



**LEGAL ASSISTANCE CENTRE**  
*Fighting for human rights in Namibia since 1988*



# *Pro* Bono

## INFORMATION ABOUT NAMIBIA'S LAW

### SAFEGUARDING CHILDREN'S RIGHTS

Article 14(3) of the Namibian Constitution states that family is the natural and fundamental group unit of society and is entitled to protection by society and the State. The United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child all protect the family, and also require the State to protect children from harm.

Namibia's key law on children, the Child Care and Protection Act 3 of 2015, is intended to safeguard children's rights against abuse, neglect or other hardships. It provides clear procedures to make sure that children get the protection and assistance they need.

Yet the legal protections for our children are not always applied as robustly as they should be. In Namibia we often praise our progressive laws while at the same time criticizing the ineffective implementation of such laws. We must ask ourselves who is failing our children when it comes to implementing these laws that protect children's rights, and what kinds of action we need to take to make them work in practice.

We have so many role players; social workers, police officers, counsellors, legal professionals, medical personnel, church and traditional leaders – as well as parents, guardians and extended family members – who have a vital duty to safeguard children. We should all be asking ourselves if we are doing enough.

The Child Care and Protection Act provides for a wide range of “protective services”, which are State interventions for children who are not receiving sufficient care or protection.

In rare cases, a social worker or a police officer can remove a child from the usual home as an emergency measure if the child is at serious risk of harm, before formal investigation and court proceedings take place. Safeguards for such removals include immediate notice to the child's parent or guardians if they were not present and a review of the removal by the children's court within just a few days. As another precaution, the law says that a police officer or a social worker who abuses removal powers would have to undergo disciplinary proceedings.

If a child appears to be in need of help, a social worker *must* investigate. If the social worker finds the child is actually in need of protective services, the social worker must advise on the most appropriate services in the best interests of the child, which could include removing the child from the usual home as a last resort. The law also provides procedures for changes to custody, guardianship and access, and for obtaining guardianship of a child whose parent or guardian has died without making any arrangement for this.

But removing children from the family home or taking away parental powers are drastic steps. This means that family problems which endanger children should be addressed through support, supervision and assistance to the family if possible, with removal of the child from the family being a

last resort. It also means that issues of custody, guardianship and access must be addressed with the utmost care. The “best interests” concept is the cornerstone of any of these decisions.

Some people speak of “best interests” as though this is just a subjective opinion about what is best for a child, which can be formed without considering in detail the child’s actual situation and needs. On the contrary, the law provides a list of clear and concrete factors which must be considered by social workers and other role players before making decisions about children.

The first step is to look at the child – what is the child’s age, sex, maturity and stage of development? What are the child’s personal characteristics? For instance, a change in home or school circumstances might be harder for a child who is very shy. What is the state of the child’s intellectual, emotional, cultural and social development? This should include a consideration of the things that are particularly important to the child – which could be anything from church attendance to participation in a particular sport. Does the child have any special needs, such as a disability or a specific learning challenge? The child is always the starting point and the centre of the enquiry.

The second step is to consider the child’s background and circumstances. Who has been caring for the child up to now? What kind of relationship exists between the child and other significant persons in the child’s life, including parents, other care-givers, extended family members or anyone else who is important to the child? Children usually need to maintain connections with their family and extended family – as well as their culture and traditions. And what about brothers and sisters? It might be desirable to keep siblings together in one household, or one sibling might be posing a danger to another.

Thirdly, social workers and courts must consider the position of the parents. What is the attitude of the child’s mother and father towards the child? Have the parents been trying their best to exercise their parental responsibilities and rights with the child’s welfare in mind? Does the mother, the father or any other care-giver involved have the capacity to provide for the child’s needs? If not, is there some support that would correct his problem, such as training in parenting skills or help with substance abuse?

A child has a constitutional right to know and be cared for by both parents – but this is not an absolute right. The courts can step in if the child’s rights are being persistently abused by a parent, or where continued contact with a parent would be harmful to the child’s well-being. If the parents do not pose a danger to the child, then the practical difficulty and expense required for the child to maintain contact with either or both parents must be taken into account – to make sure the child’s right to maintain a relationship with the parents is practical and not just theoretical.

Fourthly, one of the key issues to consider is, of course, the child’s safety. Every child needs both physical and emotional security. Is the child being abused, or exposed to the abuse of another member of the family or the household? Is the child being neglected or exploited? These are serious problems that could justify removal from the family home. However, considering the importance of a family environment for a child’s development, removing the perpetrator from the home instead of the child could be a preferable alternative.

Fifthly, it is very important to consider the views of the child where possible. Even very young children can usually communicate about what makes them feel safe and what makes them feel afraid. Child participation is fundamental to child-centred solutions. Children should be consulted in all decisions affecting them and their opinions should be given due consideration, including in administrative and legal proceedings. The law provides special rules and procedures intended to make the court experience more child-friendly, so that children will feel more comfortable about expressing their viewpoints.

Last but not least, it is also necessary to consider the bigger picture. How would a change in circumstances, affect the child in practical terms? Who would the child be separated from if there is a new living situation? How would this affect the child’s schooling, family relationships and sense of security? Would the way forward produce stability, or is it likely to lead to further conflict?

None of the factors listed in the Child Care and Protection Act are decisive on their own. Social workers and courts must consider all the factors on the list to build up a picture of the child, the family and the overall situation before making a recommendation or a decision on the child's best interests. They must also follow the legal procedures carefully, to make sure that all the relevant people have been informed of what is being considered and given a chance to give input. Parties to the proceedings also have a right to appeal to the High Court if they are unhappy with the children's court outcome.

The law contains mechanisms for resolving problems through alternative dispute resolution mechanisms such as mediation or family meetings, before engaging into formal court proceedings. This can be a good approach to problem-solving that might reduce trauma for a child, but power dynamics need to be considered carefully to make sure that any agreement is reached without intimidation and will serve the child's best interests.

Another key player is the Children's Advocate, an official in the Office of the Ombudsman who focuses on issues relating to children and has special powers to investigate, particularly where procedures in the law have not worked properly to protect a child.

Safeguarding children in Namibia should receive the same attention and consideration as other serious challenges like the Covid-19 pandemic, because we are not nearly at the finish line when it comes to protecting children from evils such as rape, neglect and abuse. We need to keep our vision focussed on a future where no Namibian child is hungry or at risk of harm.