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Government Notice

OFFICE OF THE PRIME MINISTER

No. 110

2005

PROMULGATION OF ACT OF PARLIAMENT

The following Act which has been passed by the Parliament and signed by the President in terms of the Namibian Constitution is hereby published in terms of Article 56 of that Constitution.

No. 9 of 2005: Transfer of Convicted Offenders Act, 2005.

Act No. 9, 2005**TRANSFER OF CONVICTED OFFENDERS ACT, 2005****ACT**

To make provision for the mutual transfer of sentenced offenders between Namibia and foreign States for the purpose of serving their sentences of imprisonment; and to provide for matters connected therewith.

(Signed by the President on 22 August 2005)

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Act No. 9, 2005**TRANSFER OF CONVICTED OFFENDERS ACT, 2005****SCHEDULE
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BE IT ENACTED by the Parliament of the Republic of Namibia, as follows: -

**PART I
PRELIMINARY****Definitions**

1. In this Act, unless the context otherwise indicates -

“administering country” means the country to which the sentenced offender may be, or has been, transferred in order to serve his or her sentence;

“agreement” means an agreement in force under section 20, and includes a multilateral convention to which Namibia is a signatory or to which it has acceded and which has the same effect as such an agreement;

“foreign State” means any State outside Namibia which is party to an agreement, and includes any territory under the sovereignty or control of such State;

“judgment” means a decision or order of a court or tribunal imposing a sentence;

“Minister” means the Minister responsible for prisons;

“prescribed” means prescribed by regulation;

“proper authority” in relation to Namibia means the Minister or other person delegated or assigned duties by him or her under section 21 for the purpose of this Act, and, in relation to a foreign State, means the authority responsible for the administration of the law relating to the transfer of sentenced offenders on substantially similar terms as are provided in this Act;

“regulation” means any regulation made under section 22;

“sentence” means any punishment or measure involving deprivation of liberty ordered by a court or tribunal for a determinate or indeterminate period of time in the exercise of its criminal jurisdiction;

“sentenced offender” means a person upon whom a sentence has been imposed;

“sentencing country” means the country in which the sentence was imposed on the sentenced offender who may be, or has been, transferred;

“this Act” includes a regulation made thereunder.

**PART II
TRANSFER OF SENTENCED OFFENDERS TO AND FROM NAMIBIA****Persons liable to be transferred**

2. Subject to the provisions of this Act, a sentenced offender who is in -

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- (a) Namibia and is a citizen or national of a foreign State may be transferred to that foreign State; or
- (b) a foreign State and is a citizen or national of Namibia may be transferred to Namibia,

as provided by this Act so that he or she may serve the remainder of his or her sentence in that foreign State or Namibia, as the case may be.

Limitation and applications for transfer

3. (1) A sentenced offender shall not be transferred under this Act or committed to, or kept in, custody for the purpose of his or her transfer unless -

- (a) he or she has been informed by the proper authority of the sentencing country of the substance of this Act and the corresponding law of the administering country applicable to the transfer of sentenced offenders; and
- (b) he or she or the proper authority of the sentencing country or of the administering country has made a request for the transfer.

(2) An application by, or request for, a sentenced offender to be transferred from Namibia to a foreign State or from a foreign State to Namibia shall be made to the Minister in a prescribed form and procedure.

(3) Where a sentenced offender referred to in section 2(a) applies to the Minister for his or her transfer to a foreign State, the Minister shall as soon as practicable, accordingly inform the proper authority of that foreign State to which the sentenced offender wishes to be transferred in order to serve the remainder of his or her sentence.

Conditions for transfer

4. (1) A sentenced offender may be transferred under this Act only if -

- (a) he or she is -
 - (i) citizen or national of the administering country, notwithstanding that he or she may also be a citizen or national of any other country including the sentencing country; or
 - (ii) a person whom, in the opinion of the proper authority of either the administering country or sentencing country, has no established citizenship or nationality but has a right of domicile or permanent residence in the administering country;
- (b) the judgment in respect of the offence committed is final and -
 - (i) no appeal lies there from or is pending; or
 - (ii) the normal time limit for appeal has expired; or
 - (iii) the sentenced offender having a right of appeal from the judgment

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indicates in writing to the proper authority of the sentencing country and the administering country that he or she does not intend to appeal there from; or

- (iv) no longer subject to review;
- (c) on the date of receipt by the proper authority of the sentencing country of the request for transfer, unless the sentencing country and the administering country agree on a period shorter than six months in any particular case, the remainder of the sentence to be served by him or her is more than six months or the sentence is indeterminate; and
- (d) he or she has in writing applied for or consented to the transfer or, if he or she is incapable or incompetent to give consent, the consent has been given by a person who is, in the opinion of the proper authority of the sentencing country or the administering country, entitled to act on his or her behalf; and
- (e) the proper authorities of both the sentencing country and administering country agree to the transfer.

(2) Both the sentencing country and administering country shall ensure that agreement is reached to transfer a sentenced offender who satisfies the requirements for the transfer.

