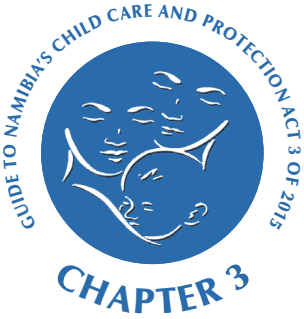


Ministry of Gender Equality and Child Welfare

Legal Assistance Centre

Embassy of Finland Windhoek

PEPFAR

unicef for every child

AGE OF MAJORITY

NOTE In this publication, "Ministry" and "Minister" refer to the Ministry and Minister responsible for child protection, and "*Guide*" means this *Guide to the Child Care and Protection Act* (which is published in separate chapters).

EDITION 2019

The Child Care and Protection Act lowers the age of majority from 21 to 18. However, despite the change in the age of majority, the consent of a parent or guardian is still required for the marriage of persons under age 21. Both civil and customary marriage are prohibited for children under age 18. This chapter also provides an overview of other important ages in Namibian law, to place the age of majority in context.

1. Constitutional and international framework

The Namibian Constitution does not contain a general definition of a "child".

> One provision which has caused some confusion in this regard is Sub-Article 15(2), which protects children from economic exploitation and prohibits the employment of children in work that is likely to be hazardous, to interfere with the child's education, or to be harmful to the child's health or development. This Sub-Article states: "For the purposes of this Sub-Article children shall be persons under the age of sixteen (16) years." The reference to the age of 16 is relevant *only* to the meaning of children in Sub-Article 15(2), and does not apply to the meaning of "child" for any other purposes.

Both the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child define a "child" as a person below the age of 18.

Convention on the Rights of the Child

Article 1:

For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

African Charter on the Rights and Welfare of the Child

Article 2:

For the purposes of this Charter, a child means every human being below the age of 18 years.

2. Key points of the new law

2.1 Definition of a "child"

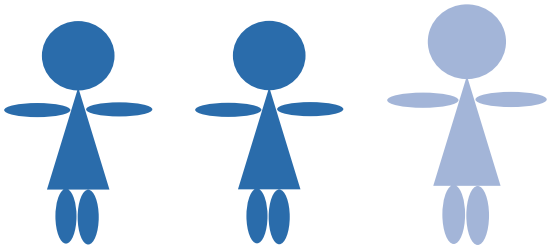
The Child Care and Protection Act defines a "child" as being a person below the age of 18. This brings Namibian law in line with the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child.

◈ Child Care and Protection Act, section 1

2.2 New rule on age of majority

To bring Namibia in line with these definitions of a "child", the age of majority has been changed from 21 to 18. However, persons below age 21 must still get the consent of a parent or guardian in order to marry.

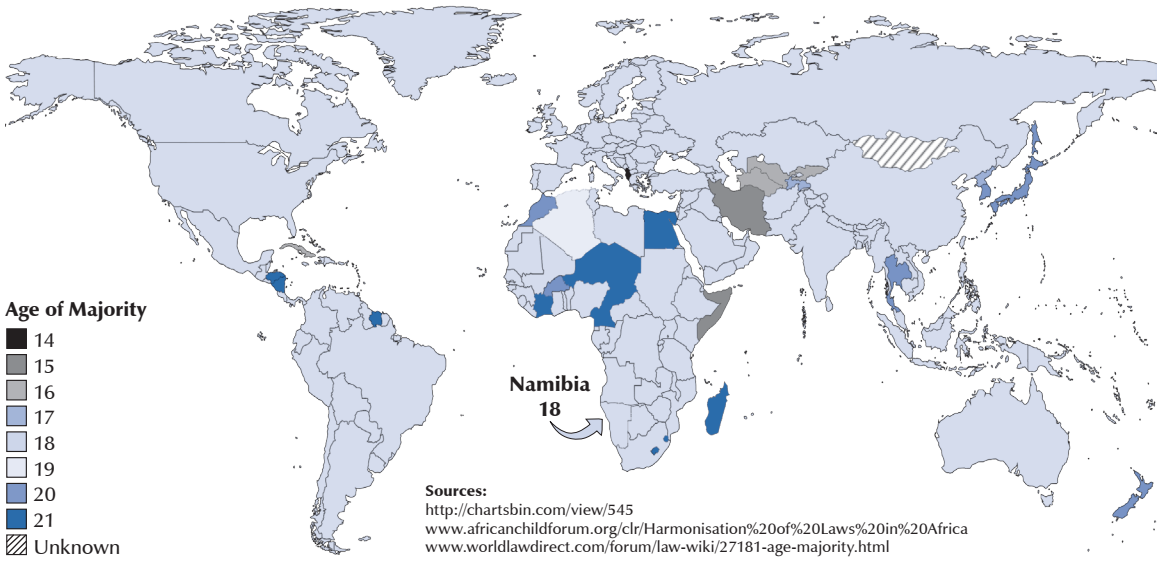
◈ Child Care and Protection Act, sections 10(1) and (10), 226(3) Note that there are two subsections numbered (3) in section 226.



child = below age 18 | ***new* age of majority = 18** | ***old* age of majority = 21**

The age of majority around the world

Most countries in the world set the age of majority at 18. The United Nations encourages countries to harmonise the definition of a "child" and the age of majority if they are not already the same. This helps to ensure that children do not lose any of their special legal protections before they get complete adult rights. By lowering the age of majority from 21 to 18, Namibia has brought its age of majority in line with most other countries in the world. The map shows the age of majority around the world as of 2016.



3. The change in the age of majority

3.1 What is majority?

The concepts of "minor" and "major" relate to the legal capacity of a person. **A person who is a major is legally an adult.** A major has full legal capacity. This means that people who have reached the age of majority can enter into contracts, bring court cases, and perform other legal acts independently. A minor can do these things only with assistance from a parent or guardian.

Before the change in the age of majority, an 18-year-old could vote, drive, drink, own a gun and be locked up in a police cell with adults, but still needed parental assistance to sign a cell phone contract. Now that the age of majority has been changed to 18, an 18-year-old is an adult and able to do all the things that any adult can do, with **one exception**: Persons under age 21 need the consent of a parent or guardian in order to marry. Also, persons in tertiary education will still be eligible for maintenance from their parents or anyone else with a legal liability to support them, usually up to age 21.

