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Amending of electoral law coming to a head in 2023



Through 2022 electoral authorities gathered comments and inputs from stakeholders with an eye to finalising the amendments before the 2024 elections

At a consultative meeting with various stakeholders on 18 February 2022 the Electoral Commission of Namibia (ECN) for the first time introduced the Electoral Amendment Bill and called for inputs to the bill.

This was followed up with another consultative workshop on 22 and 23 September 2022 at which stakeholders interrogated the various proposals received for amendments to the Electoral Act of 2014.

This workshop was followed by another one on 13 and 14 December 2022 where the final amendment proposals were motivated and discussed with a view to compile the final draft of the Electoral Amendment Bill.

At the December 2022 meeting, the ECN's Chief Electoral and Referenda Officer, Theo Mujoro, indicated that even though the stakeholder engagements had come to an end with that meeting, there was still room for stakeholders to submit inputs for consideration in the final draft until early 2023.

The amendment proposals gathered throughout 2022 concern a great many of the sections of the Electoral Act of 2014, from the definitions right through to the last sections of the law.

The Electoral Act of 2014 was enacted shortly before the November 2014 National Assembly and presidential elections, but by the time the November 2019 elections were approaching, electoral authorities were already talking about amending the law.

On pages 2 and 3, we present some of the significant changes that will in all likelihood be made to the law through the Electoral Amendment Bill.



Perspectives on Parliament is a bulletin produced by the Democracy Report project of the Institute for Public Policy Research (IPPR). Democracy Report analyses and disseminates information relating to the legislative agenda of Namibia's Parliament. The project aims to promote public engagement with the work of Parliament by publishing regular analyses of legislation and other issues before the National Assembly and the National Council. Democracy Report is funded by the Embassy of Finland. The views reported or expressed do not necessarily reflect those of the Finnish Embassy.

Scope of amendments

During the consultations in 2022 around amending the Electoral Act 5 of 2014, more than 71 sections or sub-sections of the law attracted proposals for amendment.

Following is a list (taken from an ECN presentation document) of most of the sections of the law where amendments have been proposed and / or will be made:

Section 1	– Definitions	Section 93	– Commencement and closing of the poll at polling stations.
Section 4 (1)(b)	– Independence of the Commission	Section 97	– Voting machines in elections
Section 4(2)	– Powers and functions of the Commission	Section 98	– Place of voting
Section 5	– Establishment, constitution and meetings of the Selection Committee	Section 100	– Manner of voting in elections
Section 6(3)	– Constitution of the Commission and appointment of the Commission	Section 105	– Counting of votes and sealing of packets and ballot boxes, counted results of poll in case of voting machines and ballot paper accounts
Section 10	– Term of office of members of the Commission	Section 108	– Verification of ballot paper and voting machine accounts at collation center
Section 11	– Vacation of office of members of the Commission and filling of vacancies	Section 111	– Determination and announcement of results in regional council elections
Section 12	– Meetings of the Commission and decisions	Section 113(1)(a)	– Publication of results in regional council elections
Section 13	– Committees	Section 116	– Assessment of the electoral process
Section 15A	– Financial year, submission of estimates, bookkeeping and auditing of books and accounts of the Commission	Section 124	– Place of voting, voting to be by secret ballot, manner of voting, spoilt ballot papers and assistance to voters in respect of a referendum
Section 16	– Continued existence of Directorate of Elections	Section 126	– Counting of votes and sealing of packets and ballot boxes, counted results of poll in case of voting machines and ballot paper accounts
Section 17	– Appointment of Chief Electoral and Referenda Officer	Section 133	– Assessment of the referendum process
Section 18	– Appointment of directors and other staff members	Section 136	– Application for registration as a political party
Section 19	– Establishment of regional offices and constituency offices	Sections 139 to 142	– Declaration of assets and liabilities, records and audits, disclosure of foreign and domestic financing and other obligations by political parties
Section 20	– Payment of remuneration, other benefits and expenses and conditions of service.	Sections 154 to 161	– Funding of political parties, their obligation to account for the funds, recovery of monies irregularly spent, etc.
Section 22	– Persons entitled to register as voters	Section 158	– Political parties to account for funds
Section 26	– Application for registration as a voter	Section 161A	– Canvassing of votes for candidates at elections
Section 31(1)(b)	– Preparation and publication of provisional voters' registers	Section 162	– Establishment and constitution of electoral tribunals
Section 36	– Preparation, certification and publication of the final voters' registers	Section 163	– Exercising and performing of powers and functions of electoral tribunals and additional powers and functions
Section 39	– Continuous registration of voters	Section 164	– Procedure at electoral tribunals
Section 43	– Amendment of voters' registers	Section 167	– Establishment and constitution of the Electoral Court
Section 47	– Adjustment of voters' registers on alteration of constituencies	Section 169	– Procedure at Electoral Court
Section 49	– Voter and civic education	Section 173	– Offences in connection with proceedings, disturbance or obstruction of persons and improper influence of persons
Section 50	– Establishment of division voter and civic education	Section 174	– Offences in connection with registration of voters
Section 51	– Accreditation of persons providing voter and civic education	Section 176	– Neglect of duty with regard to election or referendum
Section 55	– Invitation of observers and electoral observer missions by the Commission	Section 178	– Disturbance of proceedings and obstruction of persons
Section 60	– Behaviour rules for observers	Section 179	– Offences in connection with voting, polling stations and equipment
Section 64(2)(c)	– Determination of days for submission of nominations of candidates and polling days for elections	Section 204	– Occurrence Book
Section 77	– Submission of party lists	Section 209	– Short title and commencement
Section 78	– Publication of party lists		
Section 79	– Requirements for nomination as a candidate for regional council elections		
Section 80	– Submission of nomination as candidate for regional council elections		
Section 81	– Duration of a session on nomination day and the consideration of nominations for regional council elections		
Section 86	– Submission of political party and organisation lists		
Section 92	– Ballot boxes		

