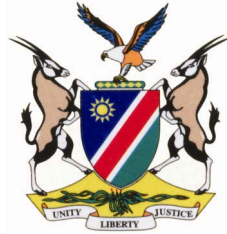


# DRAFT CHILD CARE AND PROTECTION BILL



## Ministry of Gender Equality and Child Welfare, 2009

To give effect to certain rights of children as contained in the Namibian Constitution; to set out principles relating to child welfare; to provide for the establishment of the Child Welfare Advisory Council; to provide for the appointment of a Children's Ombudsperson and social workers; to make further provision regarding children's courts; to provide for prevention and early intervention services, to provide for child protection services; to provide for foster care; to provide for places of safety, places of care, shelters, children's homes and educational and vocational training centres; to provide for the issuing of contribution orders; to make provision for the adoption of children; to provide for inter-country adoption; to give effect to the Convention on the Rights of the Child, to give effect to the trafficking protocol, to create new offences relating to children; and to provide for incidental matters

To avoid confusion, the Legal Assistance Centre has corrected obvious typographical errors, erroneous cross-references and the table of contents in the draft provided by the Ministry of Justice. The definitions in section 1 have also been placed in correct alphabetical order. Section numbering has been left as it stands for discussion of the draft, even where this is in error.

Some preliminary observations and recommendations from the Legal Assistance Centre have been included here, to encourage discussion and debate. The commentary is clearly differentiated from the actual text of the Bill.

# ARRANGEMENT OF SECTIONS

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## CHAPTER 1 DEFINITIONS, OBJECTIVES OF ACT AND APPLICATION

### Section

1. Definitions
2. Objectives of Act
3. Application

## CHAPTER 2 BEST INTEREST OF THE CHILD AND GENERAL PRINCIPLES

4. Best interest of the child
5. Child protection
6. General principles

## CHAPTER 3 INSTITUTIONS

### PART I CHILD WELFARE ADVISORY COUNCIL

7. Establishment of Child Welfare Advisory Council
8. Functions and duties of Council
9. Funds of Council
10. Access to information
11. Composition of Council
12. Disqualification for appointment
13. Term of office of members of Council
14. Vacation of office and filling of vacancies
15. Allowances
16. Committees
17. Meetings
18. Performance of administrative work of Council
19. External advisors
20. Consultation with Council
21. Annual reports by Ministries
22. Annual report by Council

PART II  
CHILDREN'S OMBUDSPERSON SOCIAL WORKERS

23. Appointment of Children's Ombudsperson and social workers
24. Functions of Children's Ombudsperson
25. Powers of Children's Ombudsperson
26. Reporting by Children's Ombudsperson
27. Proceedings respecting the furnishing of information
28. Proceedings against Children's Ombudsperson
29. Confidentiality in respect of reports made under this Chapter
30. Offences and penalties relating to Children's Ombudsperson

PART III  
PROBATION OFFICERS

31. Probation officers
32. Powers and duties of probation officers
33. Assessment of arrested child

CHAPTER 4  
**PARENTING PLANS**

33. Parenting plans
34. Parenting plan to be in writing
35. Amendment of parenting plan

CHAPTER 5  
**CHILDREN'S COURT AND COURT PROCEEDINGS**

PART I  
CHILDREN'S COURTS AND COMMISSIONERS OF CHILD WELFARE

36. Children's courts and commissioners of child welfare
37. Geographical area of jurisdiction of children's court
38. Referral of children by other court for investigation
39. Pre-hearing conferences
40. Lay-forums
41. Settling of matters out of court
42. Appeals

PART II  
CHILDREN'S COURT PROCEEDINGS AND RULES

- 43. Children's court proceedings and rules
- 44. Adjournments
- 45. Monitoring of court orders
- 46. Clerks of children's court
- 47. Assessors
- 48. Children's court environment
- 49. Proceedings private
- 50. Participation of children
- 51. Legal representation
- 52. Witnesses
- 53. Witness fees and allowances
- 54. Publication of children's court proceedings
- 55. Confidentiality of records of children's court proceedings

CHAPTER 6  
**PREVENTION AND EARLY INTERVENTION SERVICES**

- 56. The Minister's duties
- 57. Prevention and early intervention services

CHAPTER 7  
**CHILD PROTECTION PROCEEDINGS**

- 58. Child in need of protection
- 59. Reporting in respect of child in need of protection
- 60. Duty to investigate
- 61. Removal of a child with warrant
- 62. Removal of child without warrant
- 63. Action in respect of alleged offender
- 64. Automatic review of decision to remove a child
- 65. Application for child protection hearing
- 66. Notice of hearing
- 67. Reports requested by court
- 68. Status of reports
- 69. Court orders when child in need of protection
- 70. Court orders when child not in need of protection
- 71. Court orders to be aimed at securing stability in child's life
- 72. Duration and extension of orders
- 73. Register of persons unsuitable to work with children
- 74. Contents of Child Protection Register
- 75. Finding persons unsuitable to work with children
- 76. Disputes concerning findings

77. Findings to be reported to Minister
78. Consequences of entry of name in Child Protection Register
79. Disclosure of entry of name in Child Protection Register
80. Access to Child Protection Register
81. Establishment of information in Child Protection Registers
82. Disclosure of names in Child Protection Register prohibited
83. Removal of name from Child Protection Register

## CHAPTER 8

### **FOSTER CARE, PLACES OF SAFETY, PLACES OF CARE, SHELTERS, CHILDREN'S HOMES AND EDUCATIONAL AND VOCATIONAL TRAINING CENTRES**

84. Foster care
85. Application for approval as prospective foster parent
86. Prospective foster parent
87. Determination of placement of child in foster care
88. Number of children to be placed in foster care
89. Duration of foster care placements
90. Reunification of child with biological parent
91. Responsibilities and rights of foster parent
92. Termination of foster care
93. Places of safety
94. Places of care
95. Shelters
96. Children's homes
97. Educational and vocational training centres
98. Minimum standards for child reception homes
99. Management boards for children's homes and educational and vocational training centres
100. Application for registration of places of care, shelters, children's homes and educational and vocational training centres
101. Registration of places of care, shelters, children's homes and educational and vocational training centres
102. Cancellation of certificate of registration
103. Voluntary closure of a place of care, shelter, children's home and educational and vocational training centre
104. Notice of enforcement
105. Transfer of child in event of cancellation of certificate of registration
106. Inspection of place of care, shelter, children's home and educational and vocational training centre
107. Transfer of a child
108. Removal of child in foster care, place of safety, children's home or educational and vocational training centre
111. Provisional transfer from foster care, place of safety, children's home or educational and vocational training centre
112. Discharge of a child
113. Remaining in alternative care beyond age of 18

114. Death of a child in foster care, place of safety, children's home or educational and vocational training centre
115. Child in place of safety, children's home and educational vocational centre prohibited from leaving Namibia
116. Leave of absence from foster care, place of safety, children's home or educational and vocational training centre
117. Apprehension without warrant of child absent without authorisation from place of safety, children's home or educational and vocational training centre
118. Delegation

## CHAPTER 9 CONTRIBUTION ORDERS

119. Issue of contribution orders
120. Jurisdiction
121. Contribution order
122. Effect of contribution order
123. Attachment of wages of respondent
124. Change of residence or work by respondent
125. Appeals
126. Service of process, execution of contribution orders and costs

## CHAPTER 10 ADOPTION OF CHILDREN

127. Adoption orders
128. Child who may be adopted
129. Persons who may adopt a child
130. Adoption Register
131. Adoption plans
132. Consent to adoption
133. When consent not required
134. Unreasonable withholding of consent
135. Application for adoption
136. Notice of application
137. Consideration of adoption application
138. Effect of adoption order
139. Rescission of adoption order
140. Effect of rescission
141. Recording of adoption in births register
142. Registration of birth and recording of adoption of child born outside Namibia
143. Adoption register
144. Access to adoption register
145. No consideration in respect of adoption
146. Advertising

## CHAPTER 11 INTERCOUNTRY ADOPTION

147. Adoption in Namibia of child from Namibia by person in a foreign country
148. Adoption in a foreign country of child from a foreign country by person in Namibia
149. Recognition of inter-country adoptions
150. Evidential value of adoption compliance certificate
151. Recognition of inter-country adoption of child from non-convention country
152. Effect of recognition of inter-country adoption
153. Refusal to recognise inter-country adoption or Article 27 decision
154. Application to children's court for inter-country adoption of child
155. Access to information
156. Prohibition on processing or facilitating inter-country adoptions

## CHAPTER 12 TRAFFICKING IN CHILDREN AND CHILD ABDUCTION

157. Trafficking in children prohibited
158. Behaviour facilitating trafficking in children prohibited
159. Assistance to child who is victim of trafficking
160. Trafficking of child by parent, guardian or other person who has parental responsibilities and rights in respect of child
161. Reporting of child who is victim of trafficking
162. Child who is victim of trafficking found in Namibia
163. Repatriation of child who is victim of trafficking
164. Extra-territorial jurisdiction

## CHAPTER 13 PROTECTIVE MEASURES IN RESPECT OF CHILDREN

165. Consent to medical treatment and surgical operation
166. HIV-testing
167. HIV-testing for foster care or adoption purposes
168. Counselling before and after HIV-testing
169. Confidentiality or information on HIV/AIDS status of children
170. Application to terminate or suspend parental responsibilities and rights
171. Child-headed household
172. Unlawful removal or detention of child
173. Unlawful taking or sending of child out of Namibia
174. Corporal punishment
175. Child safety at place of entertainment
176. Worst forms of child labour prohibited

CHAPTER 14  
**GENERAL PROVISIONS**

- 177. Offences and Penalties
- 178. Delegation of powers and duties by Minister
- 179. Regulations
- 180. Repeal of laws
- 181. Transitional provision
- 182. Short title and commencement

BE IT ENACTED by the Parliament of the Republic of Namibia, as follows:



# CHAPTER 1

## DEFINITIONS, OBJECTIVES OF ACT AND APPLICATION

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### Definitions

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

“abandoned”, in relation to a child, means a child who has been or appears to have been deserted by the parent, guardian or care-giver;

The corresponding provision in the South African Children’s Act 2005 is:

“**abandoned**”, in relation to a child, means a child who –

- (a) has obviously been deserted by the parent, guardian or care-giver; or
- (b) has, for no apparent reason, had no contact with the parent, guardian, or care-giver for a period of at least three months.

The South African definition is more clear and definite than the Namibian version, but it also involves a policy decision which can have far-reaching consequences. For example, the term is used to define a child in need of protection, to identify children who can be placed for adoption and as a basis for dispensing with the requirement of parental consent.

“adopted child” means a child adopted under this Act, the Children’s Act, 1960 (Act No. 33 of 1960), the Adoption of Children Ordinance, 1927 (Ordinance No. 10 of 1927), the Adoption of Children’s Act, 1923 (Act No. 25 of 1923), the Children’s Act, 1937 (Act No. 31 of 1937), the Children’s Ordinance, 1961 (Ordinance No. 31 of 1961), or the Recognition of Certain Marriages Act, 1991(Act No. 18 of 1991);

This definition of “adopted child” makes reference to other provisions in Namibian law which regulated adoption in the past. It would probably be better to refer to an adopted child as “a child adopted under this Act or any other law”.

“adoption order” means an adoption order issued in terms of section 132;

“Adoption register” means a register referred to in section;

“board” means a board of management of a place of safety, a children’s home or an educational and vocational training centre;

“probation officer” means a person who complies with the prescribed requirements, and who has been appointed under section 31;

“care”, in relation to a child, includes, where appropriate –

- (a) within available means, providing the child with –
  - (i) a suitable place to live;
  - (ii) living conditions that are conducive to the child’s health, well-being and development; and
  - (iii) the necessary financial support;
- (b) safeguarding and promoting the well-being of the child;
- (c) protecting the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation and any other physical, emotional or moral harm or hazards;
- (d) respecting, protecting, promoting and securing the fulfilment of, and guarding against any infringement of, the child’s rights set out in the Constitution and the principles set out in Chapter 2 of this Act;
- (e) guiding, directing and securing the child’s education and upbringing, including religious and cultural education and upbringing, in a manner appropriate to the child’s age, maturity and stage of development;
- (f) guiding, advising and assisting the child in decisions to be taken by the child in a manner appropriate to the child’s age, maturity and stage of development;
- (g) guiding the behaviour of the child in a humane manner;
- (h) maintaining a sound relationship with the child;
- (i) accommodating any special needs that the child may have; and
- (j) generally, ensuring that the best interests of the child is the paramount concern in all matters affecting the child;

The definition of “care” is based on the South African Children’s Act where it is used as a replacement for custody. The Namibian law still uses the concept of custody, so this definition is likely to be confusing in the Namibian context and is better omitted.

“care-giver” means any person other than a parent or guardian, who factually cares for a child and includes –

- (a) a foster parent;
- (b) a kinship care-giver;

The reference to a “kinship care-giver” currently does not relate to anything else in the draft. Whether or not this should be part of the definition depends partly on decisions around foster care versus kinship care.

- (c) a person who cares for a child with the implied or express consent of a parent or guardian of the child;
- (d) a person who cares for a child whilst the child is in a place of safety;
- (e) the person at the head of a child reception centre or organization where a child has been placed;
- (f) a child who cares for a child who is without appropriate family care in the community; and
- (g) the child at the head of a child-headed household;

“competent authority”

- (a) in relation to Namibia, means the Minister;
- (b) in relation to a country, in which the Hague Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption, signed at the Hague on 29 May 1993, has entered into force, means a person or office designated by the country under Article 6 of the convention; and
- (c) in relation to another country, means a person or office designated by such country for the purpose of adoptions;

“chairperson” means the chairperson of the Council;

“child” means a person who has not attained the age of 18 years;

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 many of these things only with assistance from his or her parent or legal guardian. The age of majority in Namibia is 21, meaning that as the draft stands, a “child” is not the same as a minor.

“child protection hearing” means a hearing held to determine whether a child is in need of protection;

“children’s court” means the children’s court referred to in section 36;

“children’s home” means a facility referred to in section;

“Children’s Ombudsperson” means the Children’s Ombudsperson appointed in terms of section 23;

“Child Protection Register” means a register of persons unsuitable to work with children referred to in section 86;

“commissioner” means a commissioner of child welfare referred to in section 36;

“contribution order” means an order means an order referred to in section 119, and includes a provisional contribution order referred to in section 120(2);

“Council” means the Child Welfare Advisory Council established by section 8;

“Criminal Procedure Act” means the Criminal Procedure Act, 1977 (Act No. 51 of 1977);

“designated child protection organisation” means a child protection organisation designated in terms of section 78(3);

“designated social worker” means a social worker in the service of the State, and who is designated by the Minister for the purpose of this Act;

“district” means the area of jurisdiction of a magistrate’s court;

“early intervention services” means services referred to in section 57;

“educational and vocational training centre” means a facility referred to in section;

“family member” in relation to a child, means –

- (a) a parent of the child;
- (b) any other person who has parental responsibilities and rights in respect of the child;
- (c) a grandparent, brother, sister, uncle, aunt or cousin of the child; or
- (d) any other person with whom the child has developed a significant relationship, based on psychological or emotional attachment, which resembles a family relationship;

The definition of “family member” is very broad and may be unrealistic given some of the cross-references. Also, the term “family” is used in some places in the law – is this to be interpreted to include all “family members”? The draft Bill seems to make a distinction in some provisions between “family” (in the sense of nuclear family or the members of the child’s immediate household) and “extended family” which seems to encompass something broader. These terms must be carefully considered and made clear. It might be better to define “family” and “family member” for each specific context rather than giving an over-arching definition.

“foster care” means care of a child as described in section 88;

“foster parent” means a person who has foster care of a child by order of the children’s court;

As a point of comparison, Sierra Leone uses the following definition:

“foster parent” means an adult person who is not a biological or legal parent of a child but willing to provide care and support usually provided by the biological or legal parent; and “foster” and “foster care” shall be construed accordingly.

The appropriate definition for Namibia will depend on the outcome of discussions of different fostering paradigms and their place in the forthcoming law.

“guardian” means a parent or other person who has guardianship of a child;

“intercountry adoption”<sup>1</sup>

No definition has yet been formulated.

“in need of protection”, in relation to a child, means a child who is in a situation contemplated in section 58 ;

Should the Act refer to a child “in need of care”, a child “in need of protection”, a child “in need of care or protection”, or use some other term which will be well understood by the public? The current draft is inconsistent.