- Child Care and Protection Act, section 10(10)
- Maintenance Act 9 of 2003, section 26

3.2 The old law

Before the Child Care and Protection Act, majority was set at age 21 by the **Age of Majority Act 57 of 1972,** which Namibia inherited from South Africa at independence. A minor who was age 18 or older could apply to the High Court to be expressly declared a major in terms of the Age of Majority Act. This procedure was referred to as "emancipation". This court application was expensive and seldom used in practice. The Child Care and Protection Act has repealed the Age of Majority Act.

- Child Care and Protection Act, section 257(1)

3.3 Why was Namibia's age of majority originally set at 21?

Historically many countries set the age of majority at 21 but this has changed with time. When Namibia became independent, the law setting the age of majority at 21 was inherited from South Africa. This age was based on the idea that some children typically finished schooling at 18 and then completed a three-year university course while still being supported by their parents, after which they were ready to begin work. Different children in Namibia follow different courses of education, so the pattern described is not typical for all Namibian children. (South Africa lowered its age of majority to 18 in 2007.)

3.4 Why was Namibia's age of majority lowered to 18?

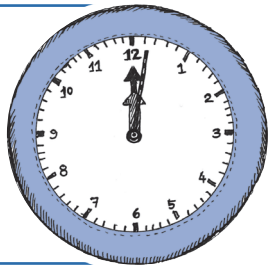
Many Namibian laws already cite the age of 18 for various powers. This meant that 18-year-olds were already treated like majors in many ways. However, this also meant that persons between the ages of 18 and 21 lost some of the legal protections afforded to "children" without being granted the autonomy of adults at the same time, thus leaving them in an unfair position.

Setting the age of majority at 18 reflects the social reality that many Namibians of this age are already working or living independently from their parents, and handling other responsibilities of adulthood.

The change also brought Namibia in line with international law and the laws in most other nations on the definition of "child".

When exactly does a person become a major?

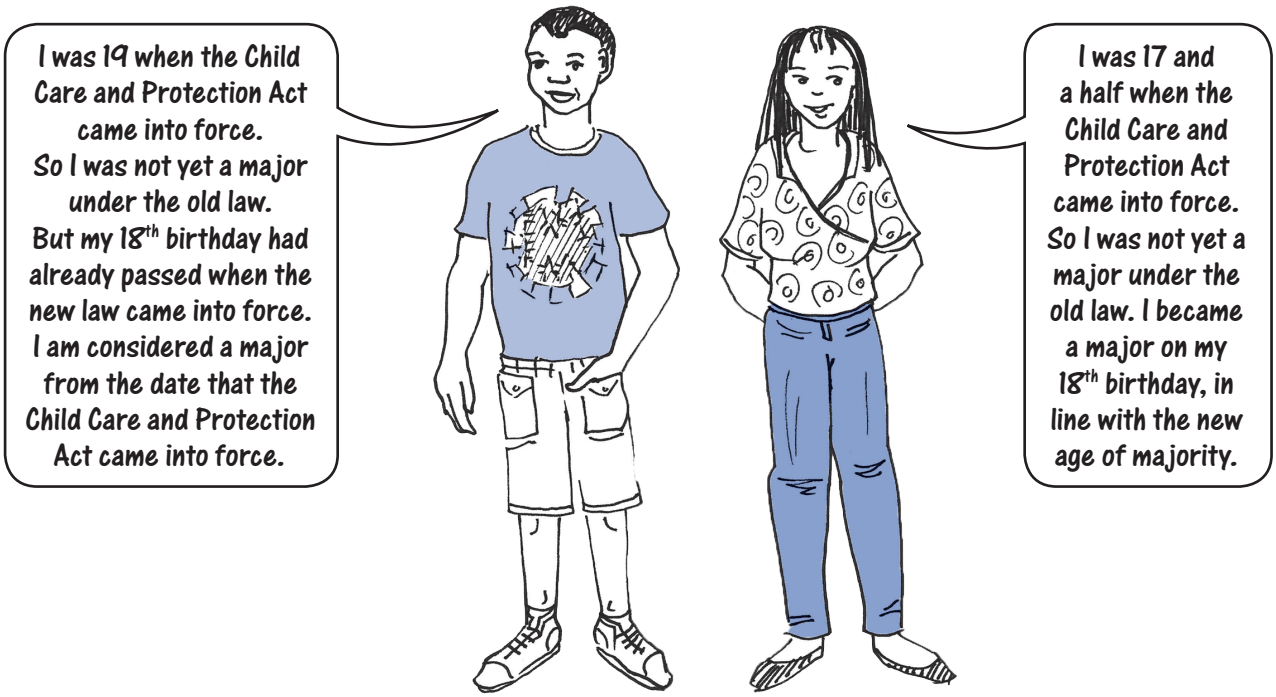
The age of majority begins on the first moment of a person's 18th birthday (the moment the clock passes midnight), no matter what time that person was actually born.



3.5 Transitional provisions

Minors in the middle: There is a provision in the Child Care and Protection Act to cover people who were between ages 18 and 21 when the Act came into force. Anyone in that position is considered to have become a major on the date that section 10 of the Child Care and Protection Act came into force (30 January 2019).

◈ Child Care and Protection Act, section 10(2)



Wills and other instruments: Documents such as trusts and wills which refer to majors and minors will be interpreted in light of the law as it stood at the time the document was made – to respect the intentions of the persons involved at the time. If such documents refer to a specific age, the change in the age of majority will not affect these references.

◈ Child Care and Protection Act, section 10(4)(b), (5) and (6)

I made a will leaving certain property to any of my children who are still minors at the date of my death. I made this will before the Child Care and Protection Act came into force. So the will applies to children under age 21 (the old age of majority).

I made a will after the Child Care and Protection Act came into force. So the word "minor" in my will means children under age 18 (the new age of majority).

I set up a family trust which refers to "children under age 21". This trust was registered before the Child Care and Protection Act came into force. The reference to "age 21" is not affected by the change to the age of majority.

Court orders: Court orders made *before* the new age of majority came into force are to be interpreted in light of the new law, "in the absence of an indication of a contrary intention".

- A reference to the "age of 21 years" will be read as a reference to age 18.
- A reference to any age between 18 and 21 years will be read as a reference to age 18.
- A reference to "age of majority", "major", "majority", "full age" or similar expressions will be read as a reference to age 18.

There is one **exception** to this general rule: It does *not* apply to any court order for *maintenance* which was in place *before* the new age of majority came into force.

◈ Child Care and Protection Act, section 10(7) and (9)

I have a court order saying that some shares in a family business will fall under the control of my children when they reach the age of majority. The court order was in place before the Child Care and Protection Act came into force. The provision which refers to the "age of majority" does not have anything to do with maintenance, so the exception does not apply. The order will now be understood to mean that the shares will be controlled by the children when they reach age 18 (the new age of majority).