Furnishing of information

5. (1) For the purpose of enabling a decision to be made on a request or an application for the transfer of an offender sentenced in Namibia, unless the Minister or the proper authority of the foreign State has earlier decided, on grounds to be indicated to the other party, not to accept the transfer of the sentenced offender, the Minister shall send the following information and documents to that foreign State -

- (a) the name, date and place of birth of the sentenced offender;
- (b) his or her address, if any, in the foreign State;
- (c) a certified copy of the judgment and copy or account of the law on which it is based;
- (d) a statement of the facts upon which the conviction and sentence were based;
- (e) the nature, duration and date of commencement of the sentence;
- (f) whenever appropriate, any medical or social reports on the sentenced offender, information about his or her treatment in Namibia and any recommendation for his or her further treatment in the foreign State; and
- (g) any other information which the proper authority of the foreign State may specify as required in all cases to enable it to consider the possibility of transfer and to enable it to inform the offender and the Minister of the full consequences of transfer for the offender under its law.

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(2) Where the Minister or a sentenced offender who is serving sentence in a foreign State has made a request or an application for a transfer to Namibia, the Minister shall, if so requested by the proper authority in that foreign State, send to it a document or statement indicating whether the sentenced offender satisfies the requirements of paragraph (a) of section 4(1).

Requests and applications and channels of communication

6. (1) Every request or application for the transfer of a sentenced offender and every reply thereto shall be made in writing.

(2) All communications relating to the transfer of a sentenced offender shall be through such channels as may be prescribed.

Supporting documents

7. Subject to paragraph (c) of subsection (1) of section 5 and unless otherwise agreed between the sentencing country and the administering country, all documents sent or received for the purpose of this Act need not be certified.

Consent and its verification

8. (1) If a person liable for transfer is serving a sentence in Namibia, the Minister shall ensure that the person required to give consent to the transfer in accordance with paragraph (d) of section 4(1) does so voluntarily according to law and with full knowledge of the legal consequences of the transfer.

(2) For the purposes of subsection (1), the Minister shall afford an opportunity to the proper authority of the foreign State to verify whether the consent complies with the conditions provided for in that subsection, if the foreign State so requests.

Notification of decisions

9. The Minister shall in writing, and, as occasion arises, inform an offender sentenced in Namibia of any relevant action taken or of any decision made by the Minister and the proper authority of the foreign State or either of them in respect of a request for his or her transfer.

Effect of transfer from Namibia

10. If a sentenced offender serving sentence in Namibia is transferred to a foreign State, the enforcement of the sentence in that foreign State shall have, to the extent that the sentence has been enforced in that foreign State, the effect of discharging that sentence.

Effect of transfer to Namibia

11. (1) Where a sentenced offender is transferred to Namibia, the Minister shall -

- (a) issue a warrant to the officer in charge of a prison authorising the detention of the offender and the continued enforcement of the sentence; or
- (b) on circumstances mentioned in section 13(2) or 14, produce the offender before the relevant court.

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(2) Subject to section 13, the enforcement of the sentence of a sentenced offender transferred to Namibia shall be in accordance with the law of Namibia and all decisions relating to the continued enforcement of the sentence shall be within the exclusive jurisdiction of the Minister.

(3) If a sentenced offender who is transferred to Namibia has been certified insane in the foreign State, the Minister shall inform the proper authority of that foreign State of the intended treatment to be provided to the offender, having proper regard to his or her mental condition.

Offenders in lawful custody during transfer

12. (1) A sentenced offender who is being transferred from Namibia, shall, while in the territory of Namibia, be deemed to be in lawful custody of the person duly authorised to escort him or her and to be subject to the same treatment, and, in the event of misconduct, to the same disciplinary action as if he or she were in a prison in Namibia.

(2) If the offender referred to in subsection (1) escapes or attempts to escape, he or she and any other person aiding or attempting to aid him or her in the escape shall be liable to the same penalty as if such escape or attempted escape or aiding or attempting to aid in escape were committed in a prison in Namibia.

PART III**ENFORCEMENT OF SENTENCE AFTER TRANSFER****Continued enforcement**

13. (1) Subject to subsection (2), the officer in charge referred to in section 11(l)(a) shall be bound by the legal nature and the duration of sentence imposed by a foreign State upon a sentenced offender who is transferred to Namibia.

(2) Notwithstanding the provisions of subsection (1), where the sentence imposed by the foreign State upon a sentenced offender who is transferred to Namibia is by its nature or duration incompatible with any law of Namibia, the Minister shall refer the matter to the High Court which shall impose a sentence as prescribed by the law of Namibia: Provided that, the legal nature of the sentence such imposed shall, as far as possible, correspond with that of the sentence imposed by a foreign State: Provided further that, the High Court shall not aggravate, by its nature or duration, the sentence imposed by that foreign State.

(3) Notwithstanding the provisions of the first Proviso to subsection (2), the High Court shall not impose a sentence of death upon any person irrespective of the laws applicable in the foreign State.

Juvenile offenders

14. (1) Where an offender sentenced to imprisonment and transferred to Namibia would, if he or she had been convicted in Namibia, have been treated by reason of his or her age as a juvenile and sentenced accordingly, he or she shall be dealt with, as his or her age dictates, in accordance with subsection (2).