“legal representative” means a legal practitioner as defined in section 1 of the Legal Practitioners Act, 1995 (Act No. 15 of 1995);

“magistrate” means a magistrate as defined in section 1 of the Magistrates Act 2003, (Act No. 3 of 2003);

“magistrates’ court “ means a magistrate court as defined in the Magistrates’ Courts Act, 1944 (Act No. 32 of 1944);

“Magistrate’s Commission” means the Magistrate’s Commission established by section 2 of Magistrate’s Act 2003 (Act No. 3 of 2003);

“marriage” means a marriage in terms of any law of Namibia and includes a marriage recognised as such in terms of any tradition, custom or religion of Namibia and any marriage in terms of the law of any country, other than Namibia, which marriage is recognised as a marriage by the laws of Namibia;

“medical practitioner” means a medical practitioner as defined in section 1 of the Medical and Dental Act, 2004 (Act No. 10 of 2004);

<sup>1</sup> The spelling of “intercountry/inter-country” is internationally inconsistent, and used inconsistently in the draft. The Hague Convention uses the spelling “intercountry”.

“member of the police” means a member of the Namibian Police Force as defined in section 1 of the Police Act, 1990 (Act No. 19 of 1990).

“mental illness” means a mental illness as defined in the Mental Health Act, 1973 (Act No. 18 of 1973);

“Minister” means the Minister responsible for child welfare;

“Ministry” means the Ministry responsible for the administration of matters relating to child welfare;

“organ of state” means

- (a) any office, ministry or agency of State or administration in the local or regional sphere of government; or
- (b) any other functionary or institution –
  - (i) exercising a power or performing a function in terms of the Namibian Constitution; or
  - (ii) exercising a public power or performing a public function in terms of any law,

but does not include a court or a judicial officer;

“orphan” means a child who has no surviving parent caring for him or her;

“parent”, in relation to a child means a woman or a man in respect of whom parentage has been acknowledged or otherwise established as contemplated in the Children’s Status Act, 2006, and includes the adoptive parent of a child,

South Africa’s definition has several exclusions which might be considered for Namibia:

“parent”, in relation to a child, includes the adoptive parent of a child, but excludes –

- (a) the biological father of a child conceived through the rape of or incest with the child’s mother;
- (b) any person who is biologically related to a child by reason only of being a gamete donor for purposes of artificial fertilisation; and
- (c) a parent whose parental responsibilities and rights in respect of a child have been terminated.

“parenting plan” means a plan referred to in section 33;

“Permanent Secretary” means the Permanent Secretary of the Ministry;

“person unsuitable to work with children” means a person listed in the Child Protection Register;

“place of care” means a place of care referred to in section 94;

The draft refers inconsistently to “partial care” and “places of care”. The latter would provide continuity with the current law and is probably more easily understood by the public.

“place of safety” means a facility referred to in section 93;

“place of safety” means care of a child in an approved children’s home, shelter or private home or any other place, where the child can safely be accommodated pending a decision or court order concerning the placement of the child, but excludes care of a child in a prison or police cell;

There are two definitions for place of safety in the draft Bill, which need to be harmonised.

“prescribe” means prescribed by regulation;

“primary caretaker” means a person other than the parent or other legal care-giver of a child, whether or not related to the child, who takes primary responsibility for the daily care of the child with the express or implied permission of the care-giver of the child;

It may cause confusion to use both the term primary caretaker and the term care-giver, as they overlap without being identical. On the other hand, both terms may be necessary to cover situations such as foster care and care in institutional settings. The South African Children’s Act uses the term care-giver but not primary caretaker, while in Namibia the term primary caretaker is used in the Children’s Status Act 2006 and the Maintenance Act 2003.

“regulation” means a regulation made under this Act;

“school” means –

- (a) a state school as defined in section 1 the Education Act, 2001 (Act No. 16 of 2001); and
- (b) a private school as defined in section 1 of the Education Act, 2001 (Act No. 16 of 2001);

“shelter” means a facility referred to in section 95;

“social worker” means a social worker registered or deemed to be registered as a social worker in terms of the Social Work and Psychology Act 2004, (Act No. 6 of 2004);

“staff member” means a staff member as defined in section 1 of the Public Service Act, 1995 (Act No. 13 of 1995);

“street child” means a child who –

- (a) because of abuse, neglect, poverty, community upheaval or any other reason, has left his or her home, family or community and lives, begs or works on the streets; or

- (b) because of inadequate care, begs or works on the streets but returns home at night;
- (c) is living on the street and is mainly concerned with survival and shelter; or
- (d) is detached from his or her family and –
  - (i) lives in a temporary shelter such as a transit facility or abandoned house or building; or
  - (ii) moves from one place to another; or
- (e) remains in contact with his or her family but because of poverty, overcrowding, sexual abuse or other abuses within the family, spends some nights and most days on the street; or
- (f) is in institutional care and has come from a situation of homelessness and seems at risk of returning to a homeless existence; and

The Orphans and Vulnerable Children (OVC) Permanent Task Force mentioned, in connection with the National Plan of Action on OVC, that it is more sensitive to use a phrase such as a “child living on the street” instead of “street child” (in the same way that “children with disabilities” is generally preferred over “disabled child”).

The South African Children’s Act 2005 uses the following definition:

**‘street child’** means a child who –

- (a) because of abuse, neglect, poverty, community upheaval or any other reason, has left his or her home, family or community and lives, begs or works on the streets; or
- (b) because of inadequate care, begs or works on the streets but returns home at night.

“this Act” includes any regulation;

“trafficking” in relation to a child –

- (a) means the recruitment, sale, supply, transportation, transfer, harbouring or receipt of children, within or across the borders of Namibia –
  - (i) by any means, including the use of threat, force or other forms of coercion, abduction, fraud, deception, abuse of power or the giving or receiving of payments or benefits to achieve the consent of a person having control of a child; or
  - (ii) due to a position of vulnerability,
 for the purpose of exploitation; and
- (b) includes the adoption of a child facilitated or secured through illegal means;



There are some significant technical differences between the international definition and the proposed definition in the Namibian legislation which need to be addressed to ensure consistency with Namibia's international commitments on this issue. The Legal Assistance Centre suggests inserting the following definition for trafficking in relation to a child to bring it in line with the relevant international conventions:

For the purposes of this Part, "trafficking" in relation to a child means the recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation, and "exploitation" includes, without being limited to –

- (a) prostitution or other forms of sexual exploitation;
- (b) forced labour or services, prohibited child labour or other economic exploitation;
- (c) slavery or practices similar to slavery, including debt bondage or forced marriage;
- (d) servitude; or
- (d) the removal of any body parts.

"UN Protocol to Prevent Trafficking in Persons" means the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the UN Convention against Transnational Organised Crime, 2000, a copy of the English text of which is set out in Schedule;

"United Nations Convention on the Rights of the Child" means the Convention on the Rights of the Child adopted by the General Assembly of the United Nations on 20 November 1989;

(2) In addition to the meaning assigned to the terms 'custody' and 'access' in any law, and the common law, the terms 'custody' and 'access' in any law must be construed to also mean 'care' and 'contact' as defined in this Act.

The recently enacted Children's Status Act retains the existing terminology of custody and access. One set of terminology should be chosen for all Namibian laws in respect of children and used consistently.

## Objectives of Act

2. The objectives of this Act are –

- (a) to promote the protection of families;
- (b) to give effect to the following children's rights as contained in the Constitution, in particular –
  - (i) parental care or alternative care if this is in the best interest of the child; and
  - (ii) that the best interests of a child be a paramount consideration in every matter concerning the child;

The references to Constitutional rights are somewhat oddly worded, since the Namibian Constitution makes no explicit reference to alternative care while some other important and relevant Constitutional rights for children are not mentioned by name in this list. The Legal Assistance Centre suggests that it is better to replace subsection (b) with the following more general text:

*(b) to give effect to children's rights contained in the Namibian Constitution.*

Another problem with subsection (b) is that respect for the best interests of the child is a self-standing right in the South African Constitution, but in the Namibian Constitution it is mentioned only in connection with legislation which limits the right of children to know and be cared for by their parents. Thus, this reference to the Constitutional standard of best interests for the child does not make sense in Namibia. We would consequently suggest that the Namibian principles should include a specific principle on the child's best interests:

*to ensure that the best interests of a child are the paramount consideration in every matter concerning the child.*

- (c) to give effect to Namibia's obligations concerning child welfare in terms of international agreements binding upon Namibia;

It is strange that subsection (c) singles out international obligations on child welfare alone, as opposed to a broader wording such as "child welfare, development and protection". The corresponding South African provision refers to "*the Republic's obligations concerning the well-being of children in terms of international instruments binding on the Republic*". The Legal Assistance Centre suggests re-wording subsection (c) as follows:

*(c) to give effect to Namibia's obligations concerning child welfare, development and protection in terms of international agreements binding upon Namibia.*

- (d) to make provision for structures, services and means for promoting and monitoring the sound physical, psychological, intellectual, emotional and social development of children;
- (e) to strengthen and develop community structures which can assist in providing care and protection for children;
- (f) to protect children from discrimination, exploitation and any other physical, emotional or moral harm or hazards;
- (g) to provide care and protection to children who are in need of care and protection; and
- (h) generally, to promote the protection, development and welfare of children.

One difficulty with the draft list is that the principles are modelled very closely on those contained in the South African Children's Act 38 of 2005, with some small changes of wording and one omission which may be interpreted as being significant. The list of objectives in South Africa includes the following:

*to recognise the special needs that children with disabilities may have.*

Since the rest of the list follows the order and wording of the South African list, the omission could be misinterpreted as a lack of concern for the welfare of children with disabilities. If the list is retained in its present form, using South African legislation as a model, then we suggest adding the following objective:

*to recognise the special needs that children with disabilities may have.*

It is important in any event to note the need to give special attention to children with disabilities.

## **Application**

3. (1) Organs of state must respect, protect and promote the rights of children contained in this Act.

(2) This Act binds both natural and juristic persons, to the extent that it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

## CHAPTER 2

# THE BEST INTEREST OF THE CHILD AND PRINCIPLES OF CHILD WELFARE

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### Best interest of the child

4. (1) This Act must be interpreted and applied so that in matters arising under it the best interests of the child affected by the proceeding is the paramount consideration.

The reference to children affected “by the proceeding” could be too limiting, in the sense that there may be informal and administrative decision-making under the Act as well as outcomes of formal court proceedings. The Legal Assistance Centre suggests that the broader wording from the South African law should be used here, which encompasses the broader coverage of the Convention on the Rights of the Child:

*In all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance must be applied.*

(2) When this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely:

- (a) the nature of the personal relationship between –
  - (i) the child and the parents, or any specific parent; and
  - (ii) the child and any other care-giver or person relevant in those circumstances;
- (b) the attitude of the parents, or any specific parent, towards –
  - (i) the child; and
  - (ii) the exercise of parental responsibilities and rights in respect of the child;
- (c) the capacity of the parents, or any specific parent, or of any other care-giver or person, to provide for the needs of the child, including emotional and intellectual needs;
- (d) the likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from –
  - (i) both or either of the parents; or
  - (ii) any brother or sister or other child, or any other care-giver or person, with whom the child has been living;

- (e) the practical difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis;
- (f) the need for the child –
  - (i) to remain in the care of his or her parent, family and extended family; and
  - (ii) to maintain a connection with his or her family, extended family, culture or tradition;
- (g) the child's age, maturity and stage of development, gender; background; and any other relevant characteristics of the child;
- (h) the child's physical and emotional security and his or her intellectual, emotional, social and cultural development;
- (i) any disability that a child may have;
- (j) any chronic illness from which a child may suffer;
- (k) the need for a child to be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment;
- (l) the need to protect the child from any physical or psychological harm that may be caused by –
  - (i) subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour; or
  - (ii) exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards another person;
- (m) any family violence involving the child or a family member of the child; and
- (n) which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child.

The Legal Assistance Centre suggests adding these points to the list, at a minimum:

- *the child's opinions and preferences, taking into account the child's age and degree of maturity*
- *any other factor which is relevant.*

## Child participation

5. Every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration.

## General principles

6. (1) The principles set out subsection (2) must guide –
- (a) the implementation of this Act; and
  - (b) all proceedings, actions and decisions by any organ of state in any matter concerning a child or children in general.
- (2) All proceedings, actions or decisions in matters concerning a child must –
- (a) respect, protect, promote and fulfil the children’s fundamental rights and freedoms set out in the Constitution, the best interests of the child standard set out in section 4 and the rights and principles set out in this Act, subject to any lawful limitation;
  - (b) respect the child’s inherent dignity;
  - (c) treat the child fairly and equitably;
  - (d) protect the child from unfair discrimination on any ground, including on the grounds of the health status or disability of the child or a family member of the child;

One question for consideration is whether it is better to leave this provision open-ended, or to specify prohibited grounds of discrimination. South Africa uses a similarly open-ended provision, whilst the South African Law Reform Commission recommended prohibition of direct or indirect discrimination on grounds –

- (a) of the race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language or birth of the child or of his or her parents, legal guardian, primary care-giver or any family member of the child; or
- (b) of the family status, health status, socio-economic status, HIV-status, or nationality of the child or of his or her parents, legal guardian, primary care-giver or of any of his or her family members.

Another question which should be considered is: what is the remedy if unfair discrimination takes place?

- (e) recognise a child’s need for development and to engage in play and other recreational activities appropriate to the child’s age; and
- (f) recognise a child’s disability and create an enabling environment to respond to the special needs that the child has.

(3) If it is in the best interests of the child, the child’s family must be given the opportunity to express their views in any matter concerning the child.

The application of this principle may not be practical given the broad definition of “family member” in section 1 (which includes grandparents, brothers, sisters, uncles, aunts and cousins as well as “any other person with whom the child has developed a significant relationship, based on psychological or emotional attachment, which resembles a family relationship”). Providing notice and an opportunity to be heard to such a broad group of people could be prohibitively expensive and impossible to implement.

The Legal Assistance Centre suggests limiting notification and automatic opportunity to be heard to parents and other persons who are in fact exercising parental rights and responsibilities (such as foster parents), guardians and primary caretakers – while allowing any other family member to approach the court on their own volition, with a right to be heard if they can show that it is the best interests of the child for them to be heard.

Notice to primary care-takers, who may be taking care of the child in question on a daily basis even in the absence of formal parental rights, is very important in order to ensure that the court receives relevant information on the child’s situation.

In every instance where notification to parents is required, the Legal Assistance Centre suggests limiting this to persons whose whereabouts can be reasonably ascertained, to avoid fruitless searches for long-absent fathers, for example.

- (4) In any matter concerning a child –
- (a) an approach which is conducive to conciliation and problem-solving must be followed and a conflict approach must be avoided; and

A conciliatory approach might be inappropriate in situations such as trafficking, child abuse or domestic violence. The Legal Assistance Centre suggests that subsection (a) should be qualified by the introductory phrase “where appropriate” or “where it would be in the best interests of the child”.

- (b) a delay in any action or decision to be taken must be avoided as far as possible.

(5) A child, having regard to his or her age, maturity and stage of development, and a person who has parental responsibilities and rights in respect of that child, where appropriate, must be informed of any action or decision taken in a matter concerning the child which significantly affects the child.

To be more clear, this provision could refer to “parents and any other persons who may have parental rights and responsibilities in respect of the child, provided that their whereabouts can be reasonably ascertained” (to avoid fruitless searches for long-absent fathers, for example). The Legal Assistance Centre also suggests that notice of decisions should also be given to primary care-takers, who may be taking care of the child in question on a daily basis even in the absence of formal parental rights.

# CHAPTER 3

## INSTITUTIONS

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### PART I

#### CHILD WELFARE ADVISORY COUNCIL

#### Establishment of Child Welfare Advisory Council

7. There is established a council to be known as the Child Welfare Advisory Council.

#### Functions and duties of Council

8. (1) The functions of the Council are to –
- (a) advise the Minister on matters relating to the welfare of children who receive services under this Act and any other law relating to child welfare;
  - (b) advise and assist, where appropriate, any organ of state in the carrying out of their functions and duties under this Act;
  - (c) advise the Minister and where appropriate any organ of state on the need for, and initiation and or amendment of laws on matters relating to the welfare of children;
  - (d) prepare and submit annual reports to the Minister respecting activities of the Council and the exercise of duties and functions of the Children's Ombudsperson;
  - (e) design and propose for adoption, to the Minister and where appropriate organs of state, programs of prevention, protection or care, as the Council considers necessary for the best interests of children;
  - (f) study and investigate the implementation of this Act and other laws related to it for the purpose of making such recommendations for improvement, to the Minister or any other relevant organ of state, as the Council considers necessary for the best interests of children; and
  - (g) perform any other function assigned to it by the Minister.

(2) The Council must encourage and facilitate, to the greatest extent possible, the involvement of non-governmental organisations and members of the community at large in the establishment and promotion of services and facilities to advance the welfare of children.



## **Funds of Council**

9. The funds of the Council consist of –
- (a) such moneys as may be appropriated by Parliament for the purpose;
  - (b) grants, donations or bequests received by the Council with the approval of the Minister; and
  - (c) such other moneys or assets as may vest in or accrue to the Council, whether in the course of its operations or otherwise.

## **Access to information**

10. The Council may obtain access to such information held by organs of state, including courts that serve children, subject to laws on confidentiality, where that information may be necessary to enable the Council to carry out its duties in terms of this Act.