I have a divorce order saying that my husband will pay maintenance for our daughter until she becomes a major. The divorce order was in place before the Child Care and Protection Act came into force. So the provision on maintenance applies until our daughter reaches age 21 (the old age of majority).

I have a maintenance order saying that the mother of my child must pay maintenance for our son until he reaches age 21. The maintenance order was in place before the Child Care and Protection Act came into force. So the order on maintenance continues to apply until our son reaches age 21 (the old age of majority).

I have a maintenance order saying that my husband must pay maintenance for our son until he reaches age 18. The maintenance order was in place before the Child Care and Protection Act came into force. Even though the Child Care and Protection Act says that the new age of majority is 18, I can still apply for this order to be extended to age 21, in line with the relevant provision in the Maintenance Act, which has not changed.

Prescription: Prescription refers to how much time a person has to bring a court case for damages after the event which caused the damages took place. The **Prescription Act 68 of 1969** says that the time of prescription for a claim by a minor is three years after the date when the minor reaches the age of majority. This special rule applies to minors because they cannot bring court cases on their own before they reach the age of majority.

The Child Care and Protection Act has a transitional provision to address the running of prescription against 18- to 20-year-olds who suddenly found themselves over the age of majority when the Act came into force. For these people, the three-year period of prescription in the Prescription Act will begin to run only after they reach age 21.

The same rule will apply to prescription periods related to the age of majority under other laws, such as the Motor Vehicles Accident Fund Act 10 of 2007. This rule prevents unfairness to people who are "caught in the middle" between the old age of majority and the new age of majority.

◈ Child Care and Protection Act, section 10(8)

MVA claims: The change in the age of majority will not affect the payment of any claim under the **Motor Vehicle Accident Fund Act 10 of 2007** where the claim arose before the new age of majority came into force. This would apply, for example, to claims for loss of support.

◈ Child Care and Protection Act, section 10(11)

Interpreting statutes in light of the new age of majority: There are many statutes which contain expressions such as "age of majority", "major", "majority", "full age", "minor" and similar expressions. Such expressions must now be interpreted to refer to the new age of majority, no matter when the statute was enacted, UNLESS there is an indication that Parliament intended something different. Where a statute refers to an age expressed in years, that reference is not affected by the change in the age of majority.

For example, one provision in the **Maintenance Act 9 of 2003** refers to "the age of 21 years". This reference is not affected by the change in the age of majority. It still means 21 years.

◈ Child Care and Protection Act, section 10(4) and (6)

Administration of Estates Amendment Act 22 of 2018: An Exception to the Age of Majority

This law amends the **Administration of Estates Act 66 of 1965**. It was gazetted on 31 December 2018 and came into force immediately. This means that it postdates the enactment of the Child Care and Protection Act by Parliament in 2015, but it was enacted before the Child Care and Protection Act came into force on 30 January 2019. However, the rules in section 10(4) of the Child Care and Protection Act would not appear to apply to this amendment – because it appears to express a contrary intention to the rules in the Child Care and Protection Act on the interpretation of statutes.

The amendment adds a new provision to the Administration of Estates Act which states that for the purposes of the Act:

> any reference to the expression "minor" or "minors" or the expression "majority" when used with reference to a "minor" must be construed as a reference to a person who has not attained the age of twenty-one years.

A new provision (section 87A) inserted into the Administration of Estates Act by this amending Act requires that **any money payable to a minor from a long term insurance policy, annuity, pension fund, bequest in a deceased estate or any other source nominating a minor as the beneficiary, or from a trust in favour of a minor, must be paid directly to the State Guardian's Fund**.

The intention seems to be to prevent young people from squandering such funds, but it could also be argued that this disempowers persons between the ages of 18 and 21 in an unreasonable way. It could be argued that this is a form of unjustified discrimination since persons under 21 who are majors *cannot* control assets they have inherited or received as beneficiaries of certain kinds of funds, while persons under 21 who are majors *can* control assets received from other sources. For example, if a parent gives assets to his or her 18-year-old child while the parent is still alive, the 18-year-old can control them – but if that same child inherits those same assets upon the parent's death, that child cannot access or control them. This amendment was controversial, and proposals for further changes to this law were under discussion in late 2019.

Regardless of whether or not this is a wise policy, the age of 21 which is cited would appear to be unaffected by the Child Care and Protection Act, since the amending Act appears to express a clear intention to the contrary. Unless a court rules otherwise on the interpretation of the law or finds it unconstitutional, this amendment appears to provide an exception to the acquisition of full powers of majority at age 18.

4. The position of minors

<table>
<tr><th colspan="2">CAPACITIES OF MINORS AND MAJORS</th></tr>
<tr><th>What is a minor able to do?</th><th>What is a minor unable to do?</th></tr>
<tr><td>Minors gradually acquire certain rights as they mature, so that they are gradually treated more like adults.</td><td>Minors can engage in certain legal actions only with the consent or assistance of a parent or guardian.</td></tr>
<tr><td>A minor who is at least 14 years old can:
• consent to medical interventions (if sufficiently mature)
• consent to an HIV test (even below age 14, if sufficiently mature)
• do certain kinds of work (if the rules in the Labour Act are followed).</td><td rowspan="2">A minor acting without assistance from a parent or guardian cannot:
• enter into contracts
• bring or defend a court case
• enter into a civil or customary marriage
• sell or mortgage land
• use or manage inherited money or property
• give up their own child for adoption (unless a court allows this).</td></tr>
<tr><td>A minor who is at least 16 years old can:
• make a will
• open and operate a bank account
• consent to sexual activity.</td></tr>
<tr><td colspan="2">A major can do all of these legal acts, with one exception: A major under age 21 needs parental consent to enter into a civil or a customary marriage.</td></tr>
</table>

Who is the guardian of a minor?

(1) In the case of a **child born to married parents**, both parents have equal guardianship rights. This means that either parent can assist the child independently. However, the consent of both married parents is required for a few important decisions.

- If the parents ***divorce***, both will retain guardianship powers unless the divorce order (or some other court order) names one parent as sole guardian. If a parent with sole guardianship powers ***dies*** and fails to name a new guardian in his or her will, then a children's court can appoint a new guardian for the minor.
- If two parents have equal guardianship powers and one of them ***dies***, then the surviving parent will normally become the sole guardian.