Creation of a deputy Chief Electoral and Referenda Officer (CERO)

Among the proposed amendments to the Electoral Act of 2014 is the creation of a position of deputy Chief Electoral and Referenda Officer (CERO) under section 17. The deputy CERO would “act if the Chief Electoral and Referenda Officer is unable to perform his/her duties or the position becomes vacant”.

The ECN directive on the matter states: “Regarding the Deputy CERO, his/her responsibilities will be to:

- Serve as a source of strategic support and advice to the Chief Electoral and Referenda Officer on electoral operations and administration matters;
- Provide strategic direction and leadership over the directorates charged with the provision of electoral operations and administration;

- Spearhead the implementation and review of the institutional Risk Management Strategy;
- Coordinate and facilitate institutional research and development initiatives and projects;
- Oversee the enforcement and monitor statutory compliance by political parties and organisations with relevant provisions of the Electoral Act;
- Ensure formulation and review of institutional policies and standard operating procedures (SOPs);
- Oversee and direct institutional planning processes;
- Oversee decentralised functions of the Commission in the regions;
- Serve as a custodian of all institutional policies, national development plans, annual plans and annual reports.

Amendment discussion on the counting of votes ...

Section	Current Contents	Proposed Change	Comment / Proposal	Commission Directives
Section 126 – Counting of votes and sealing of packets and ballot boxes, counted results of poll in case of voting machines and ballot paper accounts	The section deals with the counting of votes and sealing of packets and ballot boxes, counted results of poll in case of voting machines and ballot paper accounts	Subsection (7) refers to “have” instead of “has”.	<ul style="list-style-type: none"> •The question was asked whether the ECN is still going to use voting machines, and if so, will it be the old ones or new ones. •The opinion was also expressed that the word “and” between “machines” and “ballot paper” should be replaced with “or”. 	<ul style="list-style-type: none"> •The current EVM’s cannot be used without the VVPAT, and therefore ballot papers will be used until further assessment and consultations take place. •The possibility exists that voting machines will be used in future, together with ballot papers (for overseas voting), therefore it should remain as is.

... and the makeup of the Electoral Court

Section	Current Contents	Proposed Change	Comment / Proposal	Commission Directives
Section 167 – Establishment and constitution of the Electoral Court.	Subsection (3) states that the Electoral Court consists of the Judge President and two other Judges. Subsection (4) provides that the Judge President is the Chairperson of the Electoral Court and if he cannot act as Chairperson, the Acting Judge President of the High Court is the Chairperson of the Electoral Court.	Subsection (3) is reworded to state that the electoral Court consists of three Judges designated by the Judge President. Subsection (4) will then read that the Judge President is the Chairperson of the Electoral Court, and he/she may designate any other Judge as the Chairperson.	<ul style="list-style-type: none"> • An opinion was expressed that: There is good reasoning behind why the judge president is required to sit on the electoral court. This amendment is strongly advised against. • Another opinion was that the Electoral Court is a Court that requires more recognition. It is a well-known fact that some High Court Judges come to Court drunk. The Judge President should ensure that he presides over electoral matters. It should be taken into account what the intent of the lawmakers was – it speaks to seniority, experience and ability, and the Judge President should clear his / her calendar and rather delegate his / her cases. If the intention was that only High Court Judges should preside, then it would have been prescribed as such. 	<ul style="list-style-type: none"> • Electoral Court cases are sometimes urgent, and it could happen that the Judge President is out of the country on official duties or incapacitated and thus not able to preside over the matter. This will result in the Court not being able to adjudicate the matter if only the Judge President can preside over the Electoral Court.