## **Composition of Council**

11. (1) In this section “stakeholder” means a person, including an organ of state which has an interest in the welfare of children or which may be affected by it.

- (2) The Council consists of the following fifteen members, appointed by the Minister –
  - (a) eight members, to each represent a different stakeholder in the State and who have particular knowledge of and experience in matters relevant to the Council;
  - (b) four members, to each represent a different stakeholder in the private sector and who have particular knowledge of and experience in child welfare matters; and
  - (c) three members, to each represent a stakeholder in the community, and who have a demonstrated interest in child welfare matters.
- (3) At least eight of the members appointed under subsection (1) must be women.
- (4) Before appointing the persons contemplated in subsection (2)(b) or (c), the Minister must invite nominations from stakeholders –
  - (a) by notice in the *Gazette*;
  - (b) by publishing the invitation in at least two nationally distributed newspapers;
  - (c) by broadcasting on radio on such stations as the Minister may consider appropriate; and
  - (d) by sending the invitation by way of written notice to such stakeholder.

(5) If, after the Minister has invited nominations in terms of subsection (4), the Minister receives no or insufficient nominations within the period specified in the invitation, the Minister may appoint the required number of persons who qualify to be appointed in terms of this section.

(6) The Minister must, as soon as possible after appointing the members of the Council, give notice in the *Gazette* of the names and date of appointment of the members and, in the case of a member appointed to fill a casual vacancy, the period for which he or she is appointed.

## **Disqualification for appointment**

12. A person does not qualify to be appointed as a member of the Council if the person –
- (a) is not a Namibian citizen or holder of a permanent residence permit;
  - (b) is a member of the Parliament or a regional council or a local authority council;
  - (c) is an unrehabilitated insolvent; or
  - (d) has been convicted, whether in Namibia or elsewhere, of an offence and sentenced to imprisonment without the option of a fine, unless a period of ten years has expired after the date on which the sentence was served.

## **Term of office of members of Council**

13. A member of the Council holds office for a term of three years and is at the end of that term eligible for reappointment.

## **Vacation of office and filling of vacancies**

14. (1) The office of a member of the Council becomes vacant if that member –
- (a) becomes subject to a disqualification referred to in section 12;
  - (b) through a written notice addressed to the Minister resigns as a member of the Council;
  - (c) is absent from three consecutive meetings of the Council without permission from Council; or
  - (d) is for any other reasonable cause removed from office by the Minister.
- (2) Before removing a member from office in terms of subsection (1)(d), the Minister must –
- (a) in writing notify the member concerned of the grounds on which the member is to be removed from office;

- (b) give the member an opportunity to make oral or written representations on the matter to the Minister or to any person designated by the Minister; and
- (c) consider any representations made in terms of paragraph (b).

(3) If a member of the Council dies or vacates office before the expiry of member's term of office the vacancy must be filled by the appointment of another person in accordance with section 11, to fill the vacancy for the unexpired portion of the period for which that member was appointed.

## Allowances

15. (1) Members of the Council or members of a committee of the Council who are not in the full-time employment of the State must be paid such allowances for their services as the Minister may, with the concurrence of the minister responsible for finance, determine.

(2) The allowances determined under subsection (1) may differ according to the office held by the member of the Council concerned, or the duties performed by the member.

## Committees

16. The Council may, with the approval of the Minister, establish committees consisting of members only or consisting of members and non-members to perform subject to the Council's directions, functions the Council may assign to such committee.

## Meetings

17. (1) The Council must meet at least once every three months.

(2) The first meeting of the Council must be held at a time and place determined by the Minister and thereafter the Council must meet at such times and places determined by the chairperson of the Council.

(3) The chairperson may at any time call a special meeting of the Council, at the request of the Minister or of a majority of the members.

It is odd that this provision reads "may" and not "shall" or "must". As the provision is currently worded, the Chairperson could ignore the request of the other members for a meeting. It might be better to remove the Chairperson's discretion in this subsection, and to require that the request for a meeting from a majority of the members must be made in writing. Looking at the broadly similar Labour Advisory Council, in terms of section 98(1)(b) of the Labour Act 11 of 2007, the Chairperson of the Labour Advisory Council *must* call a special meeting on the "written and motivated request of four members" or of the Minister. The Legal Assistance Centre suggests that this provision be amended to read similarly to the corresponding provision on the Labour Advisory Council.

(4) At the first meeting of the Council the members must elect from among their number a chairperson and another member as deputy chairperson.

(5) The chairperson of the Council, or in the absence of the chairperson, the deputy chairperson, presides at meetings of the Council, or if both the chairperson and deputy chairperson are absent from the meeting, or are unable to preside at the meeting, the members must elect a member to preside at the meeting.

(6) At any meeting of the Council –

(a) a majority of the members of the Council forms a quorum;

(b) a decision of a majority of members of Council present at a meeting is the decision of the Council; and

(c) if, there is an equality of votes, the person presiding at the meeting has a casting vote in addition to that person's ordinary vote.

(7) The Council determines the procedures to be followed at its meetings.

(8) The Council may invite any person whose presence is in its opinion desirable to attend and to participate in the deliberations of a meeting of the Council, but such person has no vote.

(9) A decision taken by the Council or an act performed under the authority of the Council is not rendered invalid by reason only of a vacancy in the membership of the Council, or by reason only of the fact that a person who is not entitled to sit as a member of the Council was present when the decision was taken or the act was authorised, if the decision was taken or the act was authorised by the requisite majority of the members of the Council who were present at the time and entitled to vote.

(10) The Council must cause to be kept minutes of the proceedings at its meetings and the chairperson must deliver a copy of the minutes as soon as possible after the meeting to the Minister.

## **Performance of administrative work of Council**

**18.** (1) The Permanent Secretary must –

(a) make staff members in the Ministry available to perform the clerical work for the Council in the performance of its functions; and

(b) designate a staff member to serve as secretary to the Council.

(2) The expenditure resulting from the performance of the duties and functions of the Council in terms of subsection (1) must be paid from the State Revenue Fund from moneys appropriated for that purpose by Parliament.

## **External advisors**

**19.** (1) The Council may, after consultation with the Permanent Secretary and on such conditions as may be agreed on, obtain the services of such persons as it may consider necessary to advise the Council in connection with the performance of its functions and the carrying out of its duties.

(2) The expenditure resulting from the performance of the duties or functions of the Council in terms of subsection (1) must be paid from the State Revenue Fund from moneys appropriated for that purpose by Parliament.

## **Consultation with Council**

**20.** The Minister and, where appropriate, any organ of state exercising functions which may affect child welfare may consult with the Council in –

- (a) proposing any repeal or amendment of any provision of this Act or any other law that would affect this Act; and
- (b) promulgating, repealing or amending any regulation implementing this Act or affecting the implementation of this Act.

## **Annual reports by Ministries**

**21.** (1) Every Permanent Secretary of a government ministry exercising functions affecting child welfare and identified and notified as such by the Minister must, within one month days after the end of each financial year, submit or cause to be submitted to the Council a report on the implementation of this Act in the ministry of which he or she is Permanent Secretary.

(2) The report contemplated in subsection (1) must be submitted to the chairperson of the Council.

## **Annual report by Council**

**22.** (1) The Council must as soon as possible, but not later than three months, after the end of each financial year, prepare an annual report that contains –

- (a) a report on the activities of the Council;
- (b) reports by ministries referred to in section 21;
- (c) report by the ombudsperson referred to in section 24; and
- (d) any other matter the Minister may consider necessary to be included in the report.

(2) As soon as possible after the report has been prepared in terms of subsection (1), the chairperson of the Council must cause a copy of the report to be submitted to the Minister.

(3) The Minister must, within 28 days of receipt thereof, table that report in the National Assembly if Parliament is then in ordinary session, or if Parliament is not then in ordinary session, within 28 days after the commencement of its next ordinary session.

## PART II

### CHILDREN'S OMBUDSPERSON, SOCIAL WORKERS

If this part of the Act is retained in its present form, the name of the official should perhaps be changed to "Children's Ombudsman" to match the title of the Namibia's general Ombudsman. The word 'ombudsman' comes from the Scandinavian word *umbodhsmadhr*, which means deputy or agent. It does not refer only to a male in the same way as words like "Chairman".

#### Appointment of Children's Ombudsperson and social workers

23. The Minister must, subject to the laws governing the public service, appoint –
- (a) a person to be the Children's Ombudsperson to perform the duties and functions assigned to the Ombudsperson under this Act; and
  - (b) a sufficient number of persons as social workers to perform the duties assigned to social workers under this Act or any other law.

Subsection 23(b) addresses the general appointment of social workers, and does not appear to refer to social workers appointed as staff members of the Children's Ombudsperson. This subsection should be re-located to a more general section of the Bill to avoid confusion.

The Act should specify the qualifications of the Children's Ombudsperson. One possible approach is to require that this official be a judge or a legal practitioner who can appear in all of Namibia's courts, appointed by the Judicial Services Commission (in the same fashion as Namibia's general Ombudsman). The Act should also list the criteria for eligibility for the office, the term of office, whether reappointment is allowed and the grounds and procedure for removal from office.

#### Functions of Children's Ombudsperson

24. (1) The Children's Ombudsperson must –
- (a) receive and investigate complaints that come to his or her attention, from any source, including a child, concerning children who receive services under this Act, or relating to services provided to children under this Act;

Note that the Children’s Ombudsperson is not charged with monitoring the general implementation of the Child Care and Protection Act, but only with investigating complaints.

- (b) monitor the implementation of the United Nations Convention on the Rights of the Child and any other international instruments relating to child welfare and binding on Namibia; and

The monitoring power should extend to the implementation of the Child Care and Protection Act; otherwise (reading sections 24 and 25 together) the Children’s Ombudsperson might be limited to investigating implementation issues under this Act only where there is a complaint. It will be more effective to allow for ongoing, general monitoring of implementation issues, as opposed to acting only on specific problems reported. The Legal Assistance Centre also suggests broadening the mandate of the Children’s Ombudsperson, following on examples from other countries, to allow for a more general and proactive involvement in the promotion and protection of children’s rights.

- (c) where appropriate, try to resolve those matters mentioned in paragraph (a) that come to his or her attention through the use of negotiation, conciliation, mediation or other non-adversarial approaches; and
- (d) prepare and submit annual reports to the Council on the performance of duties and exercise of powers of the Children’s Ombudsperson; and

The Task Force assembled by the Ministry to refine an earlier draft bill recommended that, to be consistent with the Ombudsman’s Act, a Children’s Ombudsperson should report annually to the National Assembly, with these reports being copied to the Child Welfare Advisory Council.

- (e) perform additional duties and functions that the Minister may assign to the Children’s Ombudsperson.

This provision could include a clear “mission statement” or statement of purpose for the Children’s Ombudsperson. Here is an example of a possible mission statement:  
*The mission of the Children’s Ombudsperson is to protect and promote the rights and interests of children in Namibian society.*

Under the current draft provisions, the Children’s Ombudsperson is charged with the fairly narrow role of ensuring the proper enforcement of the Child Care and Protection Act and monitoring compliance with the UN Convention on the Rights of the Child and other international conventions to which Namibia is a party. The influence of the Children’s Ombudsperson on children’s rights could be greatly increased by expanding the office’s mandate and powers to include children’s rights *in any context*.

## Powers of Children's Ombudsperson

25. The Children's Ombudsperson may –

- (a) conduct inquiries, investigate, report on and make recommendations on any matter –
  - (i) relating to children who receive or are entitled to services under this Act; or
  - (ii) relating to services provided or available to children under this Act;
- (b) inspect, subject to section the provisions of this Act on the right of entry, a place of safety, shelter, children's home, or an education or vocational centre in which a child is placed in terms of this Act;

Note that this omits the power to inspect placements with foster parents or adoptive parents.

- (c) to represent, other than as a legal representative, the rights, interest and viewpoints of a child who receives services under this Act when decisions relating to the child is made under this Act; and
- (d) to solicit, accept and review reports from individuals or organisations concerned or involved with the welfare of children or families or both.

The Children's Ombudsperson would appear to need investigatory powers – such as the power to require persons to provide information or produce documents, records or things under their control – similar to the powers of Namibia's existing Ombudsman under section 7 of the Ombudsman Act 7 of 1990.

## Reporting by Children's Ombudsperson

26. The Children's Ombudsperson must report to the Council –

- (a) the outcome of the investigation made in terms of section 25, setting out his or her conclusions and reasons, as well as recommendations he or she considers appropriate; and
- (b) any matter relating to the implementation of the United Nations Convention on the Rights of the Child which the Ombudsperson considers necessary to report.

This section should perhaps be expanded to include matters relating to the implementation of the Child Care and Protection Act and or other international conventions relating to child welfare, to match section 24(1)(b). However, reporting should not be limited to conventions already binding on Namibia, as it might sometimes be useful for the Children's Ombudsperson to report on the implications of conventions that Namibia is considering becoming a signatory to.



- (2) The Children’s Ombudsperson –
- (a) must report the result of the investigation to the parent or guardian of the child;
  - (b) must report to the child, if child is of sufficient age and maturity to understand the nature of and extent of the report; and
  - (c) may report to the head of any place or premises subject to an investigation.

As the draft stands, it is not mandatory for any agency, body, place, premises or individual which was the subject of an investigation to be informed of the outcome of that investigation. The provision as currently drafted refers to report-backs on investigations only to the heads of “places or premises” and makes this report-back discretionary through the use of the word “may”.

## **Proceedings respecting the furnishing of information**

27. A proceeding may not be instituted against a person by reason of his or her compliance with a requirement of Children’s Ombudsperson to furnish information or produce any record or thing, or by reason of answering any question in an investigation by the Children’s Ombudsperson.

The wording of section 27 needs to be clarified, as it should not prohibit criminal proceedings against a person if the information provided to the Children’s Ombudsperson discloses a crime. For example, people engaged in the selling of children under the guise of adoption should not be protecting against criminal prosecution just because this is revealed through information which they provided to the Children’s Ombudsperson. However, this would have to be addressed in such a way as to respect the constitutional right of accused persons not to be compelled to give testimony against themselves – such as by allowing the criminal proceedings without allowing the specific information provided to the Children’s Ombudsperson to be introduced into evidence. If this provision is intended only to protect against victimisation for compliance with the law on the Children’s Ombudsperson, then it needs to be worded more carefully to ensure that it is not overbroad.

## **Proceedings against Children’s Ombudsperson**

28. A proceeding may not be instituted against the Children’s Ombudsperson for an act done in good faith in the performance of a duty or in the exercise of a power under this Act, or for any neglect or default in the performance or exercise in good faith of such duty or power.

## **Confidentiality in respect of reports made under this Chapter**

29. Any report made by the Council, the ministries or the Children’s Ombudsperson in terms of this Act must not abrogate legal professional privilege, and must not disclose the name of any child who is the subject of the investigation or proceeding, or any identifying information as to a child investigation, any parent or guardian of the child, or any complainant.

## Offences and penalties relating to Children’s Ombudsperson

30. A person commits an offence if that person –

- (a) hinders or obstructs the Children’s Ombudsperson in the performance of his or her functions or the exercise of his or her powers;
- (b) without lawful excuse, refuses or fails to answer any question put by an children’s ombudsperson;
- (c) intentionally furnishes false and misleading information to the Children’s Ombudsperson; or
- (d) falsely claims to be the Children’s Ombudsperson.

(2) A person convicted of an offence contemplated in subsection (1) is liable to a fine not exceeding N\$20 000 or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment.

All of the powers, duties, functions, protections and penalties relating to the Children’s Ombudsperson need to be extended to his or her staff as well, as the Children’s Ombudsperson will certainly need to delegate some work to staff members to operate effectively.

### INDEPENDENCE

The Children’s Ombudsperson provision is weakened by its failure to include any detailed language regarding the independence of the Children’s Ombudsperson from the rest of government. In this regard, the Children’s Ombudsperson provision could mirror the Ombudsman provision in Chapter 10, Article 89 of the Namibian Constitution. Below is potential language for insertion into the current draft, based on the Constitutional language:

- (1) The Children’s Ombudsman shall be independent and subject only to the Constitution and laws of Namibia.
- (2) No member of government, the Child Welfare Advisory Council or any other person or entity shall interfere with the Children’s Ombudsperson in the exercise of his or her functions. All organs of the State, particularly those charged with the care and protection of children, shall accord such assistance as may be needed for the protection of the independence, dignity and effectiveness of the Children’s Ombudsperson.