◈ Married Persons Equality Act 1 of 1996, section 14
◈ Child Care and Protection Act, section 113(1)

(2) In the case of a **child born outside marriage**, the parent who is the child's legal custodian will normally also be the child's sole guardian, unless there is a court order naming someone else as guardian.

- If the parent with sole guardianship powers ***dies*** and fails to name a new guardian in his or her will, then a children's court can appoint a new guardian for the minor.

◈ Child Care and Protection Act, sections 101(1), 113(4)

(3) It is also possible that someone (including someone other than a parent) may have been named as a child's guardian by a **court order** from a children's court or the High Court.

◈ Child Care and Protection Act, section 101
◈ common law on guardianship and powers of High Court as upper guardian of all children

There is more information on guardianship in Chapter 9 of this *Guide* on "Parental rights and responsibilities for children outside marriage" and Chapter 10 on "Guardianship after death of parent or guardian".

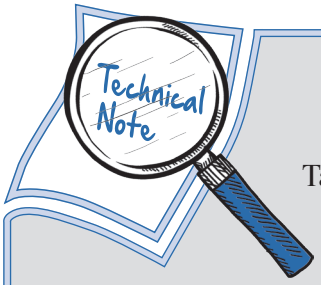
5. Becoming a major before age 18

There are two ways to become a major before reaching the age of majority which have not been affected by the new law:

(1) A minor automatically becomes a major upon **entering into a valid civil marriage**.

(2) A minor can also become a major by "**tacit emancipation**". This is a situation where a minor exercises a large degree of economic independence with the express or implied consent of that minor's parents or guardian. In such a case, the minor can be treated as a major by virtue of the circumstances. Authorities disagree on whether tacit emancipation gives a minor full legal capacity, or legal capacity only for specific purposes. This situation rarely arises and is difficult to establish.

◈ common-law on majors and minors



Examples of cases on tacit emancipation

Tacit emancipation is an issue that most often arises in the context of a contract signed by a minor, and occasionally in situations where a minor wants to bring a court case without the assistance of a parent or guardian. There is disagreement amongst the authorities on whether tacit emancipation gives a minor full legal capacity equivalent to that of a major, or merely legal capacity for the purposes of the specific matter in respect of which the minor was emancipated.

***Labuschagne v Scania Finance Southern Africa (Pty) Ltd and Others* 2015 (4) NR 1153 (SC):** The Court mentioned tactic emancipation in this case, but decided the matter on another basis. The case involved lease agreements between a trucking company and a close corporation. These agreements were signed on behalf of the close corporation by a 20-year-old minor and his parents, who became liable as sureties in respect of the agreements. However, the Court did not need to consider the question of tacit emancipation because it found that the minor had signed the agreements on the instructions of his father, who also signed the agreements. Both parents were aware of the contents and nature of the contracts which the appellant was signing and supported his signing of the agreements. The minor was therefore assisted by his parents and bound by the agreements that he signed.

***Watson v Koen h/a BMO* 1994 (2) SA 489 (O):** This case involved a suit for payment in terms of an agreement with a minor to provide some study courses. One of the minor's defences against payment was that, as an unemancipated minor, he did not have the capacity to enter such an agreement. The Court held that the onus of proving emancipation rests on the person who alleges that the minor has been emancipated. Emancipation occurs only with the express or tacit consent of the guardian of the minor and it must therefore be proved that the minor's guardian has emancipated the minor – not that the minor considered himself to be emancipated. The Court concluded that the other party to the agreement had not made a sufficient effort to ascertain whether the minor was indeed emancipated – which seemed doubtful on the facts at hand. Thus, the effort to secure payment under the agreement failed.

> "In the case of tacit emancipation the primary question is whether the parent/guardian, without giving specific consent to each independent juristic act, permits the minor to conclude agreements in connection with the income which he earns independently, in whatever way. This is a question of fact which the court must decide upon after considering all the circumstances of the case. Cognisance of the following factors will be taken in order to establish whether emancipation has taken place or not; namely, the fact that the minor lives on his own, manages his own business, his age, the relationship between the minor and his guardian, the nature of his occupation and the period during which the occupation has been carried on … Tacit emancipation can only be obtained by the implied consent of the guardian. Disinterest on the part of the parent does not result in the emancipation of a minor." (quoting Schäfer, *Family Law Service* (1988) at E 5-6)

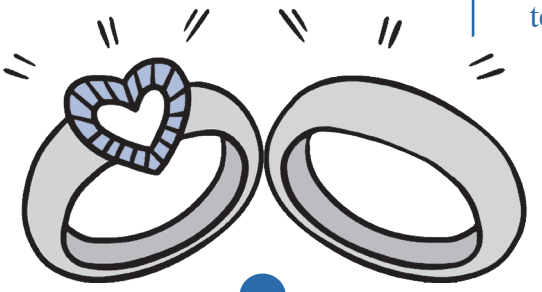
***Sesing v Minister of Police and Another* 1978 (4) SA 742 (W):** This case involved a 19-year-old who wanted to sue the police for injuries suffered in a shooting incident. He resided apart from his parents, both of whom were still living. He engaged in employment of his own choice and had complete control over his earnings. However, the Court held that there was no tacit emancipation in this case, because his parents had essentially neglected their duties and left him to fend for himself – and tacit emancipation requires the express or implied consent of the guardian. The Court stated: "There is no justification for depriving a minor of the law's protection merely because his parents have failed in their duties and left him to face life alone and unassisted."

