by the police official concerned;

(d) the degree of persistence and number of attempts made by the police official before the accused succumbed and committed the offence;

(e) the type of inducement used, including the degree of deceit, trickery, misrepresentation or reward;

(f) the timing of the conduct, in particular whether the police official instigated the commission of the offence or became involved in an existing unlawful activity;

(g) whether the conduct involved an exploitation of human characteristics such as emotions, sympathy or friendship or an exploitation of the accused's personal, professional or economic circumstances to increase the probability of the commission of the offence;

(h) whether the police official has exploited a particular vulnerability of the accused such as a mental handicap or a substance addiction;

(i) the proportionality between the involvement of the police official as compared to that of the accused, including an assessment of the extent of the harm caused or risked by such police official as compared to that of the accused, and the commission of any illegal acts by such police official;

(j) any threats, implied or expressed, by the police official against the accused;

(k) whether, before the trap was set or the undercover operation was used, there existed any suspicion, entertained on reasonable grounds, that the accused had committed an offence similar to that to which the charge relates;

(l) whether the police official acted in good or bad faith;

(m) any other factor that in the opinion of the court has a bearing on the question.

(3) (a) If a court in criminal proceedings finds that in the setting of a trap or the engaging in an undercover operation the conduct goes beyond providing an opportunity to commit an offence, the court may refuse to allow such evidence to be tendered or may refuse to allow such evidence already tendered, to stand, if the evidence was obtained in an improper or unfair manner and the admission of such evidence would render the trial unfair or would otherwise be detrimental to the administration of justice.

(b) When considering the admissibility of the evidence, the court must weigh up the public interest against the personal interest of the accused, having regard, where applicable, to the following factors:

(i) The nature and seriousness of the offence, including-

(aa) whether it is of such a nature and of such an extent that the security of the State, the safety of the public, the maintenance of public order or the national economy is seriously threatened thereby;

(bb) whether, in the absence of the use of a trap or an undercover operation, it would be difficult to detect, investigate, uncover or prevent its commission;

(cc) whether it is so frequently committed that special measures are required to detect, investigate or uncover it or to prevent its commission; and

(dd) whether it is so indecent or serious that the setting of a trap or the engaging of an undercover operation was justified;

(ii) the extent of the effect of the trap or undercover operation on the interests of the accused, if regard is had to-

(aa) the deliberate disregard, if at all, of the accused's rights or any applicable legal and statutory requirements;

(bb) the ease, or otherwise, with which the requirements contemplated in item (aa) could have been complied with, having regard to the circumstances in which the offence was committed; and

(cc) the prejudice to the accused resulting from any improper or unfair conduct;

(iii) the nature and seriousness of any infringement of any fundamental right contained in the Namibian Constitution;

(iv) whether in the setting of the trap or the engagement of an undercover operation the means used was proportional to the seriousness of the offence;

(v) any other factor that in the opinion of the court ought to be taken into account.

(4) (a) A police official who sets or participates in a trap or an undercover operation to detect, investigate or uncover or to obtain evidence of or to prevent the commission of an offence, is not criminally liable in respect of any act that constitutes an offence and that relates to the trap or undercover operation if it was performed in good faith.

(b) No prosecution for an offence contemplated in paragraph (a) may be instituted against a police official without the written consent of the Prosecutor-General.

(5) If at any stage of the proceedings the question is raised whether evidence should be excluded under subsection (3), the burden of proof to show, on a balance of probabilities, that the evidence is admissible, lies with the prosecution, but-

(a) the accused must furnish the grounds on which the admissibility of the evidence is challenged;

(b) if the accused is not represented, the court must raise the question of the admissibility of the evidence.

(6) The question whether evidence should be excluded under subsection (3) may, on application by the prosecutor or the accused or by order of the court of its own motion, be adjudicated as a separate issue in dispute.”

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