### LEGAL CAPACITY TO ACT ON BEHALF OF CHILDREN

Unlike the Children’s Ombudsperson, the Namibian Ombudsman has the capacity to bring actions in court in order to remedy violations of Namibian’s rights under the Constitution. The constitutional requirement that the person appointed as Ombudsman be either a judge or a legal practitioner qualified to appear in any Namibian court further strengthens the ability of the Ombudsman to bring legal actions in protection of Constitutional rights. Namibia’s Ombudsman’s Act elaborates on this capacity by including two remedies which can be pursued through the courts amongst the potential actions to be taken after conclusion of an investigation or enquiry:

- bringing proceedings in a Court of competent jurisdiction for an interdict or some other suitable remedy to secure the termination of the offending action or conduct or the abandonment or alteration of the offending procedures; or
- bringing proceedings to interdict its enforcement by challenging the validity of such legislation or regulation if the offending action or conduct is sought to be justified by subordinate legislation or regulation which is grossly unreasonable or otherwise ultra vires.

The Committee which monitors the UN Convention on the Rights of the Child has said that such institutions “should have the power to support children taking cases to court, including the power (a) to take cases concerning children’s issues in the name of the national human rights institution and (b) to intervene in court cases to inform the court about the human rights issues involved in the case.”

Thus, the Legal Assistance Centre recommends that the Namibian Children’s Ombudsperson should have the power to legally represent children and children’s rights and interests in court, both by representing the child as a party to a case and by intervening in appropriate ways in cases where children’s rights are implicated, even though no affected child is a party to the case.

## PART III PROBATION OFFICERS

### Probation officers

31. The Minister may designate social workers who comply with prescribed requirements as probation officers or may appoint as many persons as he or she considers necessary as probation officers to exercise the powers and to perform the duties conferred or imposed by or under this Act or any other law on a probation officer.

(2) A probation officer shall be an officer of every children’s court and magistrate’s court.

(3) Any person appointed as a probation officer under the Children’s Act, 1960 (Act 33 of 1960,) is deemed to have been appointed as a probation officer under this Act.

(5) The requirements to be complied with by persons for appointment, as probation officers are as prescribed.

(5) The Minister may classify probation officers for different purposes in different categories.

(6) Different regulations may be made in respect of different categories of probation officers.

### Powers and duties of probation officers

32. (1) The powers and duties of probation officers include –

- (a) the investigation of the circumstances of an accused with a view to reporting to the court on his or her treatment and committal to an institution, as well as the rendering of assistance to his or her family;

- (b) the rendering of assistance to a probationer in complying with his or her probation conditions in order to improve his or her social functioning;
- (c) the immediate reporting to the court or to the commissioner of child welfare when a probationer does not in any manner comply with or in any manner deviates from his or her probation conditions;
- (d) the reporting to the court or the commissioner, in such manner and at such time as the court or the commissioner may determine, on the progress and supervision of, and the compliance with the probation conditions in question by, a probationer;
- (e) the reception, assessment and referral of an accused and the rendering of early intervention services and programmes, including mediation and family group conferencing;

The Namibian draft, unlike the South African law on which it is modelled, does not provide for family group conferencing – which makes this reference to it confusing.

- (j) the investigation of the circumstances of an accused and the provision of a pre-trial report recommending the desirability or otherwise of prosecution;
- (k) the investigation of the circumstances of a convicted person, the compiling of a pre-sentencing report, the recommendation of an appropriate sentence and the giving of evidence before the court.

These seem to be general powers and duties and not just relevant to children. If this is what is intended, the Child Care and Protection Act seems an odd place for this provision as opposed to the Criminal Procedure Act or some other law. The section of the Children’s Act 33 of 1960 on probation officers (section 58) refers only to duties relating to children.

(2) A person who opposes or wilfully hinders or obstructs a probation officer or a volunteer in the exercise of his powers or the performance of his duties or functions shall be guilty of an offence and liable on conviction to a fine not exceeding N\$ 20 000 or to imprisonment for a period not exceeding five years, or to such imprisonment without the option of a fine or to both such fine and such imprisonment.

## Assessment of arrested child

**33.** (1) In this section “assessment” means a process of developmental assessment or evaluation of a person, the family circumstances of the person, the nature and circumstances surrounding the alleged commission of an offence, its impact on the victim, the attitude of the alleged offender in relation to the offence and any other relevant factor;

(2) Any arrested child who has not been released must be assessed by a probation officer as soon as reasonably possible, but before his or her first appearance in court in terms of section 50(1)(c) of the Criminal Procedure Act 51 of 1977 (Act 51 of 1977), but if the child has not yet been assessed when brought before the court, the court may authorise the extension of the period within which the assessment must take place by periods not exceeding seven days at a time following his or her first court appearance.

# CHAPTER 4

## PARENTING PLANS

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### Parenting plans

33. (1) The co-holders of parental responsibilities and rights in respect of a child may agree on a parenting plan determining the exercise of their respective responsibilities and rights in respect of the child.

The term “parental responsibilities and rights” is not defined. It presumably refers to parental authority in the form of custody, guardianship and access. The reference to “parental responsibilities and rights” should be defined or changed so that it is clear in the Namibian context.

(2) If the co-holders of parental responsibilities and rights in respect of a child are experiencing difficulties in exercising their responsibilities and rights, those persons, before seeking the intervention of a court, must first seek to agree on a parenting plan determining the exercise of their respective responsibilities and rights in respect of the child.

(3) A parenting plan may determine any matter in connection with parental responsibilities and rights, including –

- (a) where and with whom the child is to live;
- (b) the maintenance of the child;
- (c) contact between the child and –
  - (i) any of the parties; and
  - (ii) any other person; and
- (d) the schooling and religious upbringing of the child.

(4) A parenting plan must comply with the best interests of the child standard as stated in section 4.

- (5) In preparing a parenting plan the parties must seek –
- (a) the assistance of a legal representative, social worker or psychologist; or
  - (b) mediation through a social worker or other suitably qualified person.

The draft as currently worded requires the intervention of a third party. One question for discussion is whether outside assistance should be required if the parties to the plan are able to reach mutual agreement without outside intervention. For example, parents who live apart might make an agreement about contact with the child even if they are not in dispute, as a way to clarify their intentions and prevent the possibility of future conflict. In South Africa, third party involvement is required only where there is some dispute between co-holders of parental responsibilities and rights.

## Parenting plan to be in writing

34. (1) A parenting plan –

- (a) must be in writing and signed by the parties to the agreement; and
- (b) subject to subsection (2), may be registered with a legal representative or made an order of court.

The requirement that a parenting plan must always be in writing contrasts to the oral *or* written agreement that unmarried parents may make on who will be the child's custodian (as legislated in the Children's Status Act 6 of 2006).

(2) An application by co-holders of parental responsibilities and rights for the registration of a parenting plan or for it to be made an order of court must –

- (a) be in the prescribed format and contain the prescribed particulars; and
- (b) be accompanied by –
  - (i) a copy of the plan; and
  - (ii) a statement by –
    - (aa) a legal representative, social worker or psychologist contemplated in section 33(5)(a) to the effect that the plan was prepared after consultation with such legal representative, social worker or psychologist; or
    - (bb) a social worker or other appropriate person contemplated in section 33(5)(b) to the effect that the plan was prepared after mediation by such social worker or such person.

(3) A parenting plan registered with a legal representative may be amended or terminated by the legal representative on application by the co-holders of parental responsibilities and rights who are parties to the plan.

## REGISTRATION OF PARENTING PLANS

The draft does not specify which courts have jurisdiction to register parenting plans, although it says that parenting plans may be amended or terminated by either the Children's Court or High Court. It would be unusual to give a Children's Court the power to amend or terminate an order made by the High Court without making this power explicit, so presumably the power to register an agreement in the first instance is intended to rest with the Children's Court. This needs to be clarified.

The purpose of registration with a legal practitioner is not clear, as this would not make the parenting plan enforceable in a court. The draft seems to suggest that a parenting plan made between parties who were not in dispute can simply be registered with a legal practitioner, whilst a parenting plan made between parties who were in dispute and required third party assistance to negotiate the agreement is best made into an order of court. However, the distinction between the two options for registration is not clear in the draft.

The Namibian draft substitutes the term "legal representative" for the term "Family Advocate" used in the South African law. The Namibian draft defines "legal representative" merely as "a legal practitioner as defined in section 1 of the Legal Practitioners Act, 1995 (Act No. 15 of 1995)". This is very different from the South African concept of "Family Advocate". In South Africa, a Family Advocate is an advocate (ie a specialised legal practitioner) who is appointed to the position by the Minister of Justice on the basis of his or her "involvement in or experience of the adjudication or settlement of family matters". The Family Advocate is thus an Officer of the Court employed by the Department of Justice & Constitutional Development, who acts as an advisor to the Court and as a mediator between family members involved in family law cases.

Several potential problems arise because of the substitution of "legal representative" for "Family Advocate":

- The use of the term "representative" implies that the legal practitioner is representing one of the parties rather than acting as a neutral arbiter.
- Who will pay the legal representative? If one of the parties pays while the other cannot afford to share the costs, this could interfere with the concept of neutrality.
- Many legal practitioners will not have skill or experience in family matters
- It seems unwise to allow a private legal practitioner to register and amend an agreement, without some public record.

In Namibia, the task of registering and amending parenting plans should at the very least fall to a Notary Public (a legal practitioner who has passed a special examination to demonstrate advanced knowledge of certain types of legal agreements, such as ante-nuptial contracts), and there should be a clear procedure for maintaining a record of such parenting plans. The Legal Assistance Centre recommends that registration should be possible only at a Children's Court, and coupled with simple, low-cost enforcement procedures.

## Amendment of parenting plan

35. (1) A parenting plan that was made an order of court may be amended or terminated only by an order of court on application –

- (a) by the co-holders of parental responsibilities and rights who are parties to the plan;
- (b) by the child, acting with leave of the court; or
- (c) in the child's interest, by any other person acting with leave of the court.



(2) An application in terms of subsection (1) may be made to a children’s court or the High Court within whose area of jurisdiction the child concerned is ordinarily resident.

(3) The court hearing an application contemplated in subsection (1) may grant the application unconditionally or on such conditions as it may determine, or may refuse the application, but an application may be granted only if it is in the best interests of the child.

(4) When considering an application contemplated in subsection (1) the court must be guided by the principles set out in Chapter 2 to the extent that those principles are applicable to the matter before it.

(5) The court may for the purposes of the hearing order that –

(a) a report and recommendations of a family advocate, a social worker or other suitably qualified person must be submitted to the court;

Experience with a similarly-worded provision in South Africa has indicated that the reference to a “suitably qualified person” is too vague, and that the law or its regulations should spell out the qualifications of suitably qualified persons. This could perhaps include persons with experience in mediation, child psychologists and others.

(b) a matter specified by the court must be investigated by a person designated by the court;

(c) a person specified by the court must appear before it to give or produce evidence; or

(d) the applicant or any party opposing the application must pay the costs of any such investigation or appearance.

(6) The court may –

(a) appoint a legal representative to represent the child at the court proceedings; and

(a) order the parties to the proceedings, or any one of them, or the state if substantial injustice would otherwise result, to pay the costs of such representation.

There are elaborate provisions for amending or terminating a parenting plan which has been made into a court order, in contrast to a complete lack of procedural formalities for amending or terminating a parenting plan which is registered by a “legal representative” in terms of section 34(3) above. This is particularly problematic since it is not clear how to choose between the two routes for registration, and particularly as registration of the parenting plan at all is completely optional in terms of section 34(1)(b). The kinds of interventions suggested seem more suitable to a situation where the parties are in dispute and unable to reach agreement even with the assistance of third parties, rather than as aids to amendment of a parenting plan. In South Africa, the procedure in question applies to the process of making parenting plans into an order of court in the first place, and not to amendments and terminations of such plans. However, even in South Africa, problems with the drafting of this section have been cited.

### **ENFORCEMENT**

The draft Bill is for the most part silent on the effect and enforcement of parenting plans. There are already procedures in the Children's Status Act 6 of 2006 for dealing with disputes between unmarried parents about custody, guardianship and access. These are designed to be simple and inexpensive procedures which need not entail the services of a legal practitioner. One option would be to make analogous procedures available for making, enforcing and amending parenting plans – with alterations to the procedures outlined in the Children's Status Act if necessary to ensure appropriate mediation and participation of children. It would be easiest for both members of the public and children's court personnel if there is one basic procedure for addressing family disputes of similar nature.

# CHAPTER 5

## CHILDREN'S COURT AND COURT PROCEEDINGS

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### PART I

#### CHILDREN'S COURT AND COMMISSIONERS OF CHILD WELFARE

#### **Children's court and commissioners of child welfare**

**36.** (1) For the purpose of this Act, every magistrate's court is a children's court and has jurisdiction on any matter arising from the application of this Act for its area of jurisdiction.

(2) A children's court has similar status of a magistrate's court at a district level.

(3) Every magistrate appointed for a district is a commissioner of child welfare for that district and every additional and assistant magistrate is an additional and assistant commissioner of child welfare for that district.

(4) For the purposes of this Act, the Magistrate's Commission may assign magistrates as dedicated commissioners for a specific children's court or for more than one children's court.

(5) A commissioner is subject to the Magistrate's Act.

(6) A commissioner must preside over every session of a children's court.

(7) A commissioner must promote and protect the best interests of a child who comes before a children's court in terms of this Act or any other law.

(8) The commissioner of the children's court must perform such functions as may be assigned to him or her under this Act or any other law.

(9) The Minister responsible for justice must ensure that commissioners receive training regarding the implementation of this Act and in their specific duties and functions before assuming any duty or function under this Act.

#### **Geographical area of jurisdiction of children's court**

**37.** (1) The children's court that has jurisdiction in a particular matter is –

(a) the court of the area in which the child involved in the matter is ordinarily resident; or

- (b) if more than one child is involved in the matter, the court of the area in which any of those children is ordinarily resident.

(2) Where it is unclear which court has jurisdiction in a particular matter, the children's court before which the child is brought has jurisdiction in that matter.

The principle should be to give jurisdiction to the court which is most convenient for the child and least likely to divide the child from his or her caretakers. For example, one could have a situation where a child who is ordinarily resident in Oshakati is living in Windhoek with other relatives. It would not make sense to require the child to return to Oshakati for a court proceeding which might end up changing the child's ordinary residence to Windhoek through a new ruling on custody or alternative care. In the Children's Act 33 of 1960, a child in need of care or protection could be brought before a children's court in the district where the child "resides" or "happens to be".

## Referral of children by other court for investigation

**38.** (1) If it appears to any court in the course of proceedings that a child involved in or affected by those proceedings is in need of care and protection, the court must order that the question whether the child is in need of care and protection be referred to a designated social worker for an investigation contemplated in section 60.

The corresponding provision in the South African law contains a useful subsection on suspension of proceedings which should perhaps be included here (with appropriate modifications to suit Namibia):

- (2) If, in the course of any proceedings in terms of the Administration Amendment Act, 1929 (Act No. 9 of 1929), the Matrimonial Affairs Act, 1953 (Act No. 37 of 1953), the Divorce Act, the Maintenance Act, the Domestic Violence Act, 1998 (Act No. 116 of 35 1998) or the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998), the court forms the opinion that a child of any of the parties to the proceedings has been abused or neglected, the court –
- (a) may suspend the proceedings pending an investigation contemplated in section 155(2) into the question whether the child is in need of care and protection; and
  - (b) must request the Director for Public Prosecutions to attend to the allegations of abuse or neglect.

The Legal Assistance Centre suggests that a similar provision be added to the Namibian draft to cover proceedings relating to divorce, maintenance or any proceedings under the Children's Status Act (which could include custody, guardianship or access questions). The option of suspending proceedings would be very useful in proceedings about divorce, custody, guardianship and access, as the outcome of the social worker investigation would be likely to affect the disposition of the underlying proceeding.

(2) A court issuing an order in terms of subsection (1) may also order that the child be placed in place of safety if it appears to the court that this is necessary for the safety and welfare of the child.

(3) The best interests of the child must be the determining factor in any decision whether a child in need of care and protection should be removed and placed in a place of safety, and all relevant facts must for this purpose be taken into account including the safety and welfare of the child as the first priority.

## Pre-hearing conferences

**39.** (1) If a matter brought to or referred to a children's court is contested, the court may order that a pre-hearing conference be held with the parties involved in the matter in order to –

- (a) mediate between the parties;
- (b) settle disputes between the parties to the extent possible; and
- (c) define the issues to be heard by the court.

(2) Pre-hearing conferences may not be held in the event of a matter involving the alleged abuse or sexual abuse of a child.

(3) The child involved in the matter may attend and may participate in the conference unless the children's court decides otherwise.

- (4) The court may –
  - (a) prescribe how and by whom the conference should be set up, conducted and by whom it should be attended;
  - (b) prescribe the manner in which a record is kept of any agreement or settlement reached between the parties and any fact emerging from such conference which ought to be brought to the notice of the court; and
  - (c) consider the report on the conference when the matter is heard.

The Legal Assistance Centre suggests that pre-hearing conferences should be facilitated by persons trained in mediation techniques. Otherwise, it is possible that parties who are financially weaker or feel vulnerable in some way may make agreements that they are not really comfortable with. It may also be difficult to ensure equal bargaining positions if one party has a legal representative while the other does not.