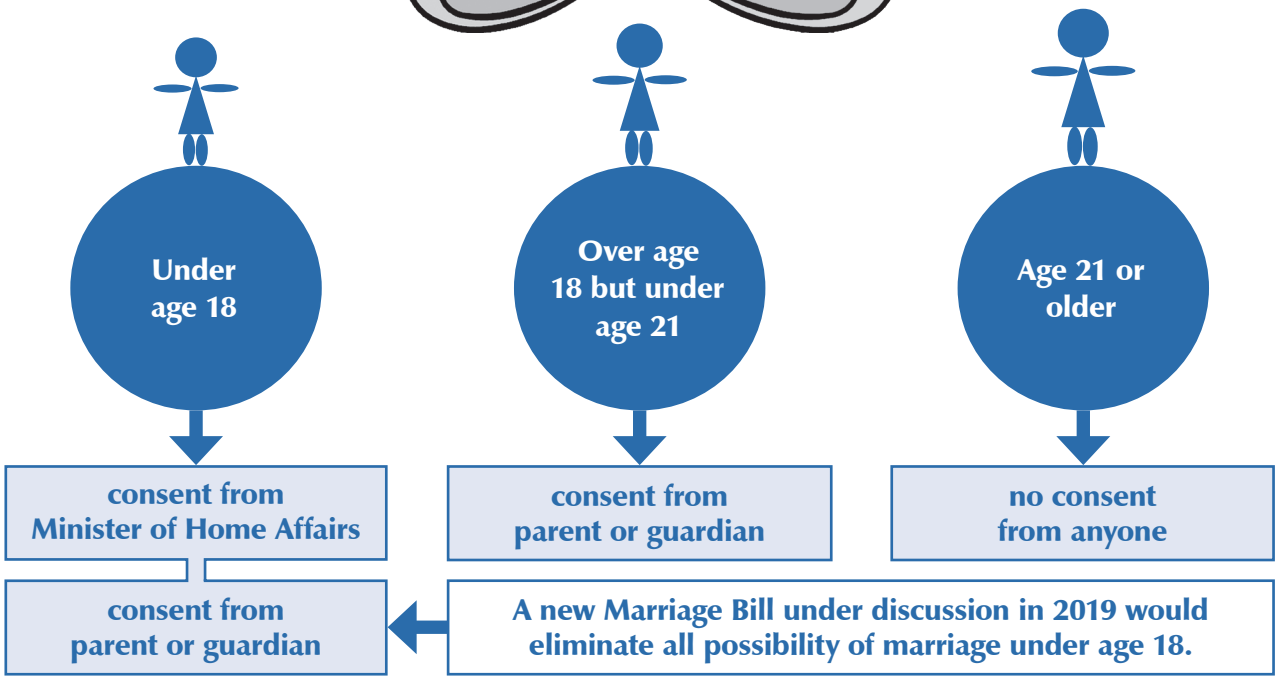
6. Consent to marriage

The Child Care and Protection Act has made a new rule about the age of consent to marry. The law sets the minimum age for marriage at age 18, for both civil and customary marriage. However, although the age of majority has been changed to 18, there is one exception to the rule that anyone over the age of 18 has independent legal capacity:

Persons under age 21 need the consent of a parent or guardian in order to marry.

See Chapter 20 of this *Guide* on harmful social, cultural and traditional practices for more detail on child marriage, including a discussion of technical aspects of the provisions in the Child Care and Protection Act on child marriage.





6.1 Who must consent to the marriage of a person between the ages of 18 and 21?

Parental consent is required for the marriage of a person between the ages of 18 and 21:

- If the parents are **married**, then both parents must consent.
- If the parents were **never married**, the parent who has guardianship must consent.
- If the parents are **divorced**, the parent who has guardianship must consent unless the divorce order says something different. (If the divorce order makes both parents equal guardians, then the consent of either of them would suffice – unless the divorce order contains a special requirement for consent to marriage.)

◈ Married Persons Equality Act 1 of 1996, section 14(2)
◈ Child Care and Protection Act, section 101(1)

6.2 Who must consent to the marriage of a person under age 18?

The minimum age for marriage is age 18, for both civil marriage and customary marriage. This means that a person under 18 needs the **parental consent** described above AND written permission from the **Minister responsible for home affairs**.

> **EXAMPLE:** Suppose that two 17-year-olds wished to marry right away because the girl in question was pregnant and they wished to make sure that the child was born inside marriage due to their religious beliefs. The Minister might agree to an underage marriage in this situation.

> **EXAMPLE:** Suppose that two 17-year-olds wished to marry right away because the boy had cancer and was not expected to live until his 18th birthday. The Minister might agree to an underage marriage in this situation.

However, a new Marriage Bill under discussion in 2019 would prohibit civil and customary marriage for persons under age 18, with no exceptions.

◈ **civil marriage**: Marriage Act 25 of 1961, section 26, as amended by the Married Persons Equality Act 1 of 1996 (expected to be replaced by a new Marriage Act in 2020)
◈ **customary marriage**: Child Care and Protection Act, section 226(3), read together with the definitions of "child" and "marriage" in section 1
◈ **parental consent:** Child Care and Protection Act, sections 10(10), 226(3)

A new Marriage Bill under consideration in 2019 would close the door completely to civil marriage by persons under age 18. No Ministerial consent could enable a person under age 18 to enter a civil marriage. Law reform on customary marriage was also pending as of 2019, so the option of Ministerial authority to enter *any* kind of marriage in Namibia below the minimum age of 18 might fall away completely.

Underage marriage and the laws on consent to sex

In terms of the **Combating of Rape Act 8 of 2000**, it is rape for a person to commit any of the defined sexual acts with a child **under age 14**, if that person is at least three years older than the child — even if there is no force or coercion. This Act states: "***No marriage or other relationship shall constitute a defence to a charge of rape under this Act***." It is unlikely that the Minister responsible for home affairs would give permission for a child under age 14 to marry — but a charge of rape might be laid in a situation where a child marriage was concluded without the required consent, and in such a case the existence of the "marriage" would be no defence to the charge of rape.

◈ Combating of Rape Act 8 of 2000, section 2(2)(d) and (3)

In terms of the **Combating of Immoral Practices Act 21 of 1980,** it is a crime for a person to commit a sexual act (as defined in the Combating of Rape Act), or an indecent or immoral act (which is not defined), with a child **under age 16**, if that person is at least three years older than the child — even if there is no force or coercion. However, in terms of that Act, ***no offence is committed if the persons in question are married in a civil or a customary marriage.*** So if there were a valid marriage involving a child between the ages of 14 and 16, no criminal charge under this law could be laid.

◈ Combating of Immoral Practices Act 21 of 1980, section 14

6.3 Exceptions to the consent requirements

There are two situations where the usual parental and/or State consent to marriage would not be required – but both of these would be rare in practice.

(1) **Previous valid civil marriage:** A minor who is married in a civil marriage (with the required consents) automatically becomes a major. This majority status survives even if the marriage ends by divorce or death. So, if that person wants to marry again, he or she does not need State or parental permission for the second marriage – even if he or she is still under the relevant age of 18 or 21 at the time of the second marriage.

◈ Child Care and Protection Act, section 10(10)
◈ Marriage Act 25 of 1961, section 24(2)

(2) **Previous emancipation:** Under the Age of Majority Act (which is repealed by the Child Care and Protection Act), a minor who was at least 18 years old could apply for a court order declaring him or her to be a major. If a person was declared a major by such a court order while the Age of Majority Act was still in force, that person does not need parental consent to marry even if he or she is still under age 21 at the time of the marriage.

