



# LEGAL REPRESENTATION

The outcome of a Children’s Court case could have serious implications for a child’s future. Therefore it is important that the child’s rights and interests are fully considered. This means that it can be necessary for a child to have a legal representative. A legal representative can help to make sure that child’s views are clearly presented to the court, and that the child’s best interests are properly taken into account. A legal representative can bring additional investigative power and resources to the case, making it more likely that all relevant information will be placed before the court. This can be particularly important where there is a conflict of opinion between the child and the adults who are responsible for that child.

The current law (the Children’s Act of 1960) provides only for representation of children by prosecutors, who are children’s court assistants. The Minister of Justice is also authorised to appoint dedicated children’s court assistants if necessary. Giving prosecutors this duty can help to ensure that legal services are available throughout Namibia. However, prosecutors have a heavy workload and this requirement can be an additional burden.

There is no provision for children’s courts assistants in the draft Child Care and Protection Act. Instead, the draft Act says that the court may refer a matter to the Directorate of Legal Aid for possible legal representation. However it is not clear how a decision to provide legal aid would be made in such circumstances, since this is normally determined on the basis of a means test. Children are unlikely to be self-supporting. The parent or guardian might have sufficient funds to hire a lawyer, but what would happen where the court case involves a conflict or problem between the child and the parent or guardian?

South Africa has decided that legal aid should be provided for representation of children in custody, access and guardianship matters, paternity claims, adoption, divorce cases and maintenance cases. In Kenya, the decision on when legal representation is required for a child is left to the discretion of the court. In New Zealand, a legal practitioner must be appointed to represent a child in any proceedings involving custody, guardianship, access, or a child in need of care or protection, if the child does not already have legal representation. What should Namibia do?

## Type of representation

The table below summarises the different types of representation that a child could have. Different countries use different methods. One of the most difficult questions about child representation is whether the representative should take instructions from the child, or whether the representative should make decisions based on the best interest of the child. For example, a child may wish to live with his mother, even though the mother is an alcoholic and it is not safe for the child to remain with her. Another issue is that a lawyer representing a child may lack instructions if the child is not capable of advocating a view (such as where the child is an infant) or if the child is not mature enough to give meaningful directions to the lawyer. This could lead to a lawyer advocating his or her own view of the child’s best interests rather than actually representing the child.

OPTIONS FOR REPRESENTING THE BEST INTERESTS OF A CHILD IN COURT		
Type of representation	Explanation	Comment or question
Legal representation	A legal representative is expected to act on the instructions of the client, although this may not be strictly possible in the case of legal representation of a very young child.	Should a child be able to make decisions that are against his or her best interest, or should a legal representative only advance the best interests of a child? How old must a child be to give meaningful instructions to a legal representative?
Curator <i>ad litem</i>	A “curator” is someone who takes care of something. “ <i>Ad litem</i> ” is a Latin term meaning “for the proceeding”. A <i>curator ad litem</i> is expected to act on behalf of the person who is under curatorship, to advance that person’s best interests, rather than taking instructions from the person in question. Some countries call this person a “Children’s Guardian”.	A curator is charged with acting on behalf of the child’s best interests rather than strictly representing the child’s views. It would be useful in some cases for a child to have both a legal representative to put forward the child’s views and a curator to represent the child’s best interests, but this would often be impractical in terms of resources.
State officials	In some countries a state official is used to help identify and represent a child’s best interests. This could involve consultation with the child, but is not necessarily limited to advancing the child’s opinion as opposed to the child’s best interests.	State representatives may have institutional or professional bias or interests. These could include issues related to administrative procedures or costs. They may also be constrained by government policy.

## Mandatory reporting and legal professional privilege

Attorney-client communications and interactions are governed by legal professional privilege where they take place in confidence for the purpose of obtaining legal advice or in connection with pending or contemplated litigation – although there is an exception to the privilege for situations where legal advice is sought to further a criminal purpose. Attorney-client confidentiality is a broader concept.

The draft Child Care and Protection Act states that there should be mandatory reporting about child abuse. The draft specifically lists “legal practitioners” amongst the professionals with this duty, but provides an exception for “legal professional privilege”. This means that some communications between attorneys and their clients would be exempt from the mandatory reporting requirement, but not all. There is no corresponding exception for communications between doctors and patients. What should a legal practitioner do upon learning that a child client is being abused? Requiring a legal practitioner to report the abuse could destroy the child’s trust, but failing to report the abuse could put the child in danger.

In the United States, approximately half the states require lawyers to report child abuse. Some of the states adopt a “best interests approach” which appears to give the lawyer authority to make disclosures that serve the child’s best interests, even when the child prefers not to make such disclosures. Other states specifically uphold attorney-client privilege in the face of child abuse, or exempt lawyers from mandatory reporting requirements. What should Namibia do?

### ISSUES FOR DISCUSSION

- Ⓢ Should the existing provision on automatic appointment of state prosecutors as children’s court assistants be retained in the new law?
- Ⓢ If state-funded legal representation for children in children’s court proceedings is provided, should this be through legal aid or some other procedure?
  - Ⓢ How could a decision on legal aid be applied to a child?
  - Ⓢ What should happen in a case where the parent or guardian has means but is in conflict with the child?
- Ⓢ Should a legal representative put forward the viewpoint of the child or the best interests of the child?
  - Ⓢ Should the law identify any circumstances where legal representation of a child should be supplemented by other voices speaking on behalf of the child, such as a *curator ad litem* or a state official similar to South Africa’s Family Advocate, such as when a potential conflict between the child’s wishes and the child’s best interests is identified?
- Ⓢ Should the legal profession establish specific guidelines for the representation of children?
- Ⓢ Should Namibia seek to introduce training for a specialised pool of lawyers certified to represent children?
- Ⓢ If the Child Care and Protection Act retains a mandatory reporting provision, how should it apply to legal practitioners?
  - Ⓢ Should there be different rules for confidential communications between legal practitioners and adult clients as compared to legal practitioners and child clients who are the subjects of the legal proceedings rather than parties to the legal proceedings in the usual sense?
- Ⓢ Should there be different confidentiality and reporting rules for legal practitioners acting as legal representatives of a child as opposed to those acting in other capacities, such as *curators ad litem*?

### WHAT DO YOU THINK?

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For more information on the draft Child Care and Protection Act, contact Monalisa Zatjirua (061-2833116) or Celeste Feris (061-2833179) at the Ministry of Gender Equality and Child Welfare, or Rachel Coomer at the Legal Assistance Centre (061-223356).