## Lay-forums

**40.** (1) The children's court may, where circumstances permit, refer a matter brought or referred to a children's court, order a lay forum hearing, which may include

- (a) mediation by a social worker, a social service worker or other suitably qualified person;  
or

This subsection refers to both a social worker and a social service worker. The distinction between the two is not clear.

- (b) a traditional authority, as defined in the Traditional Authorities Act, 2000 (Act No. 25 of 2000),

in an attempt to settle the matter by way of mediation out of court.

The South African law requires that the court take certain factors into account before ordering the parties to resort to a lay forum:

- (a) the vulnerability of the child;
- (b) the ability of the child to participate in the proceedings;
- (c) the power relationships within the family; and
- (d) the nature of any allegations made by parties in the matter.

(2) Lay-forums may not be held in the event of a matter involving the alleged abuse or sexual abuse of a child.

(3) The children's court may –

- (a) prescribe the manner in which a record is kept of any agreement or settlement reached between the parties and any fact emerging from such conference which ought to be brought to the notice of the court; and
- (b) consider a report on the proceedings before the lay-forum to the court when the matter is heard.

#### **ISSUES RELATING TO LAY FORUMS**

The child involved has a right to attend a pre-hearing conference unless the children's court decides otherwise. But the provision on lay-forums is silent on child participation. Failing to include the child in this context would seem to violate the principle of allowing children to participate in decisions which affect them.

The same concerns about mediation discussed in connection with pre-hearing meetings arise in connection with lay forums. It would be possible in theory to train Namibian social workers and auxiliary social workers in mediation skills, but it might not be realistic to place this new duty on an already overstretched profession. However, if the parties must pay for private mediators, then the quality of the service may be different for persons in different economic positions.

Another set of issues relates to the option of referring disputes to traditional authorities. Whilst the positive role of traditional authorities in settling disputes is recognised, it could be argued that where parties are subject to customary law, they already had the chance to approach a traditional

forum or a children's court to resolve their dispute; if they chose the children's court in the first place, is it sensible to send them away and suggest that the matter be resolved with the assistance of a traditional leader? Another complication is that in some Namibian communities, women reportedly feel disadvantaged in some traditional forums in comparison to men, in areas such as their right to speak or their confidence to speak freely in this environment.

Since mediation works best when parties engage in it voluntarily, it might be better to allow the children's court to suggest mediation as an option but without empowering the court to insist that the parties attempt this against their will. It may be that power relationships are such that women, children or other vulnerable parties may fear that they will be pressured to agree to something they are not comfortable with if they are forced to attempt mediation before being able to assert their rights in court.

Parties should certainly be encouraged to use court cases as a last resort for settling family disputes in a more informal and amicable manner, but this should perhaps be accomplished by means of referrals by the court to willing parties rather than by means of court orders – particularly given the fact that mediation as an alternative method of dispute resolution is not yet well-established in Namibia.

One other issue to be addressed is who will carry the costs of an alternative forum (if any) where this is ordered by the court. In South Africa, the South African Law Reform Commission proposed that there should be a specific budget for this.

## Settling of matters out of court

41. (1) If a matter is settled out of court and the settlement is accepted by all parties involved in the matter, the clerk of the children's court must submit the settlement to the children's court for confirmation or rejection.

- (2) The court must consider the settlement and, if it is in the best interests of the child, may –
  - (a) confirm the settlement and make it an order of court;
  - (b) before deciding the matter, refer the settlement back to the parties for reconsideration of any specific issues; or
  - (c) reject the settlement.

## Appeals

42. (1) Any party involved in a matter before a children's court may appeal against any order made or any refusal to make an order, or against the variation, suspension or rescission of such order of the court to the High Court having jurisdiction.

(2) An appeal in terms of subsection (1) must be noted and prosecuted as if it were an appeal against a civil judgment of a magistrate's court, subject to subsection (3).

(3) The children's court is bound by the law as applicable to magistrates' courts when exercising criminal jurisdiction in respect of matters it may adjudicate upon.

Subsection (3) is misplaced and belongs in the provision on jurisdiction.

## PART II

# CHILDREN'S COURT PROCEEDINGS AND RULES

### Children's court proceedings and rules

**43.** (1) Except as is otherwise provided in this Act, the Magistrates' Courts Act, and the rules made in terms of that Act, including the rules made by Rules Board under section 25 of that Act, apply, with the necessary changes required by the context, to the children's court with regard to –

- (a) appointment and functions of staff members and officers of the court;
- (b) issue and service of process;
- (c) appearance in court of legal practitioners;
- (d) conduct of proceedings;
- (e) execution of judgements; and
- (f) imposition of penalties for non-compliance with orders of court, obstruction of execution of judgements and contempt of court.

(2) A children's court may, in addition to the orders it is empowered to make in terms of this Act –

- (a) grant interdicts and auxiliary relief in respect of any matter it may adjudicate upon in terms of this Act;
- (b) extend, withdraw, suspend, vary or monitor any of its orders;
- (c) impose or vary time deadlines with respect to any of its orders;
- (d) make appropriate orders as to costs in matters before the court; and
- (e) order the removal of a person from the court after noting the reason for the removal on the court record.

(3) A children's court may for the purposes of this Act estimate the age of a person who appears to be a child in the prescribed manner.



## Adjournments

44. (1) The proceedings of a children's court may be adjourned only –

- (a) on good cause shown, taking into account the best interests of the child;
- (c) for a period of not more than 30 days at a time.

(2) A commissioner of a children's court may excuse any person from appearing at adjournment proceedings.

## Monitoring of court orders

45. (1) A children's court may monitor –

- (a) compliance with an order made by it in a matter; or
- (b) the circumstances of a child following an order made by it.

(2) For purposes of monitoring compliance with an order made by a children's court or the circumstances of a child following an order, the court –

- (a) when making that order, may order –
  - (i) any person involved in the matter to appear before it at any future date; or
  - (iii) reports by a designated social worker be submitted to the court within a specified period or from time to time as specified in the order;
- (b) at any time after making an order or when a report of non-compliance mentioned in subsection (4) is referred to it, may call or recall any person involved in the matter to appear before it.
- (3) When a person appears before the court in terms of subsection (2) the court may –
  - (a) inquire whether the order has been or is being complied with, and if not, why the order has not been complied with or is not being complied with;
  - (b) confirm, vary or withdraw the order; or
  - (c) enforce compliance with the order, if necessary through a criminal prosecution in a magistrate's court.

(4) Any person may report any alleged non-compliance with an order of a children's court, or any alleged worsening of the circumstances of a child following a court order, to the clerk of the children's court, who must refer the matter to a presiding commissioner for a decision on possible further action.

This provision would fit more logically near the end of the section on procedure.

## Clerks of children's court

46. (1) Subject to the laws governing public service, the minister responsible for justice may, for every children's court, appoint one or more persons as clerks of the children's court, who must –

- (a) at any proceedings of the children's court to which they are attached, perform the functions as may be prescribed by or under this Act or any other law; and
- (b) generally assist that court in performing its functions.

(2) If a clerk is for any reason unable to act as such or if no clerk has been appointed under subsection (1) for any children's court, the presiding commissioner of that court may assign, after consultation with Chief: Lower Courts, any competent staff member in the ministry responsible for matters relating to justice, to act as a clerk for as long as the clerk is unable to act as such or until a clerk is appointed under that subsection.

(3) For purposes of giving full effect to this Act persons may be appointed as clerks of the children's court for one or more children's courts.

This section would fit better right after the section on Commissioners of Child Welfare. Although dedicated clerks would be ideal, it would seem to make practical and financial sense in some locations for the existing clerk of the court to also act as the clerk of the children's court. To allow for this, the provision above could say "appoint or designate" clerks of court, as in the corresponding South African provision. Subsection (2) might technically allow for this, but does not seem aimed at this purpose. Although the draft does not mention specialised training for clerks as it does for Commissioners of Child Welfare in section 36(9), it is essential that clerks also have the necessary skills to perform their tasks effectively.

## Assessors

47. (1) A commissioner may, subject to subsection (2), request the assistance one or more persons (hereinafter referred to as assessors) who in his or her opinion, may be of assistance in any matter which may be considered at the court proceedings at which the commissioner is presiding.

(2) Assessors must only be summoned if it is necessary for the administration of justice to do so and only in respect of prescribed matters.

(3) The assessor referred to in subsection (1), must have the necessary knowledge of, and experience in matters relating to the proceeding for which his or her assistance is required.

(4) In considering whether summoning assessors under subsection (1) would be expedient for the administration of justice, the presiding commissioner must take into account –

- (a) the best interest of the child concerned; and
- (b) any other matter or circumstance which he or she may deem to be indicative of the desirability of summoning an assessor or assessors.

(5) An assessor may not hear any evidence unless the assessor takes an oath or makes an affirmation, administered by the presiding commissioner, that the assessor will on evidence placed before assessor give a true decision on issues to be tried.

(6) An assessor who takes an oath or makes an affirmation becomes, subject to subsection (7) and (8), a member of the children's court.

(7) A decision or finding of fact is the decision or finding of the children's court, but when the commissioner sits with only one assessor, the decision or finding of the commissioner is, in the case of a difference of opinion, the decision or finding of the children's court.

(8) The presiding commissioner alone must decide on any question of law or on any question as to whether a matter constitutes a question of law or a question of fact, and for this purpose the commissioner may sit alone.

(9) An assessor who is not in the full-time employment of the State is entitled to such allowances, as the minister responsible for justice, in consultation with the minister responsible for finance, may determine in respect of expenses incurred by him or her in connection with his or her attendance at the trial and in respect of his or her services as assessor.

(10) Section 147 of the Criminal Procedure Act, 1977 applies with necessary changes where an assessor dies or becomes in the opinion of the presiding commissioner of child welfare incapable of continuing to act as an assessor.

The Task Force previously assembled by the Ministry to advise on refining an earlier draft Bill suggested that the section on assessors should add authorisation for the Minister to determine from time to time in regulations whether the use of assessors will be **required** in certain categories of cases. This could be useful if Commissioners are later found to be struggling with some of their new responsibilities under the Act.

## Children's court environment

- 48.** The children's court hearings must, as far as is possible, be held in a room which –
- (a) is furnished and designed in a manner aimed at putting children at ease;
  - (b) is conducive to the informality of the proceedings and the active participation of all persons involved in the proceedings without compromising the prestige of the court;
  - (a) is not ordinarily used for the adjudication of criminal trials; and

- (d) is accessible to disabled persons and persons with special needs.

## Proceedings private

49. (1) Proceedings of a children's court are closed and may be attended only by –
- (a) the child involved in the matter before the court and any other party in the matter;
  - (b) a person who has been instructed in terms of this Act by the clerk of the children's court to attend those proceedings;
  - (c) the legal representative of a person;
  - (d) a person who obtained permission to be present from the commissioner of the children's court; and
  - (e) the designated social worker served with a notice of hearing.

### PRIVACY VERSUS PARENTS' RIGHTS

The Children's Act 33 of 1960 provides that no one can be present at proceedings of a children's court except persons whose "presence is necessary in connection with the proceedings of that court" or "a parent or the guardian or a person *in loco parentis* of a child whose presence is necessary as aforesaid (or the attorney or counsel of such a child, parent, guardian or person *in loco parentis*)" or a person who has been granted permission to be present by the presiding officer.

The pros and cons of automatically authorising the presence of parents or guardians (who are not already parties to the matter) should be discussed; there could be a provision authorising the court to exclude them if this would be in the best interests of the child – such as where there was a history of child abuse – and in fact, section 43(2)(e) of the draft Bill already authorises the court to remove any person from the hearing after noting the reasons on record.

Section 6(3) of the draft Bill says: "If it is in the best interests of the child, the child's family must be given the opportunity to express their views in any matter concerning the child". Section 66(1) requires that all parents be given notice of a pending child protection hearing. These provisions need to be harmonised with the right to attend the proceedings. It should be noted that a parent could be given an opportunity to express an opinion without necessarily attending the proceedings together with the child.

This issue should also be discussed with respect to the child's primary caretaker.

The corresponding provision in the South African Children's Act also allows the presence of "a person performing official duties in connection with the work of the court or whose presence is otherwise necessary for the purpose of the proceedings". A similar provision should probably be added to the Namibian draft.

- (2) The clerk of the children's court may, on the directions of the commissioner by written notice in the prescribed manner, request a party in a matter before a children's court, a family member of a child involved in the matter or a person who has another interest in the matter, to attend the proceedings of the children's court.

(3) The person in whose physical control the child is must ensure that the child attends those proceedings except if the clerk of the children’s court or the court directs otherwise.

No sanctions are specified in respect of subsections (2) and (3) so it is not clear how they would be enforceable. It is not covered in the section 177 on offences and penalties, although some of the cross-references in this provision are clearly in error. The Legal Assistance Centre suggests that the penalties should be coupled with the relevant section instead of being placed in a single section at the end, which is confusing and less user-friendly.

(4) The presiding commissioner must explain to the children, parents and any other person with an interest in the proceedings, who appear before him or her, the nature and significance of the proceedings, and the explanation must be in a manner that can be understood as far as possible by the person to whom it is directed so as to ensure participation to the full extent of such person’s abilities.

The last three subsections above do not pertain to the privacy of the proceedings. The Legal Assistance Centre suggests that they should be moved to separate sections on “attendance at proceedings” and “explaining the proceedings”. Clear headings will make the Act more user-friendly.

## Participation of children

50. (1) The commissioner presiding in a matter before a children’s court must –

- (a) allow a child involved in the matter to express a view and preference in the matter if the court finds that the child, given the child’s age, maturity and stage of development and any special needs that the child may have, is able to participate in the proceedings and the child chooses to do so;
- (b) record the reasons if the court finds that the child is unable to participate in the proceedings or is unwilling to express a view or preference in the matter; and
- (c) intervene in the questioning or cross-examination of a child if the court finds that this would be in the best interests of the child.

(2) A child who is a party or a witness in a matter before a children’s court must be questioned through an intermediary as provided for in section 193 of the Criminal Procedure Amendment Act of 2004 if the court finds that this would be in the best interests of that child.

### VULNERABLE WITNESS PROVISIONS

The current draft has several provisions aimed at making the court experience less traumatic for children who are involved. A better alternative might be to incorporate the entire comprehensive set of provisions which apply to young child witnesses in criminal cases, to proceedings in the Children’s Courts.

Namibia's Criminal Procedure Amendment Act 24 of 2003 provides the following protections for vulnerable witnesses:

- **alternative venues for trials**, so that they can held in environments which are less intimidating than courtrooms
- **testifying behind one-way screens** or by means of closed-circuit television (with such facilities already available in several courtrooms)
- **support persons to accompany witnesses while they are testifying**, so that (for example) a young child could speak to the court while sitting on the lap of a family member
- **strict limitations on the use of irrelevant cross-examination to badger witnesses**
- **cross-examination through the presiding officer or an intermediary**, to make sure that lawyers do not try to intimidate or confuse a witness
- **more possibilities for using information given by a young child prior to the trial**, such as statements to social workers or police officers, to avoid the necessity of asking the child to repeatedly recount the details of a traumatic experience.

These provisions could be made applicable to all proceedings in Children's Courts, so that child-friendly court facilities could be fully utilised. Harmonising the two would also make the job of Magistrates easier, since they could get used to one procedure for dealing with children instead of applying two similar but different systems.

(3) The court –

(a) may, at the outset or at any time during the proceedings, order that the matter, or any issue in the matter, be disposed of separately and in the absence of the child, if it is in the best interests of the child; and

(b) must record the reasons for any order in terms of paragraph (a).

Section 50 of the draft Bill overlaps with section 5, which could be confusing. For example, section 5 states that "views expressed by the child must be given due consideration", but this section does not give any guidance to the court on how to deal with the child's views. The requirement that the child's views be given due consideration should be repeated in section 50, for clarity.

## Legal representation

**51.** (1) A person who is a party in a matter before a children's court is entitled to appoint a legal representative of his or her own choice and at his or her own expense.

(2) Where a child involved in a matter before the children's court is not represented by a legal representative, and the court is of the opinion that it would be in the best interests of the child to have legal representation, the court must refer the matter to the Director of Legal Aid referred to in section 3 of the Legal Aid Act, 1990 (Act No. 29 of 1990).

(3) The Director of Legal Aid contemplated in subsection (1) must deal with a matter contemplated in that subsection in accordance with that Act, read with the changes required by the context.

## LEGAL REPRESENTATION FOR CHILDREN

The South African Children's Act follows a very similar approach to the Namibian draft Bill. However, the South African legislation is bolstered by section 28(1)(h) of the South Africa Constitution, which says "every child has the right to have a legal practitioner assigned by the state and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result."

The draft South African Bill proposed by the South African Law Reform Commission contained the following provision:

### **Legal representation of children**

(1) A child involved in a matter before a child and family court is entitled to legal representation, despite section 77.

(2) (a) A child may appoint a legal representative of own choice and at own expense to represent the child in such matter.