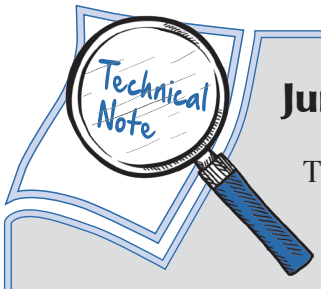
◈ Child Care and Protection Act, section 10(10)

6.4 Overruling refusal to give consent

If a person felt that a parent or the Minister was unreasonably withholding consent, the **High Court** could probably give the necessary permission.

The High Court, as the upper guardian of minors, would clearly have this power for persons under the age of 18 in a case where parental consent or State consent was being withheld. The High Court would likely have a similar power in a case where parental consent was being withheld for the marriage of a person between the ages of 18 and 21.

◈ See the technical note below.



Jurisdiction of the High Court on underage marriage

The High Court is the "upper guardian" of all minor children. This means that the High Court has inherent jurisdiction to act in matters involving minor children, even where there is no specific statutory authorisation for its involvement. Because the Court is the "upper guardian" of children, it even has the power to overrule a parent where this would be in the child's best interests. Thus, the High Court could clearly act to authorise the marriage of a minor (a child under age 18) where consent to the marriage was being withheld by a parent or by the Minister, if the Court found that the marriage was in the child's best interests.

Jurisdiction as the "upper guardian" of minor children would ***not*** appear to apply in a case involving marriage by a person between the age of 18 and 21, since a person in this age range is no longer a minor. However, the High Court has additional forms of inherent jurisdiction. The Namibian Supreme Court has stated that "the exercise of inherent jurisdiction is justified

where there is a lacuna in the law", while cautioning that inherent jurisdiction cannot entitle a court "to act contrary to an express provision of an Act of Parliament". The High Court has similarly described this inherent jurisdiction as "a reservoir of power to be employed in circumstances where the law does not cater for a given situation", also cautioning that the Court cannot use this power to contradict a statutory prohibition.

It is likely that the High Court could utilise its general inherent jurisdiction to authorise a marriage by a person between the ages of 18 and 21, where parental consent was being withheld against the best interests of the person in question. The Child Care and Protection Act does not prohibit a Court from overruling the withholding of parental consent for 18- to 21-year-olds. Furthermore, the Court clearly has this jurisdiction for children under 18, who are still minors. This results in a gap in the law, in the sense that children under 18 are clearly able to approach the High Court to overcome an obstacle to marriage, while 18- to 21-year-olds are not clearly able to approach the High Court to overcome that same obstacle. No purpose is served by such differential treatment. Thus, it seems likely that the High Court would exercise its inherent jurisdiction to consider such a matter.

◈ See Art 78(4) of the *Namibian Constitution; S v Strowitzki* 2003 NR 145 (SC); *Namibia Development Corporation v Aussenkehr Farms (Pty) Ltd* 2010 (2) NR 703 (HC)

The power of a minor to approach the court

Normally, a minor (a child below age 18) cannot bring a court case alone and must have assistance from a parent or guardian. The High Court also has inherent power to appoint a representative called a *curator ad litem* to assist a child with legal proceedings if necessary. Cases in the High Court on consent to marriage also appear to allow minors to approach the court without assistance for this purpose.

The Child Care and Protection Act includes a general authorisation for children to approach a children's court. The Act also gives children's courts the power to appoint a curator for the child if this is necessary to protect the child's best interests.

◈ Child Care and Protection Act, sections 47(2)(f), 52(2)(a), 58(2)
◈ *Ex Parte Grobler and Another* 2004 NR 105 (HC)

6.5 Consequences of marriage without the required consents

It is unlikely that a marriage could be concluded without the valid consents, because the marriage officer has a duty to make sure that all of the relevant consents have been provided. It is also possible that marriage licences from the Ministry of Home Affairs and Immigration will be required in future before a marriage can take place, which would mean that a ministry official would also confirm that the required consents are in place.

However, if a marriage somehow takes place without the required consents, the marriage could be "void" or "voidable".

A marriage is **void** if one (or both) parties is under age 18 and did not have official state consent for the marriage. **No court order is required to declare such a marriage void.** In such cases, the marriage never really existed – even if the problem is discovered only after one of the parties

to the marriage has died. **However, either spouse, or anyone else with an interest in the marriage, can ask the High Court to make an order *confirming* that the marriage is void. The court order *places on record* the fact that the marriage never existed**. This can give certainty and prevent any doubt or confusion. If one or both of the parties entered into the marriage in good faith, the Court has the power to adjust affairs between them to prevent hardship or unfairness. But the Court does not have the power to make a void marriage into a valid marriage.

A marriage is **voidable** (eligible for annulment by a court) if one (or both) parties is under age 21 and did not have the required consent of his or her parent or guardian for the marriage. In this case, either the underage party or that party's parent or guardian could approach the High Court to ask that the marriage be declared void – but the Court will do this only if it would be in the best interests of the underage spouse or spouses. A request for an annulment must be made while both spouses are still alive. If the spouses continue to live together for a substantial period of time without taking any action after the basis for annulment comes to light, the Court might conclude that they have accepted the situation. In this case, the Court might refuse to grant an annulment if there were no clear reasons for the delay (such as a lack of money to bring the case to Court). If the marriage is declared void, the consequences would be similar to those of a divorce.

There are special rules about children born of a void or voidable marriage.

(1) **Status of child:** Because a *void* marriage never existed in the eyes of the law, a child born in this situation will be regarded as a child born outside marriage. But in the case of a *voidable* marriage, the child will be treated as a child born inside marriage even after the marriage is annulled.

(2) **Protecting the best interests of the child:** In case of a *void* marriage, the Court must enquire into the best interests of any child of that couple before confirming that the marriage is void. A Court may not annul a *voidable* marriage before it has considered the best interests of any child of that marriage. In both cases, the Court must make provision for safeguarding the best interests of the child or children, as in the case of a divorce.

◈ common law on void and voidable marriage
◈ Child Care and Protection Act, sections 109-100

6.6 Arranging a child marriage is a crime

It is a crime for a person to "give a child out in marriage or engagement" if the child has not consented to the marriage or engagement OR if the child is below the minimum age for marriage and the required official consents have not been obtained. The penalty is a fine of up to N$50 000 or imprisonment for up to 10 years, or both. A child who marries without the required consent has not committed a crime, although the marriage may be void or voidable.

◈ Child Care and Protection Act, section 226(3)
Note that there are two subsections numbered (3) in section 226.

"Child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be 18 years and make registration of all marriages in an official registry compulsory."