(2) An offender to whom subsection (1) applies shall be produced before the Court having jurisdiction to try the offence of which he or she was sentenced and the

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Court shall sentence him or her on the basis of the conviction of the court of a foreign State and with regard to the nature of the offence and to any observations made by the convicting court in passing sentence as if the offender had been convicted of that offence by the court in Namibia.

Offenders of unsound mind

15. (1) If a person who is a citizen of Namibia, having been charged with an offence and whether or not he or she is convicted of that offence, is ordered by a court in a foreign State to be detained because he is incapable by reason of mental illness to stand his or her trial or, for the same reason, is incapable in law of being convicted of that offence, that person may be transferred to Namibia at the request of the proper authority of that foreign State and with the agreement of the Minister and the provisions of paragraph (d) of section 4 requiring him or her to make an application for a transfer in writing shall not apply.

(2) A person transferred by virtue of subsection (1) shall be detained in a mental hospital or similar institution as the Minister may direct and he or she shall be deemed for all purposes to be a person ordered to be so detained by a court in Namibia in like circumstances.

Pardon and reprieve

16. Unless in any particular case of a sentenced offender the Minister agrees otherwise with the proper authority of a foreign State -

- (a) the President of the Republic of Namibia may grant pardon or reprieve of sentence in accordance with Sub-Article (3)(d) of Article 32 of the Namibian Constitution or other law in respect of a sentenced offender transferred from Namibia; and
- (b) any pardon granted to an offender transferred to Namibia pursuant the exercise of prerogative of mercy in a foreign State, shall, to the extent to which such prerogative is exercised, have effect as if it were a pardon granted by the President of the Republic of Namibia to that transferred offender.

Termination of enforcement

17. The Minister shall terminate or cause to be terminated the enforcement of a sentence being served by a sentenced offender transferred to Namibia as soon as he or she receives information from the proper authority of the foreign State of any decision or measure whose effect renders the sentence further unenforceable.

Information on enforcement

18. (1) Where a sentenced offender is transferred to Namibia, the Minister shall thereafter notify the sentencing country -

- (a) when he or she considers enforcement of the sentence to have been completed; or
- (b) if the sentenced offender escapes from custody before the enforcement of the sentence has been completed.

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(2) In addition to the provisions of subsection (1), the Minister shall, if so requested by the proper authority of the foreign State, provide that authority with a report or reports concerning the enforcement of the sentence.

**PART IV
MISCELLANEOUS**

Costs of transfer

19. Without prejudice to the right of the sentencing country or the administering country to defray all expenses connected with the transfer of a sentenced offender, the cost of transfer shall be defrayed in such proportions as may be agreed upon either generally or in any particular case between the Minister and the proper authority of the foreign state involved in the transfer.

Minister may enter into agreements

20. (1) Subject to the provisions of Article 32(3)(e) of the Namibian Constitution, the Minister may, on such conditions as he or she may deem fit, enter into an agreement with any foreign State for the transfer of sentenced offenders, and may likewise agree to any amendment or revocation of such an agreement.

(2) No agreement referred to in subsection (1), or any amendment or revocation thereof, shall be of any force or effect until ratification of, or accession to, or amendment or revocation of such an agreement has been agreed to by the National Assembly.

(3) The Minister shall as soon as practicable after the National Assembly has agreed to the ratification of, or accession to, or amendment or revocation of an agreement referred to in subsection (1), give notice thereof in the *Gazette*.

Delegation of powers and assignment of duties

21. (1) The Minister may, subject to such conditions as he or she may determine, delegate any power, excluding the power to enter into agreements under section 20 or to make regulations under section 22, or assign any duty entrusted to him or her by or under this Act, to the Commissioner of Prisons or any staff member in the management cadre of his or her Ministry.

(2) Any power exercised or duty performed in terms of a delegation or an assignment under subsection (1) shall be deemed to have been exercised or performed by the Minister.

(3) A delegation or an assignment under subsection (1) shall not divest or relieve the Minister of the power or duty so delegated or assigned.

(4) For the purpose of this section, “staff member” in the management cadre shall include “senior prison officer” as defined in section 1 of the Prisons Act, 1998 (Act No. 17 of 1998).

Regulations

22. (1) The Minister may make regulations as to -

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- (a) the form, manner and procedure in which a sentenced offender may apply to be transferred to or from Namibia;
 - (b) matters which the Minister considers necessary or convenient to be prescribed for carrying out or giving effect to this Act.
- (2) Different regulations may be made in respect of different foreign States.

Amendment of laws

23. The laws mentioned in the Schedule are hereby amended to the extent indicated in the third column thereof.

Short title and commencement

24. (1) This Act shall be called the Transfer of Convicted Offenders Act, 2005 and shall come into operation on a date to be determined by the Minister by notice in the *Gazette*.

(2) Different dates may be determined under subsection (1) in respect of different provisions of this Act.

SCHEDULE
LAW AMENDED
(Section 23)

Number and year of Law	Short title	Extent of amendment
No. 17 of 1998	Prisons Act, 1998	Delete sections 120 and 121