(b) If a legal representative appointed in terms of paragraph (a), does not serve the interests of the child in the matter or serves the interests of any other party in the matter, the court must terminate the appointment.

(3) If no legal representative is appointed in terms of subsection (2) (a), the court must inform the parent or care-giver of the child or a person who has parental responsibilities and rights in respect of the child, if present at the proceedings, and the child, if the child is capable of understanding, of the child's right to legal representation.

(4) If no legal representative is appointed in terms of subsection (2) (a) after the court has complied with subsection (3), or if the court has terminated the appointment of a legal representative in terms of subsection (2) (b), the court may, subject to subsection (5), order that legal representation be provided for the child at the expense of the state.

(5) The court must order that legal representation be provided for the child at the expense of the state if –

- (a) it is requested by the child;
- (b) it is recommended in a report by a social worker or an adoption social worker;
- (c) it appears or is alleged that the child has been abused or deliberately neglected;
- (d) any recommendations of a social worker who has investigated the circumstances of the child that the child be placed in alternative care, is contested by –
  - (i) the child;
  - (ii) a parent or care-giver of the child;
  - (iii) a person who has parental responsibilities and rights in respect of the child; or
  - (iv) a would-be adoptive parent, foster parent or kinship care-giver of the child;
- (e) two or more adults are contesting in separate applications for the placement of the child with them;
- (f) any other party besides the child is or is to be legally represented at the hearing;
- (g) the court has terminated the appointment of a legal representative in terms of subsection (2) (b);
- (h) in any other situation where it appears that the child will benefit substantially from representation either in regard to the proceedings themselves or in regard to achieving the best possible outcome for the child; or
- (i) substantial injustice would otherwise result.

(6) The court must record its reasons if it declines to issue an order in terms of subsections (4) or (5).

(7) A child who must be represented at state expense must be represented by –

- (a) a family advocate;
- (b) a child and family law practitioner whose name appears on the Family Law Roster and instructed by the senior family advocate of the area; or

- (c) the child and family court registrar, if it is an urgent matter which does not allow for the appointment of a person referred to in paragraph (a) or (b).
- (8) If the court makes an order in terms of subsection (4), the clerk of the court must, subject to subsection (7) (c), request the senior family advocate of the area to instruct a family advocate or a legal practitioner on the Family Law Roster, to represent the child.

The Namibian Task Force charged to assist with refinements to an earlier draft of the Bill recommended the following provision on legal representation:

**Legal representation**

- (1) A children’s court-
  - (a) shall appoint a legal representative to assist, throughout the proceedings before it, any child who is the subject of any proceedings under this Part in the following instances-
    - (a) where it is requested by the child, with due regard to the child’s level of maturity
    - (b) where it is recommended in a report by a social worker
    - (c) where there is evidence or allegations of sexual, physical or emotional abuse
    - (d) where the placement recommended by a social worker is contested by the child, a parent or guardian, a primary caretaker or a would-be foster parent or adoptive parent
    - (e) where two or more adults are contesting in separate applications for placement of the child with them
    - (f) where any other party besides the child will have legal representation at the hearing
    - (g) in any situation where it appears that the child would benefit substantially from legal representation either as regards the proceedings themselves or as regards achieving in the proceedings the best possible outcomes for the child; and
  - (b) may make a recommendation that the state should grant legal aid to an adult party to any proceedings under this Part if that party cannot afford legal representation on their own.
- (2) Any party to proceedings in a children’s court may be represented by a legal representative.

**PROSECUTORS AS CHILDREN’S COURT ASSISTANTS**

Under the current Children’s Act 33 of 1960, children appearing before children’s court are most often assisted in practice, if at all, by prosecutors who are children’s courts assistants by virtue of their posts as prosecutors. Prosecutors serve a similar function in maintenance cases, where they act as maintenance officers to assist complainants. The theory behind using prosecutors for multiple duties in this way is that it is an efficient means to ensure that legal services are available throughout Namibia, in areas where private legal practitioners may be thin on the ground. The key counterargument to this approach is that it places a heavy workload on prosecutors, who are already over-burdened with their criminal work, and makes scheduling difficult.

The current Children’s Act 33 of 1960 also authorises the Minister of Justice to appoint dedicated children’s court assistants for children’s court proceedings “who may adduce any available evidence relevant to those proceedings and who may at such proceedings cross-examine any witness giving evidence thereat whom he did not call, and who shall generally assist the said court in performing its functions”. However, it appears that there are no dedicated children’s court assistants in place in Namibia, meaning that only prosecutors are available to serve these functions when necessary. There is no provision for dedicated children’s courts assistants, or for prosecutors to serve this function, in the draft Child Care and Protection Bill.



The Legal Assistance Centre recommends that prosecutors continue to be automatically designated as children's court assistants who can act to assist children in children's court proceedings if legal representation is not readily available or if the state budget for this purpose is exhausted, in addition to the appointment of dedicated children's court assistants where possible. The Task Force assembled by the Ministry of Gender Equality and Child Welfare to revise an earlier draft Bill also recommended that the practice of using children's court assistants should continue.

#### **STATE FUNDING FOR CHILDREN'S REPRESENTATION**

To avoid confusion, the Legal Assistance Centre suggests that there needs to be a specific dedicated explanation regarding how state funding of legal representation for children will work, either in the Child Care and Protection Act itself or in the form of an appropriate amendment to the Legal Aid Act.

#### **GUIDELINES FOR LEGAL PRACTITIONERS**

The draft Bill should provide explicitly for regulations incorporating guidelines to provide clarity on attorney-child relationships for children's legal representatives.

## **Witnesses**

**52.** (1) The clerk of a children's court must, summons a person to give evidence or produce any book or document at any proceedings of that court, on request by –

- (a) the presiding commissioner, on behalf of the court;
- (b) a person likely to be affected by any order that may be made by a children's court; or
- (c) a legal representative acting on behalf of person referred to in paragraph (b).

(2) A summons referred to in subsection (1) must be served on the person concerned as if it were a summons to give evidence or to produce a book or a document at a criminal trial in a magistrate's court.

(3) Sections 188 and 189 of the Criminal Procedure Act, read with such changes as the context may require, apply to a person who has been summonsed in terms of subsection (1) or required by the presiding commissioner of oath to give evidence.

## **Witness fees and allowances**

**53.** (1) Witness fees and allowances payable to witnesses in criminal proceedings in a magistrate's court must, subject to subsection (2), be paid out of state funds to a person who is summonsed in terms of section 52(1)(a) and who complied with that summons.

(2) A person summonsed in terms of section 52(1)(b) or (c) is not entitled to an allowance from state funds except if the presiding commissioner of child welfare orders that such allowance be paid.

## Publication of children's court proceedings

54. (1) A person may not publish in any manner, except with the permission of the commissioner, given in the interest of justice, any information relating to the proceedings of a children's court which reveals or may reveal the name or identity of a child who is or was a party or a witness in the proceedings.

(2) A person who contravenes subsection (1) commits an offence and is liable on conviction to a fine not exceeding N\$20 000 or to imprisonment for a period not exceeding five years, or to both the fine and imprisonment.

## Confidentiality of records of children's court proceedings

55. Records of the proceedings of a children's court are confidential, and may only be disclosed in the following circumstances:

- (a) for the purpose of performing official duties in terms of this Act;
- (b) in terms of a court order if the court finds that disclosure is compatible with the best interest of the child; or
- (c) for the purpose of review or appeal.

There should be a provision allowing for access to court records for the purposes of monitoring and research, provided that no identifying information about any of the parties is revealed. Otherwise, it will not be possible to monitor the implementation of the law effectively. For example, the Child Welfare Advisory Council might want to commission a study of the operation of the children's courts which would require access to the records of proceedings.

### POSSIBLE ADDITIONAL PROVISIONS

There are several useful recommendations on children's court procedure in the South African Law Commission Discussion Paper and in the South African Children's Act 38 of 2005 which should be considered in respect of Namibia.

**(1) Who may approach a children's court?** The South African Children's Act lists the following as persons who may approach the court on any matter which falls within the jurisdiction of a children's court:

- (a) a child who is affected by or involved in the matter to be adjudicated;
- (b) anyone acting in the interest of the child;
- (c) anyone acting on behalf of a child who cannot act in his or her own name;

- (d) anyone acting as a member of, or in the interest of, a group or class of children; and
- (e) anyone acting in the public interest.

This could be very important for Namibia where the rules on “standing” (meaning who has the right to approach a court on particular cases) are even narrower than in South Africa.

**(2) Participation of interested persons:** The South African Children’s Act allows for certain persons with an interest in the child in question – even if they are not parties – to give evidence and (with the permission of the Commissioner) to question or cross-examine witnesses:

- (a) a child involved in the matter;
- (b) a parent of the child;
- (c) a person who has parental responsibilities and rights in respect of the child;
- (d) a care-giver of the child;
- (e) a person whose rights may be affected by an order that may be made by the court in those proceedings; and
- (f) a person who the court decides has a sufficient interest in the matter.

It seems useful to give all persons who have a close connection with the child a chance to participate, in order to ensure that all relevant information is before the court. A similar provision should be considered for the Namibian law.

**(3) Inquisitorial nature of proceedings:** The South African Children’s Act contains a provision intended to emphasise the fact that the presiding officer should direct and control children’s court proceedings, rather than relying on the parties to direct the case in an adversarial fashion:

(1) The presiding officer in a matter before a children’s court controls the conduct of the proceedings, and may –

- (a) call any person to give evidence or to produce a book, document or other written instrument;
- (b) question or cross-examine that person; or
- (c) to the extent necessary to resolve any factual dispute which is directly relevant in the matter, allow that person to be questioned or cross-examined by –
  - (i) the child involved in the matter;
  - (ii) the parent of the child;
  - (iii) a person who has parental responsibilities and rights in respect of the child;
  - (iv) a care-giver of the child;
  - (v) a person whose rights may be affected by an order that may be made by the court in those proceedings; or
  - (vi) the legal representative of a person who is entitled to a legal representative in those proceedings.

It might be advisable to state even more explicitly the Commissioner’s duty to control the proceedings and take responsibility for ensuring that all relevant information is presented, with the least amount of trauma to the child.

**(4) Private discussions with child:** It might be useful to give the Commissioner discretion to consult in private with a child (either a child-party or a child-witness), provided that this is found necessary to achieve a proper resolution of the case. If the power is exercised, the Commissioner should be required to record in writing the reasons for deciding to meet with the child in private. For example, the child may be frightened to speak about abuse in front of an abuser, or unwilling to speak honestly about his or her parents in a negative way. The draft Bill provides that children’s court proceedings will be closed to the public, but the child might be afraid to speak in front of other persons who are parties. Since children’s court proceedings are not criminal matters, this would probably raise no constitutional problems. Where the Commissioner exercises the power

to meet with a child in private, the Commissioner should have unfettered discretion to decide whether any other person should be present. The draft already allows the Commissioner to order that any person be removed from the court (section 43(2)(e)), but this may be more drastic than what is required in some situations – which could be a brief consultation with the child in private, to discuss reasons for a child’s apparent discomfort, for example. (If it is determined that there could be constitutional problems with the suggestion that the presiding officer could meet with the child in private, then an alternative would be to give the court explicit authority to adjourn for further social worker investigation if during the enquiry there is reason to believe that the child is afraid to speak openly because of abuse, etc. The court could also be given authority to refer the child to a psychologist or other appropriate expert at state expense in such circumstances.)

**(5) Emergency maintenance grants:** The South African Law Reform Commission recommended that children’s courts should be able to provide short-term emergency maintenance (out of a limited budget provided for this purpose) to a child who is in urgent need – for example, in a case where a grant would remove the need to place the child in alternative care (which would be much more expensive to the state). This emergency procedure would be a stop gap measure, giving the relevant persons time to apply for an ordinary state grant through the usual channels. The South African Law Reform Commission recommended that the emergency grant be in the form of a lump sum, or a monthly payment for a maximum period of 4 months. This very practical idea should be considered for Namibia.

**(6) Temporary maintenance orders:** For similar reasons the South African Law Reform Commission recommended that children’s courts should be able to make maintenance orders (or at least temporary maintenance orders) for maintenance payments by private individuals if evidence of the necessity of such an order has been adduced in line with the provisions of the Maintenance Act. This would be similar to the temporary maintenance orders which courts can combine with protection orders under the Combating of Domestic Violence Act.

**(7) Domestic violence protection orders:** The South African Law Commission recommends that children’s courts should be able to issue interim protection orders or protection orders in cases of domestic violence. The same could be done in respect of Namibia’s Combating of Domestic Violence Act. It makes sense to provide for a combined procedure if the relevant evidence is before the court, as this might reduce the number of times the child in question has to participate in court proceedings. It is also possible that the issue of a protection order might take away the need to remove the child from the home. Allowing for hearings on protection orders to take place simultaneously with children’s court hearings would also be cost-effective, by taking away the need for duplicative court processes.

# CHAPTER 6

## PREVENTION AND EARLY INTERVENTION SERVICES

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### **The Minister's duties**

56. The Minister must –

- (a) ensure the provision of prevention and early intervention services to children and families; and
- (b) ensure the provision of such facilities and programs as the Minister considers necessary for the provision of prevention and early intervention services,

in order to promote and further the objectives of this Act.

(2) For the purpose of subsection (1), the Minister may, out of money appropriated by parliament for that purpose, allocate funding to a provider of prevention and early intervention services, who complies with the prescribed requirements.

### **Prevention and early intervention services**

57. (1) Early intervention services means services which are –

- (a) designed to serve the purposes mentioned in subsection (3); and
- (b) provided to families where there are children identified as being vulnerable to or at risk of harm or removal into alternative care.

(2) Prevention services means services –

- (a) designed to serve the purposes mentioned in subsection (3); and
- (b) provided to families with children in order to strengthen and build their capacity and self-reliance to address problems that may or are bound to occur in the family environment which, if unchecked, may lead to statutory intervention.

(3) Prevention and early intervention services must focus on –

- (a) preserving a child's family structure;

- (b) developing appropriate parenting skills and the capacity of parents and care-givers to safeguard the well-being and best interests of their children;

The corresponding provision in the South African law includes the phrase “including the promotion of positive, non-violent forms of discipline”. Given the Namibian law’s even stronger stance on corporal punishment, it would seem appropriate to include that phrase here. The South African law also includes a separate point on

*developing appropriate parenting skills and the capacity of parents and care-givers to safeguard the well-being and best interests of children with disabilities and chronic illnesses.*

The Legal Assistance Centre recommends including a similar provision in the Namibian law, given that appropriate care of children with chronic illnesses and disabilities is also a common family problem in Namibia.

- (c) establishing appropriate interpersonal relationships within the family;
- (d) promoting the well-being of children and the realisation of their full potential;

The corresponding South African provision includes a more specific provision:  
*providing psychological, rehabilitation and therapeutic programmes for children.*

- (e) preventing the neglect, abuse or inadequate supervision of children and preventing other failures in the family environment to meet children’s needs;
- (f) preventing the recurrence of problems in the family environment that may harm children or adversely affect their development;
- (e) diverting children away from the criminal justice system; and
- (h) avoiding the removal of a child from the family environment.

### **SPECIFIC INTERVENTIONS**

The original discussion around this section in Namibia envisaged services which would address alcohol and drug abuse and addiction, as these are often inextricably intertwined with child abuse and neglect. These might be encompassed under some of the broader headings, but it would be better to name them explicitly: “providing information to families about the dangers of alcohol and other drugs and assisting them to address abuse of alcohol or other drugs by any family member”. Another possible addition might be assistance with gambling addictions.

The following additional points are included in the corresponding South African provision:

- (2) Prevention and early intervention programmes may include –
- (a) assisting families to obtain the basic necessities of life;
- (b) empowering families to obtain such necessities for themselves;
- (c) providing families with information to enable them to access services;

- (d) supporting and assisting families with a chronically ill or terminally ill family member;
  - (e) early childhood development; and
  - (f) promoting the well-being of children and the realisation of their full potential.
- (3) Prevention and early intervention programmes must involve and promote the participation of families, parents, care-givers and children in identifying and seeking solutions to their problems.

These additional goals should be considered for inclusion in the Namibian context as well.

Consideration should also be given to explicitly recognising poverty as a contributor to family problems, with corresponding interventions such as assistance with registration for state maintenance grants or involving the family in appropriate income-generating initiatives. In this regard, one of the earliest drafts of the Namibian Child Care and Protection Bill (prepared in 1994 for the Ministry of Health and Social Services) included a draft set of regulations which articulated the following goals:

## **2. Goals of preventative programmes and services**

- (1) The Minister shall, after consultation with the Child Welfare Advisory Council as provided in section 9, implement and co-ordinate the involvement of other pertinent Ministries and non-governmental organisations in preventative programmes and services to support Namibian families and children.
- (2) The goals of such programmes shall include, without being limited to –
- (a) reduction of the incidence of child neglect and abuse through community-based “life skills” education programmes and the provision of family-strengthening services, such as childcare, instruction in child development and techniques for child discipline;
  - (b) alcohol and other drug counselling;
  - (c) job skills training or other training related to income-generation; and
  - (d) basic food and nutrition programmes.
- (3) To the extent possible, these preventive programmes shall train families in leadership and management skills so as to empower local communities and make the programmes self-sustaining.