◈ African Charter on the Rights and Welfare of the Child, Article 21(2)

7. Other important ages

There are many laws which set ages for particular purposes. These ages are not affected by the change in the age of majority.

Alcohol, tobacco and drugs: It is illegal for a person **under age 18** to consume, produce or possess alcoholic beverages. A person **under age 18** who does any of these things can be fined up to N$300 and/or required to attend an educational programme on the dangers of underage drinking.

Any person who sells or supplies alcohol to an underage person can be fined up to N$5 000 or imprisoned for up to one year, and be required to attend an educational programme on the dangers of underage drinking. Repeat offences can lead to the loss of a liquor licence, and even to disqualification from ever holding another liquor licence.

It is also illegal for any person, including a parent, to –

- coerce any child **under age 18** to drink an alcoholic beverage or to take an illegal drug;
- allow or encourage any child **under age 18** to take any illegal drug; or
- allow or encourage any child **under age 16** to drink an alcoholic beverage.

The penalty is a fine of up to N$20 000, imprisonment for up to five years, or both. The convicted person may also be required to attend an educational programme on the dangers of underage drinking or drug abuse.

There is an exception to these rules for the use of alcohol in generally-recognised religious sacraments, such as providing wine as part of communion.

It is illegal for any person to sell or supply any tobacco products to persons **under age 18**. The penalty is a fine of up to N$100 000, or imprisonment for a period of up to five years, or both.

◈ Liquor Act 6 of 1998, section 56 and 72(2A)-(2C), as amended by Child Care and Protection Act, section 257(4)
◈ Tobacco Products Control Act 1 of 2010, section 18
◈ Child Care and Protection Act, section 230
◈ These provisions are discussed in detail in Chapter 23 of the *Guide*.

Bank accounts: A child who is **age 16** or older can independently open an account at a bank or building society.

◈ Banking Institutions Act 2 of 1998, section 67
◈ Building Societies Act 2 of 1986, section 62

Civil liability: A child who has caused some sort of damage can be held liable to pay for the damage in a civil case if it can be shown that the child understood the consequences of his or her actions. There is **no specific age** for this purpose.

◈ common law

Consent to medical interventions and HIV testing: The Child Care and Protection Act allows children to give consent to medical treatment if they are **at least 14 years old AND mature enough** to understand the benefits, risks and implications of the medical intervention. But if the medical intervention involves a surgical operation, consent must ALSO be given by a parent or guardian of the child, or by the child's care-giver if there is no parent or guardian.

The Child Care and Protection Act allows children to give consent to an HIV test if they are **at least 14 years old OR mature enough** to understand the implications of HIV testing. This means, for example, that a mature 10-year-old would be allowed to consent to an HIV test. The law says that the test may be given only if the child receives proper counselling before and after the test.

- Child Care and Protection Act, sections 220-221
- These provisions are discussed in detail in Chapter 19 of the *Guide*.

Consent to sexual activity: A child **under age 14** cannot consent to "sexual acts" as defined in the Combating of Rape Act 8 of 2000 (including sexual intercourse and other very intimate sexual acts) with someone who is *more than three years older*. Such sexual contact is rape. If the child is under age 13, or "by reason of age exceptionally vulnerable", the minimum sentence of 15 years imprisonment will apply (for a first offence) and the minimum sentence of 45 years will apply to subsequent offences. The maximum sentence is life imprisonment. Marriage is no defence to a charge of rape in these circumstances.

A child **under age 16** cannot consent to a "sexual act" as defined in the Combating of Rape Act 8 of 2000, *or* to "an indecent or immoral act", with someone who is *more than three years older*. Such sexual contact would be an offence under the Combating of Immoral Practices Act 21 of 1980. The maximum penalty is a fine of up to N$40 000, or imprisonment for up to 10 years, or both. No offence is committed if the parties are married in a civil or customary marriage.

Sexual intercourse or other sexual contact between children who are within the three-year age gap is not criminalised if no coercion is involved, since it would not be clear in such circumstances if one person was taking unfair advantage of the other. This means that it is a bit misleading to talk about an "age of consent" to sexual activity in Namibia.

It is a crime for any person to give drugs or alcohol to a person **under age 18** with the intent to stupefy or overpower that person for the purpose of engaging in sexual conduct. The penalty is imprisonment for up to 10 years.

- Combating of Rape Act 8 of 2000, sections 1, 2(2)(d), 3
- Combating of Immoral Practices Act 21 of 1980, section 14 (as amended by Act 7 of 2000) and section 16 (as amended by the Child Care and Protection Act)

Criminal responsibility: Any child **over age 7** can in theory be convicted of a crime. However, children **between the ages of 7 and 14** can be convicted only if the prosecutor proves that the child in question knowingly intended to do wrong and understood the consequences of the wrongful act.

> The age of criminal responsibility is likely to be changed by the Child Justice Bill which was still under discussion in 2019. It was anticipated that this Bill would set the age of criminal responsibility at age 14.

Offenders **under age 18** are given certain special treatment, such as having their cases tried in closed court, but they can be convicted and sentenced as if they were adults.

> Even before the age of majority was lowered from 21 to 18, offenders over the age of 18 were treated in the same way as adults. The treatment of offenders under age 18 is likely to be changed by the forthcoming Child Justice Bill.

◈ common law

Driving licences: A person is eligible to get a normal driving licence at **age 18**. It is possible to get a driving licence for some types of motorcycle at **age 16**, and other types of motorcycle at **age 17**. These ages are not affected by the change to the age of majority.

◈ Road Traffic and Transport Act 22 of 1999, section 34.
◈ The ages for driving particular types of vehicle are set by regulation.

Education: Education is compulsory only up to **age 16**, or until the child finishes primary school – whichever comes first.

◈ Namibian Constitution, Article 20 read together with Education Act 16 of 2001, section 63

Firearms: A person **under age 18** is not eligible for a firearm licence. No person may allow or enable a person **under age 18** to be in possession of any arm or ammunition, with the exception that a person who is over age 21 may allow a person under age 18 to use a firearm under his or her direct supervision. The penalty for violating any of these rules is a fine of up to N$4 000, or imprisonment for up to one year, or both.

◈ Arms and Ammunition Act 7 of 1996, sections 3, 8, 34, 38(2)(d), 44(3)

Gambling: In terms of the **Casinos and Gambling Houses Act 32 of 1994**, a person **under age 18** may not be present in a casino or gambling house. The penalty for the underage person is a fine of up to N$5 000, or imprisonment for up to six months, or both. A license-holder who knowingly allows an underage person to be present can be fined up to N$10 000, or imprisoned for up to 12 months, or both.