Interesting proposal:

“There was a proposal from the CCN [Council of Churches in Namibia] that the ECN should consider how elections would be conducted in case of a pandemic or world pandemic. What measures would be considered so that the country will not be caught off-guard during such a time. The Covid-19 pandemic should have been a learning lesson.” The ECN response to this was that “The proposal is noted”.

For the full presentation of comments and ECN directives on amendments, click on this link: <http://bit.ly/3YlhAup>

Concerns regarding proof of citizenship

The Legal Assistance Centre identified problems in the current law with proving citizenship in order to register to vote

In August 2022 the Legal Assistance Centre (LAC) submitted comments for consideration in discussions towards amending the electoral law.

The submission was made ahead of the consultative workshop of late September 2022 where most of the substantive inputs were made to the Electoral Amendment Bill.

The LAC's inputs concerned the sort of proof that prospective voters had to provide in order to prove citizenship for the purposes of voter registration. The following sections have been taken directly from the LAC's submission and explain the concerns as well as providing solutions for how to fix the identified issues:

Section 26(4)(c) on proof of citizenship currently provides three avenues of proof:

1. a **certificate** of Namibian citizenship
2. a valid ordinary Namibian **passport**;
3. a **birth certificate** or **ID** indicating that the person was **born in Namibia OR is a Namibian citizen**, AND a sworn statement that the person in question **has not lost Namibian citizenship due to renunciation**.

We see several problems with this provision, which is not currently earmarked for amendment:

1) Firstly, it is problematic that the presentation of a birth certificate or ID suffices if it shows that the person in question was **born in Namibia OR is a Namibian citizen**. The constitutional qualification for voting is citizenship and not place of birth. Many people born in Namibia would clearly not be citizens, such as –

- children born to diplomats stationed in Namibia;
- children born to foreign tourists only temporarily visiting Namibia
- children born to foreigners in border regions who came to Namibia only to have the birth in a Namibian health facility.

The Act as it now stands would allow these persons to vote by virtue of birth in Namibia.

2) Secondly, while it is the case that the Ministry of Home Affairs and Safety and Security (MHAISS) has had (at times) a practice of issuing “Namibian” and “non-Namibian” birth certificates, **there is no law that makes birth certificates proof of citizenship**. In fact, **international treaties that Namibia has joined (specifically the *Convention on the Rights of the Child* and the *African Charter on the Rights and Welfare of the Child*) require registration of all children born in Namibia, regardless of citizenship**. This means that all children born in Namibia would be enti-

tled to a birth certificate containing a record of the key facts of their birth. Moreover, **administrative designations on citizenship made by Ministry staff are not always reliable**, as shown by the Supreme Court case of *MW v Minister of Home Affairs* 2016 (3) NR 707 (SC) (also known as *De Wilde v Minister of Home Affairs*), where the Court found that a child issued with a “non-Namibian” birth certificate was in fact a citizen. Children born in Namibia to foreign parents who are *ordinarily resident* in Namibia are Namibian citizens, but this standard must be applied on a case-by-case basis and is not an easy issue to determine.

3) Thirdly, it makes no sense to apply the possibility of **renunciation** only to proof of citizenship by presentation of a birth certificate or an ID. A person could in theory remain in possession of a certificate of citizenship or a Namibian passport after renouncing his or her citizenship (even if this transpired dishonestly).

4) Fourthly, it makes no sense to require information about renunciation of citizenship without also enquiring about **deprivation** of Namibian citizenship under section 9 of the Namibian Citizenship Act 14 of 1990 (which applies to citizens by naturalisation or registration).

Recommendations

Closer cooperation with MHAISS could produce a more accurate and reliable voters' register. We propose amending section 26(4)(c) to incorporate the following points, mindful of the fact that MHAISS's *Civil Registration and Identification Bill* is expected to be tabled in Parliament this year.

1) The Electoral Act should clearly require **Namibian citizenship** (and not birth in Namibia) as a qualification for voting, to be consistent with Article 17(3) of the Namibian Constitution.

2) Proof of citizenship for purposes of voting should take advantage of the computerised Population Register maintained by the Ministry of Home Affairs, which identifies the citizenship of all persons registered and incorporates information about renunciation or deprivation of citizenship where relevant. **The citizenship status of anyone who seeks to register to vote upon presentation of an identifying document should be checked against Namibia's Population Register by the Electoral Commission of Namibia**. This would be much more accurate than relying on sworn statements about renunciation (or deprivation) of citizenship and could also take advantage of determinations of ordinary residence of foreign parents made by the Ministry.

3) Because of the importance of the right to vote, we would also propose instituting an **accessible appeal procedure** where it transpires that a person who tries to register to vote is either (1) not listed in the Population Register at all, or (b) listed in the Population Register but not identified as a Namibian citizen.