## **ROLE OF LOCAL AUTHORITIES**

The table of contents above refers to a provision on “Assignment of functions to local authorities” which does not appear in the text of this section of the act. It would be useful to detail the role of local authorities here, although one question would be whether state funds would be provided for local services. In South Africa, the Minister is required to develop a comprehensive national strategy for the provision of such services, which must encompass provincial strategies as well.

## **LINKS TO COURT ORDERS**

The South African law includes a very important link which is missing in the Namibian approach. In South Africa, the law allows for a court order for participation in a prescribed intervention, as an alternative to the removal of a child from the family environment, where the child is in no imminent danger. After a period extending for no longer than six months, a social worker must report on any progress made; the court will then decide whether to remove the child, or to extend the order for the relevant early intervention service for another six months:

### **Court may order early intervention programme**

**148.** (1) Before making an order concerning the temporary or permanent removal of a child from that child’s family environment, a children’s court may order –

- (a) the provincial department of social development, a designated child protection organisation, any other relevant organ of state or any other person or organisation

- to provide early intervention programmes in respect of the child and the family or parent or care-giver of the child if the court considers the provision of such programmes appropriate in the circumstances; or
- (b) the child's family and the child to participate in a prescribed family preservation programme.
- (2) An order made in terms of subsection (1) must be for a specified period not exceeding six months.
- (3) When a case resumes after the expiry of the specified period, a designated social worker's report setting out progress with early intervention programmes provided to the child and the family, parent or care-giver of the child, must be submitted to the court.
- (4) After considering the report, the court may –
- (a) decide the question whether the child should be removed; or
  - (b) order the continuation of the early intervention programme for a further specified period not exceeding six months.
- (5) Subsection (1) does not apply where the safety or well-being of the child is seriously or imminently at risk.

While there may not be appropriate programmes for all family problems in all parts of Namibia, this option should perhaps be available for situations where there is an appropriate programme. The Legal Assistance Centre suggests that the Namibian law should allow for a court order for participation in an appropriate and existing programme as an alternative to the removal of the child, if the child is not at immediate risk.



# CHAPTER 7

## CHILD PROTECTION PROCEEDINGS

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There are references above to a “child in need of care or protection” rather than just a “child in need of protection”. There is probably no usefulness in separating these two concepts, meaning that a single category of children “in need of protection” would suffice. Whatever choice is made, the text must be harmonized on this point to avoid confusion.

### Child in need of protection

58. (1) In this Chapter, a child is in need of protection, if the child –
- (a) is abandoned or orphaned and insufficient provision has been made for the care of the child;
  - (b) is engaged in behaviour that is, or is likely to be harmful and the parent or guardian or the person in whose care the child is, is unable or unwilling to control that behaviour;
  - (c) lives or works on the streets or begs for a living;
  - (d) lives in or is exposed to circumstances which may seriously harm the physical, mental or social welfare of the child;
  - (e) is in a state of physical or mental neglect;
  - (f) may be at risk if returned to the custody of the parent, guardian or the person in whose care the child is, as there is reason to believe that he or she will live in or be exposed to circumstances which may seriously harm the physical, mental or social welfare of the child; or
  - (g) is being, or is likely to be maltreated or abused by a person having the care custody, control or charge of the child.

#### CRITERIA FOR IDENTIFYING A CHILD IN NEED OF PROTECTION

Various other countries include in their similar definitions a child who –

- is addicted to a dependence-producing substance and is without any support to obtain treatment for such dependency;
- has been exploited or lives in circumstances that expose the child to exploitation;
- has a parent or guardian who does not exercise proper guardianship;
- is destitute;

- is under the care of a parent or guardian who, by reason of criminal or drunken habits, is unfit to have the care of the child;
- is wandering and has no home or settled place of abode or visible means of subsistence;
- is begging or receiving alms, whether or not there is any pretence of singing, playing, performing, offering anything for sale or otherwise, or is found in any street, premises or place for the purpose of begging or receiving alms;
- frequents the company of any reputed thief or reputed prostitute;
  - (Ghana provides that a child shall not come within the scope of the provisions on frequenting the company of a prostitute if the only prostitute that the child associates with is the child's mother and she exercises proper guardianship and care to protect the child from corrupt influences.)
- is found acting in a manner from which it is reasonable to suspect that he is, or has been, soliciting or importuning for immoral purposes;
- is below the age of criminal responsibility and is involved in an offence other than a minor criminal matter;
- has no parent or the parent has been imprisoned;
- with parents or guardian who find difficulty in parenting;
- is truant or is falling into bad associations;
- is prevented from receiving education;
- is subjected or is likely to be subjected to female circumcision or early marriage or to customs and practices prejudicial to the child's life, education and health;
- is being kept in any premises which, in the opinion of a medical officer, are overcrowded, unsanitary or dangerous;
- is exposed to domestic violence;
- is pregnant;
- is terminally ill, or whose parent is terminally ill;
- is disabled and is being unlawfully confined or ill treated;
- has been sexually abused or is likely to be exposed to sexual abuse and exploitation including prostitution and pornography;
- is engaged in any work likely to harm his or her health, education, mental or moral development;
- is displaced as a consequence of war, civil disturbances or natural disasters;
- is a member of the same household as a child against whom any such offence has been committed, or is a member of the same household as a person who has been convicted of such an offence against a child; or
- is engaged in the use of, or trafficking of drugs or any other substance that may be declared harmful by the Minister responsible for health.
- experiences such serious differences with parents, guardians or other persons having the care of the child that the physical, mental or emotional wellbeing of the child is being seriously impaired;
- has behaved, or is behaving, in a manner that –
  - is, or is likely to be, harmful to the physical or mental or emotional wellbeing of the child or to others; and
  - the child's parents or guardians, or the persons having the care of the child are unable or unwilling to control;
- has committed an offence or offences the number, nature, or magnitude of which is such as to give serious concern for the wellbeing of the child;

South Africa also provides that any child who is a **victim of child labour** or who **lives in a child-headed household** must be investigated as potential child in need of care or protection. New Zealand covers the situation where the ability of the child to form a significant psychological attachment to the person caring for the child is being seriously impaired because of the **number of occasions on which the child has been placed in the care of another person**.

It has been pointed out in South Africa that it is advisable to have “**child-centred**” **criteria rather than criteria that focus on “care-giver fault”**. Although some criteria – such as those pertaining to child abuse – cannot avoid a focus on care-giver fault, it is recommended that most criteria should focus on the child’s situation.

It has also been noted that **criteria which focus on the past or the present** will be easier to apply and prove, in contrast to those which require a prediction about the future (such as assessments of future risk). Again, although professional judgements about possible future harm will have to be made in some circumstances, it is recommended that the criteria should be conceptualised to focus on past and present circumstances where possible.

## Reporting in respect of a child in need of protection

**59.** (1) Despite the provisions of any other Act, if a person, including person who performs professional or official duties with respect to children, has information that leads that person to reasonably believe that a child is or may be in need of protection, that person must report the information to a designated social worker or a member of police.

One technical problem here is that the general public is given the duty to report a suspicion that a child may be “in need of protection”. This is a legal conclusion, and not something that a member of the public should be expected to be able to assess. It would be better to confine the mandatory reporting requirement to factual grounds based on the criteria for finding a child in need of protection – such as a suspicion that the child is being abused or mistreated, neglected or abandoned.

(2) For the purpose of subsection (1), a person who performs professional or official duties includes a school principal, teacher, medical practitioner, dentist, psychologist, registered nurse, physiotherapist, speech therapist, occupational therapist, traditional health practitioner, legal practitioner, social worker, religious leader, member of staff at a place of safety, place of care, children’s home or an educational and vocational centre and a labour inspector.

One alternative would be to limit the legal obligation to report to those with professional duties towards children. The provision as drafted places this legal duty on all persons. The question then is: what is the purpose of defining a separate category of persons who perform legal and professional duties towards children? In South Africa, the distinction is made because professionals who work with children **MUST** report suspected abuse or neglect while any person **MAY** report a suspicion that a child is in need of protection.

(3) Subsection (1) applies notwithstanding that the information on which the belief is founded is confidential and its disclosure is prohibited under any other law, but this section does not apply to legal professional privilege.

“Legal professional privilege” does not cover all attorney-client communications. This could create particular ethical problems for an attorney who is representing a child.

(4) A person is not subject to civil liability for any report required or permitted in terms of this section, except if the person knowingly makes the report or provides information which is false or misleading.

(5) Any person who fails to comply with subsection (1) commits an offence and is liable on conviction to a fine not exceeding N\$20 000 or to imprisonment for a period not exceeding five years or to both the fine and imprisonment.

## Duty to investigate

60. (1) A designated social worker to whom a report is made under section 59 must –

- (a) make an initial assessment of the report and ensure the safety and welfare of the child, if the child's safety or welfare is at risk;
- (b) report the matter to the Director of Social Services in the Ministry; and
- (c) investigate the truthfulness of the report and if satisfied that it is in the best interest of the child not to be removed from his or her home or place where he or she resides, but that the removal of an alleged offender from such home or place would secure the safety and welfare of the child, request a member of police to take the steps referred to in section 63.

What happens if the social worker is of the opinion that it **is** in the child's best interests to be removed? This probably needs to be linked to sections 61 and 62.

(2) A member of police to whom a report is made under section 59, must –

- (a) make an initial assessment of the report and ensure the safety and welfare of the child, if the child's safety or welfare is at risk; and
- (b) without delay, notify a designated social worker of the report and any action taken as contemplated in paragraph (a).

The social worker should probably then be obliged to take the steps set out in subsection (1).

(3) If, after an investigation contemplated in subsection (1), a designated social worker finds that the child who is the subject of the investigation is in need of protection –

This wording seems problematic, since the finding that a child is "in need of protection" is a legal determination made by the Children's Court in terms of section 69(3). It does not seem that the social worker could make this conclusion after the investigation, before the enquiry has even taken place. The investigation might conclude, rather, that the child is at risk or is likely to be found "in need of protection".

- (a) prevention and early intervention services may be provided to the child or the child's family; and
- (b) the designated social worker must apply for a child protection hearing.

#### **WHO CAN CARRY OUT AN INVESTIGATION?**

The draft Bill says that investigations must be carried out by “designated social workers”. This category of social workers is defined as meaning “a social worker in the service of the State, and who is designated by the Minister for the purpose of this Act”.

The Children's Act 33 of 1960 currently in force in Namibia is more expansive than the draft Bill, referring to “authorised officers”. An authorised officer need not necessarily be a social worker, but can be anyone authorised by a magistrate, Commissioner of Child Welfare, justice of the peace or probation officer to carry out the duties in question. The authorised officer can also be a person employed by an “approved agency”, which refers to any group which the Minister certifies as having the necessary competency. This makes it possible for privately-employed social workers to assist with investigations.

South Africa also uses the term “designated social worker” but give it a broader meaning which includes social workers employed by approved child protection organisations. The South African regulations include criteria for determining suitable persons to investigate child abuse or neglect: A person is suitable to conduct investigations into cases of alleged child abuse or neglect... if such person –

- (a) is a registered social worker or is employed by the Department or a provincial department of social development;
- (b) is employed by a designated child protection organisation;
- (c) has sufficient experience in the field of child protection or is working under the supervision of a person who has at least five years experience in child protection;
- (d) has not been found unsuitable to work with children and has no previous convictions relating to child abuse;
- (e) demonstrates a willingness to enhance his or her skills on a regular basis;
- (f) upholds the rights of the child and children's best interests; and
- (g) is willing to work in a multi-disciplinary team with the objective of securing the best protection plan based on a child's developmental needs.

The South African regulations also include criteria which must be met by child protection organisations before they can be designated for this purpose.

#### **POWERS NEEDED TO CONDUCT EFFECTIVE INVESTIGATIONS**

The draft Bill does not discuss the powers that a social worker might need to conduct an effective investigation. The draft provides for the authorisation of a social worker to search for and remove a child who is in danger, but there are no powers to enable investigations other than in situations where there is already a belief that a child needs to be removed. The Task Force assembled by the Ministry to assist with refining a previous draft of the Bill recommended that a social worker should have –

- (1) the power to carry out an investigation by questioning persons who may have relevant information and by entering and examining private premises for relevant purposes, in accordance with the rules which apply to warrants;

(2) the power to enter homes and other private premises without a warrant in a situation where there is reason to suspect that the delay involved in obtaining the warrant would frustrate the objects of the search;

(3) access to a quick and simple procedure for obtaining a warrant (so that there would be no temptation to circumvent the warrant procedure without good grounds)

(4) the right to be accompanied by a police officer during a search with or without a warrant.

The South African Children's Act 38 of 2005 contains a general provision which applies to all investigations:

#### **50 Investigations**

(1) A children's court may, subject to section 155(9) [which requires the court to consider a social worker report before making a decision as to whether or not a child is in need of care or protection], before it decides a matter, order any person –

(a) to carry out an investigation or further investigation that may assist the court in deciding the matter; and

(b) to furnish the court with a report and recommendation thereon.

(2) An investigation or further investigation must be carried out –

(a) in accordance with any prescribed procedures; and

(b) subject to any directions and conditions determined in the court order.

(3) The court order may authorise a designated social worker or any other person authorised by the court to conduct the investigation or further investigation to enter any premises mentioned in the court order, either alone or in the presence of a police official, and on those premises –

(a) remove a child in terms of sections 47 and 151 [on removal of children to temporary safe care];

(b) investigate the circumstances of the child;

(c) record any information; and

(d) carry out any specific instruction of the court.

(4) In addition to the powers a police official has in terms of the South African Police Service Act, 1995 (Act 68 of 1995), the police official accompanying the designated social worker or other person authorised to conduct the investigation or further investigation may –

(a) enter the premises mentioned in the court order and conduct any search;

(b) question any person;

(c) request the name, address and identification details of any person on or residing or suspected to be residing on those premises;

(d) remove any person, from the child's home or place of normal residence in the manner contemplated in section 153 [removal of alleged offenders] if the police official has a reasonable suspicion that the person –

(i) has caused the child harm; or

(ii) is likely to cause the child harm if the person is not so removed.

(e) record any information; and

(f) carry out any specific instruction of the court.

(5) A police official referred to in subsection (4) may use such force as may be reasonably necessary to overcome any resistance against the entry or search of the premises contemplated in subsection (4) (a), including the breaking of any door or window of such premises: Provided that such police official must first audibly demand admission to the premises and notify the purpose for which he or she seeks to enter such premises.

## GUIDELINES FOR INVESTIGATIONS

The Task Force previously assembled by the Ministry suggested that the law should state that the Ministry must issue guidelines from time to time on procedures for social worker assessments, to ensure consistency of approach and to provide a basis for clear expectations on the part of the community. Those guidelines should include principles such as the following principles recommended for South Africa by the South African Law Reform Commission:

- Assessment should be undertaken by a multi-disciplinary team, and should be holistic and appropriate to the child's culture, language and developmental stage.
- Assessment should be undertaken within a developmental approach which places emphasis on the strengths of the child (and family).
- Assessment should always be undertaken within the family home and/or community unless proved not to be in the best interests of the child.
- Assessment should be done with the child and family and not to them. Family conferencing (and/or community conferencing where appropriate) should be included in the process.
- The process should aim to increase insight and competency and should involve shared decision-making with all relevant role-players.
- Assessment should be based on minimum standards and guidelines for practice.
- Assessment should result in an appropriate referral to a programme of intervention which is regularly reviewed together with the child and family.
- Assessment processes and documentation should be of such a nature and standard that they can be used at the point of reception of any level and do not necessarily need to be repeated (only reviewed) within a 12-month period.
- The process and procedure of reception, assessment and referral should not be ad hoc, regardless of circumstances and time constraints. Whether located in a particular centre or not, this process should recognise the critical impact of any referral decision upon the child and family and should be consistent and thorough.
- Observation and assessment is a process and should continue throughout the young person's participation in the child and youth care system. However, there are particular stages during that period of participation that warrant a comprehensive assessment. For example, at the point of reception, at the point of placement, annually, and at the point of disengagement. A reception/referral interview or an overnight procedure should not be labelled as assessment, but considered to be the first step in a more holistic assessment process.
- The reception and referral process should be rooted within the community and should actively involve the "significant others" in the child's life. Where appropriate, consideration should be given to including the community leaders and volunteers within the team decision-making process.