The **Gaming and Entertainment Control Act 13 of 2018** (which was not yet in force as of November 2019) contains even more elaborate protection for **minors (defined as persons under age 18)**. It forbids minors from entering areas within a licensed premises where gambling games are available, operating a gambling machine, or conducting or engaging in a gambling activity. It also prohibits minors from falsely claiming to be over age 18 in order to get around these restrictions. Gambling licence-holders and persons in control of licensed premises or gambling machines have a duty not to permit minors to violate these restrictions, and to take reasonable measures to determine whether or not a person is a minor before permitting that person to engage in any of the restricted activities. Violation of any of these rules, including by the minor, is a crime punishable by a fine of up to N$10 000 or imprisonment for up to two years, or both. Minors are also not eligible to hold gambling licences or to engage in forms of employment in the gambling industry which require key employee licences.

In terms of the **Lotteries Act 15 of 1992,** it is an offence to knowingly sell a lottery ticket to someone **under age 18**, punishable by a fine of up to N$2 000, or imprisonment for up to three months, or both.

This law's forthcoming successor, the **Lotteries Act 13 of 2017** (which was not yet in force as of November 2019), contains more detailed (but less comprehensive) restrictions relating to **minors (defined as persons under age 21).** This law makes it a crime to sell a ticket to a minor for the State Lottery, a sports pool or a benevolent lottery, punishable by a fine of up to N$400 000 or imprisonment of up to four years, or both. The Act also prohibits inviting, causing or permitting a minor to participate in any lottery (unless the Minister has made a specific exception by regulation), punishable by a fine of up to N$4 million or imprisonment of up to 20 years, or both.

The change in the age of majority is unlikely to affect the Lotteries Act's definition of "minor" since the Lotteries Act was passed by Parliament subsequent to the passage of the Child Care and Protection Act and yet cites the specific age of 21; thus, the Lotteries Act appears to express an intention contrary to reliance on the age of majority in the Child Care and Protection Act.

- Casinos and Gambling Houses Act 32 of 1994, section 47
- Gaming and Entertainment Control Act 13 of 2018, sections 42-43, 74 (not in force as of July 2019)
- Lotteries Act 15 of 1992, sections 1, 27
- Lotteries Act 13 of 2017, sections 1, 74(3), 75(2), 76 (not in force as of July 2019)
- Child Care and Protection Act, section 10(4) and (6)

Identity documents: A person who is a Namibian citizen or permanent resident is expected to apply for a Namibian identity document within three months after reaching **age 16.** The process involves a photograph, fingerprints and a palm-print. If it comes to the attention of an officer in the Ministry of Home Affairs that a person who is eligible for a Namibian identity document has failed to apply, that officer has a duty to "take such steps as may be necessary to ensure that such person applies for an identity document". Failure to apply for an identity document within the required time frame is a criminal offence.

- Identification Act, sections 5(1)-(2), 7, 8, 19(2), 15(j)
- Identification Regulations, regulation 2(2)

Labour: There are various rules about the work that children may do. The **Namibian Constitution** has two rules about child labour:

- Children **under age 14** must not work in any factory or mine, except under conditions and circumstances regulated by statute.
- Children **under age 16** must be protected from economic exploitation and must not do any work that is likely to be hazardous, to interfere with their education, or to be harmful to their health or physical, mental, spiritual, moral or social development.

The Constitution is supplemented by rules in the **Labour Act 11 of 2007**:

- Children **under age 14** may not be employed.
- Children **between the ages of 14 and 16** may not do work that is likely to –
  - be hazardous
  - interfere with their education (such as by preventing them from attending school or having time to do their homework)
  - harm their health
  - harm their physical, mental, spiritual, moral or social development.
- Children **between the ages of 14 and 16** may not work in the evening from 20h00 until 07h00.
- Children **between the ages of 16 and 18** may work in the evening from 20h00 until 07h00 only if the Minister responsible for labour has issued regulations which allow this under certain conditions.

- Children **between the ages of 14 and 18** may not work –
  - on a construction or demolition site
  - in a place where work is done underground or in a mine
  - in a place where goods are manufactured
  - at a power plant
  - where machinery is put together or taken apart

  unless the Minister responsible for labour has issued regulations which allow these kinds of work under certain conditions.

Employing a child in violation of these rules is a criminal offence. It is also an offence to allow a child to be employed in violation of these rules. The penalty is a fine of up to N$20 000, or imprisonment for up to four years, or both.

It is also a crime under the **Child Care and Protection Act** to force, induce or allow a child to engage in labour that could harm the child's health, safety or morals, or put the child's well-being or development at risk. The penalty is a fine of up to N$50 000 or imprisonment for 10 years, or both.

◈ Namibian Constitution, Article 15(2)-(3)
◈ Labour Act 11 of 2007, section 3
◈ Child Care and Protection Act, section 234(1)(g) and (i), and (7)
◈ These provisions are discussed in detail in Chapter 21 of the *Guide*.

Maintenance: Maintenance orders under the Maintenance Act 9 of 2003 normally come to an end when the child reaches **age 18**, although they can remain in place until **age 21** if the beneficiary is "attending an educational institution for the purpose of acquiring a course which would enable him or her to maintain himself or herself". (Also, a child who is unable to become self-supporting because of a disability or some other reason may be entitled to ongoing maintenance, without any cut-off age.)

◈ Maintenance Act 9 of 2003, section 26
◈ common law on child maintenance

Voting and running for office: The ages for voting and running for office are set by the Namibian Constitution and not tied to the age of majority. Namibian citizens have the right to vote at **age 18**, and the right to stand for public office (other than President) at **age 21**. A Namibian citizen by birth or descent is eligible to stand for election as President at **age 35**.

◈ Namibian Constitution, Articles 17(2) and 28(3)

Wills: A child who is **age 16** or older can make a will.

◈ Wills Act 7 of 1953, section 4

Witnesses: Children **of any age** can testify in court, in both civil and criminal cases, although the court may take age into account in deciding what weight to give to the evidence of a child witness. A child **under age 18** is classified as a "vulnerable witness" in criminal proceedings or children's court proceedings, meaning that special arrangements can be applied to make the experience of appearing in court less traumatic for the child.

◈ Criminal Procedure Act 51 of 1977, section 158A
◈ Child Care and Protection Act, section 55
◈ These provisions are discussed in detail in Chapter 6 of this *Guide*.