The regulations issued in South African pursuant to the Children's Act 2005 contain the following guidelines for investigation:

- (i) establish the facts surrounding the circumstances giving rise to the concern;
- (ii) evaluate the child's parental circumstances, including parental characteristics, mental stability, maturity; physical or emotional impairment, substance abuse, capabilities, temperament, employment status, level of support given to the parent or care-giver by friends; the capacity and disposition of the parent or care-giver to give the child guidance and to give adequate and appropriate support to a child with disabilities; emotional bonding between the parent or care-giver and the child; and a history of parental abuse or neglect of the child;
- (iii) evaluate the child's family circumstances, including family violence; inappropriate discipline; dependency; marital stress; temporary or permanent unemployment; and family or parental composition;

- (iv) evaluate the child's environmental circumstances, including poverty; overcrowding; homelessness; isolation; high mobility of the parents; the presence of social, environmental or financial stress; and the type of neighbourhood and community;
- (v) identify sources who may verify the alleged abuse;
- (vi) identify the level of risk that the child's safety or well-being is exposed to, including factors indicating that the child has suffered, or is likely in the near future to suffer, a non-accidental physical injury due to conditions which his or her parent or care-giver has failed to correct, or due to their having failed, to provide adequate protection; that the child is displaying symptoms of emotional damage and the unwillingness of the parent to address the problem or to seek assistance; that the child has been sexually abused by a member of the household; and that the child is in need of medical treatment, without which he or she will suffer severe ill-effects;
- (vii) identify actual and potential protective and supportive factors in the home and broader environment to minimise risk to the child; and
- (viii) decide on the appropriate protective measures or intervention as provided for in the Act.

The guidelines also specify some of the indicators that the child is a child in need of care or protection, so that persons who are carrying out investigations will know what to look for:

- (a) the presence of indicators of physical abuse, including bruises in and around the mouth, face or any other part of the body; grasp marks on the arms, chest or face; variations in bruising colour; black eyes; belt marks; bruising or tears around or behind the ears; cigarette or other burn marks; cuts; welts; fractures; head injuries; fits; convulsions that are not due to epilepsy or high temperature; drowsiness; irregular breathing; vomiting; pain; fever or restlessness;
- (b) the presence of indicators of sexual abuse, including vaginal bleeding; genital lacerations or bruising; penile or vaginal discharge; sexually transmitted infections; abnormal dilation of the vagina, anus or urethra as assessed by a health care professional competent to perform the relevant examination; itching, soreness or unexplained bleeding of the genitals; faecal soiling or retention; pain on passing urine and recurrent urinary tract infections; semen in the vagina, anus, external genitalia or on clothes as determined through recognised forensic procedures; pregnancy; recurrent abdominal pain; difficulty in walking or sitting; withdrawal from peer group activities; deterioration in school work or sudden and quiet behaviour trends in otherwise lively and active children;
- (c) the presence of emotional and behavioural indicators of physical, psychological or sexual abuse, including aggression; physical withdrawal when approached by adults; anxiety; irritability; persistent fear of familiar people or situations; sadness; suicidal actions or behaviour; self-mutilation; obsessional behaviour; neglect of personal hygiene; age or socially inappropriate sexual behaviour or knowledge; active or passive bullying; unwillingness or fearfulness to undress or wearing layers of clothing;
- (d) the presence of developmental indicators of physical, psychological or sexual abuse, including failure to thrive; failure to meet physical and psychological developmental norms; withdrawal; stuttering; unwillingness to partake in group activities; clumsiness; lack of coordination or orientation or observable thriving of children away from their home environment;
- (e) the presence of indicators of deliberate neglect, including underweight; reddish scanty hair; sores around the mouth; slight water retention on the palm of the hands or in the legs; extended or slightly hardened abdomen; thin and dry skin; dark pigmentation of skin, especially on extremities; abnormally thin muscles; developmental delay; lack of fatty tissue; disorientation; intellectual disability; irritability; lethargy or withdrawal;
- (f) a disclosure of abuse or deliberate neglect from the child; or
- (g) a statement relating to a pattern or history of abuse or deliberate neglect from a direct witness relating to the abuse of the child.



If any of these indicators are present, then the person investigating is directed to “assess the total context of the child’s situation in accordance with the following guidelines”:

- (a) many indicators may be non-specific to abuse or neglect;
- (b) a cluster or pattern of indicators as opposed to a single isolated indicator will provide support for a conclusion of abuse or neglect;
- (c) information about specific times of any incidents, places where incidents have taken place and the context within which incidents have taken place, which must be noted in writing, may provide support for a conclusion of abuse or neglect;
- (d) abuse may be unintentional, but failure on the part of the parent or care-giver to prevent abuse of the child may amount to neglect;
- (e) abuse may be physical, psychological or sexual without any visible indicators and is likely to exist if the child continuously reports threats of harm or punishment;
- (f) a series of minor incidents, any of which may, when considered in isolation, not amount to abuse or neglect, may constitute abuse or neglect when considered together;
- (g) the child’s age, personality and temperament should be taken into account; and
- (h) discrepancies in the rendition of incidents by the child and his or her parent or care-giver may either provide or diminish support for a conclusion of abuse or neglect.

The regulations also set out the administrative steps which should be taken by the investigator:

- (a) receive a report alleging the abuse or neglect of a child;
- (b) investigate such report as referred to in the broad risk assessment framework contemplated in regulation 40 within such reasonable time as may be required by the severity of the case, with due regard to the need for post-exposure prophylaxis within 72 hours in cases of sexual abuse;
- (c) if necessary, accompany the child or cause the child to be accompanied to a police station for purposes of laying a complaint;
- (d) if necessary, accompany the child or cause the child to be accompanied to a medical facility for purposes of medical treatment of the child;
- (e) facilitate counselling and support to reduce trauma to the child and his or her family members, and if necessary, refer the child to other relevant disciplines;
- (f) co-ordinate the available and applicable child protection services to ensure the safety and well-being of the child;
- (g) develop and implement a child protection plan in consultation with the child, his or her family and, if required, other applicable disciplines;
- (h) review the child protection plan on a six-monthly basis or earlier, depending on the severity of the abuse or neglect;
- (i) ensure that the prescribed particulars of the child are recorded in Part A of the National Child Protection Register established by Part 2 of Chapter 7 of the Act; and
- (j) take such protective measures as are contemplated in the Act or in guidelines issued by the Department.

## Removal of child with warrant

61. (1) To the extent that this section authorises the interference with the privacy of persons or homes as contemplated in Article 13(1) of the Namibian Constitution, this section is enacted on the authority of Sub-Article (2) of that Article.

(2) If, on evidence given by any person on oath or affirmation before a commissioner it appears that a child who resides in his or her area of jurisdiction is in need of protection, the commissioner must order that the question of whether the child is in need protection be referred to a designated social worker for an investigation contemplated in section 60.

The draft on this point indicates that the evidence would have to be given personally to a Commissioner rather than in the form of a sworn affidavit. Regulations will probably have to clarify how this will work, since this is a preliminary step and not part of a Children's Court enquiry.

(3) When making an order under subsection (2), the commissioner may issue a warrant authorising a member of police a social worker or any other person authorised by the commissioner, to search for and remove a child and place the child in a place of safety if the commissioner is satisfied –

- (a) that the child concerned is in need of protection;
- (b) a person has refused to give access to the child to a designated social worker or a member of police in terms of section 62; and
- (b) that the removal of the child is necessary for the safety and welfare of the child.

(4) A warrant issued in terms of subsection (3) must identify the child in sufficient detail to execute the order.

(5) A person authorised by a warrant under subsection (3) may alone or accompanied by a member of police –

- (a) enter any premises mentioned in the order;
- (b) remove the child from the premises; and
- (c) carry out the instructions of the court.

(6) A person authorised by a warrant issued under subsection (3) may use such force as may be reasonably necessary to overcome any resistance against the entry of the premises contemplated in subsection (5)(a), including the breaking of any door or window of such premises, but the person must first audibly demand admission to the premises and notify the purpose for which he or she seeks to enter the premises.

(7) The person who has removed a child in terms of this section, must –

- (a) without delay, but within 24 hours, inform the fact the child has been removed, to the parent, guardian or the person in whose care the child was before the removal, if that person can be traced; and
- (b) within 24 hours, refer the matter to a designated social worker for investigation; and
- (c) if that person is a social worker report the matter to the Director of Social Services in the Ministry.

(8) The best interests of the child must be the determining factor in any decision whether a child in need of care and protection should be removed and placed in place of safety, and all relevant facts must for this purpose be taken into account, including the safety and welfare of the child as the first priority.

(9) Any person who removes a child in terms of this section must comply with the prescribed procedures.

#### TECHNICAL ISSUES CONCERNING REMOVALS

There are some technical problems with the wording of the provision on removal with a warrant.

**(1) The warrant procedure is tied to the situation where a person initiates a social worker investigation by providing information on oath to the Commissioner stating that a child appears to be in need of care or protection.** But what if a social worker believes that a child needs to be removed in the course of an investigation triggered when a member of the public reports a case to a social worker or to the police in terms of section 59, or when any court which is conducting proceedings that involve or affect a child orders that the question of whether the child is in need of care and protection should be referred for social worker investigation in terms of section 38(1)? The social worker should have to approach the children's court for a warrant for removal whenever the delay occasioned by seeking the warrant would not be dangerous to the child. As this provision is currently worded, the option of issuing a warrant is tied to an order that an investigation be conducted – which makes no sense if the investigation is already underway.

**(2) The standard to be satisfied by the Commissioner is problematic in several ways: (a) The Commissioner should not be expected to make a finding that the child is “in need of protection” in advance of the hearing which is intended to address this question. (b) It does not make sense that the warrant would be premised on a denial of access to the child.** Whether or not state officials can get *access* to the child does not determine whether or not they are going to be allowed to *remove* the child. And it does not make sense to force them to attempt to remove the child with the consent of the person who has custody of the child before approaching the court in the first place, as this could end up putting the child at greater risk. It would make more sense to have the warrant in hand before attempting a removal, then if it can be done cooperatively that is all the better. In the corresponding provision in South Africa, the presiding officer of the court can issue an order for the removal of the child to be placed in temporary safe care “if it appears that it is necessary for the safety and well-being of the child”. Namibia's 1994 draft required that the court could order a removal if satisfied that the child was “at substantial risk of serious harm” (section 33). Such tests would appear to focus on the only factor which is really relevant.

**(3) In the case of removal without a warrant, consideration should be given to the possible removal of the alleged offender from the home as an alternative method for protecting the child.** There is seemingly no reason why this alternative should not be considered in respect of a removal with a warrant if the appropriate information is before the court. Section 63 refers to this option, but it needs to be integrated with the provisions on removal.

**(4) Only removals by social workers must be reported to the Director of Social Work.** Removals by any other person must be immediately referred to a social worker for investigation. It would seem to make sense to require this social worker to report the removal to the Director so that there is a record of all the outcome of *all* removals by warrant for monitoring purposes, to provide comprehensive records for monitoring purposes.

**(5) In the case of a removal without a warrant, the draft Bill requires that the clerk of court be informed right away.** Where the court ordered the removal, it would seem useful to similarly inform the clerk of court once the order has been successfully implemented.

**(6) The person authorised to carry out the removal is authorised to enter the premises named in the order to remove the child. It was noted in South Africa (which has a similar provision) that the law should also allow entry into any premises where the child named in the order is reasonably believed to be.** The child may have been moved, but could still be in urgent danger. (If the person carrying out the removal were a social worker or police, they could perhaps proceed to enter different premises under the procedure for removal without a warrant, but it would be better to make the warrant procedure suffice whenever possible.)

**(7) The draft Bill illogically authorises the use of force by police to enter the premises, but not to overcome resistance to the removal by the child or any other person present.** Minimal force should be authorised in such circumstances as a last resort.

**(8) In South Africa, the children’s court is authorised to initiate an investigation before deciding “any matter”. This would allow for an urgent preliminary social worker investigation into the question of whether or not removal was necessary, for example.** Allowing for such a possibility in the Namibian draft could be useful.

## Removal of child without warrant

**62.** (1) To the extent this section authorises the interference with the privacy of persons homes as contemplated in Article 13(1) of the Namibian Constitution, this section is enacted on the authority of Sub-Article (2) of that Article.

(2) Despite the provisions of section 61, a member of the police or a designated social worker may without a warrant remove a child and place the child in a place of safety if there is reason to believe –

- (a) that the child –
  - (i) is in need of protection; and
  - (ii) needs immediate protection;
- (b) that any delay in obtaining warrant may jeopardise the child’s safety and welfare; and
- (c) that the removal of the child from his or her home environment is the best way to secure the child’s safety and welfare.

The criticisms of the standard applied for removal with a warrant are equally applicable here. The 1994 draft bill suggested the following standard for removal without a warrant: (1) the child faces a substantial risk of serious harm; (2) removal is critically necessary to avoid the harm to the child; and (3) any delay in obtaining a warrant would increase the risk of danger to the child.

- (3) If a social worker has removed a child under subsection (2) the social worker must –
- (a) without delay, but within 24 hours, inform the fact the child has been removed, to the parent, guardian or the person in whose care the child was before removal, if that person can be traced;
  - (b) report the matter to Director of Social Services in the Ministry; and
  - (c) not later than the next court day inform the relevant clerk of the children’s court of the removal of the child.

What must the clerk do with this information? It should be recorded in the relevant file on a prescribed form.

- (4) If a member of police has removed a child under subsection (1), and placed the child in a place of safety the member of the police must, –
- (a) without delay but within 24 hours inform the parent, guardian or the person in whose care the child was before removal, if that person can be traced;
  - (b) refer the matter to a designated social worker for investigation; and
  - (c) not later than the next court day inform the relevant clerk of the children’s court of the removal of the child.

The draft Bill is not explicit, but it seems as if the social worker would also be obliged to commence an investigation into the child’s circumstances, if this is not already underway. This should probably be made explicit so as to leave no doubt.

As discussed in the case of removal with a warrant, the social worker to whom the case is referred should be required to report the removal to the Director of Social work for a complete record.

(5) The best interests of the child must be the determining factor in any decision whether a child in need of protection should be removed and placed in temporary safe care, and all relevant facts must for this purpose be taken into account, including the possible removal of the alleged offender in terms of section 63 from the home or place where the child resides, and the safety and welfare of the child as the first priority.

(6) Misuse of a power referred to in subsection (2) by a member of police constitutes grounds for disciplinary proceedings against such member as contemplated in section 28 of the Police Act, 1990 (Act No. 19 of 1990).

(7) Misuse of a power referred to in subsection (2) by a social worker constitutes grounds for disciplinary proceedings against such social worker as contemplated in section 38 of the Social Work and Psychology Act, 2004 (Act No.6 of 2004).

(8) Any person who removes a child in term of this section must comply with the prescribed procedure.

(9) If a child removed in terms of section 61 or 62, is not returned to the custody of the person who has the right of custody of the child, within 48 hours of being removed, the designated social worker must apply for a child protection hearing within seven days after the date of removal.

Subsection (9) is misplaced since it applies to removal both with and without a warrant.

The provisions of subsections 61(8) (on removal of a child with a warrant) and 62(5) (on removal of a child without a warrant) attempt to achieve the same objective, namely that the safety and welfare of the child should be the first priority during a removal. Yet the provisions of subsection 62(5) appear to be more elaborate. Consideration should be given to aligning the wording of these provisions unless there is a reason for them to be different.

#### TIMING

Will the proposed procedure give time for investigation? This is an accelerated time frame, as the law allows for 30 days for completion of a social worker investigation and report in other situations.

However, this provision must be read together with 65(5), which says that the hearing must be scheduled within 30 days of the social worker completing the report making application for the hearing. This means that the maximum time period which the child could remain in the place of safety pending the hearing would be 37 days – and perhaps more since the hearing can extend over a maximum 90-day period (in terms of section 65(6) if there are postponements.

The 1994 draft included what might be a more appropriate follow-up provision, which allows for a hearing to take place only on the question of temporary removal while the more general hearing is pending. This procedure could be a particularly good safeguard in a case where a child was removed without a warrant:

#### **38. Placement of child pending disposition of case**

- (1) A child removed under section 33 or 34 must be brought before a children's court for a hearing as soon as possible after removal and in no case later than 48 hours after the removal.
- (2) At the removal hearing required under subsection (a), the children's court shall order the child returned to his or her home unless an application to open a children's court file is made under section 40, and the court finds that the grounds for removal continue to be met and orders that the child continue to be kept in a place of safety for a maximum period of 14 days.
- (3) The Commissioner may from time to time order that the child continue to be kept in a place of safety, so long as the grounds for removal are met, until such time as the enquiry under section 41 is concluded or the problems which gave rise to the opening of a children's court file under section 40 are otherwise resolved.
- (4) Where a child has been removed from his or her home, every effort shall be made to hold an enquiry under section 41 within 14 days of the date of removal, and in no case shall such enquiry be held more than three months from the date of removal.

### CONDITIONS OF REMOVAL

The 1994 draft Bill included a provision on “conditions of removal” which required that any child removed from the home environment should be placed with family members as a place of safety, other than those from whom the child was removed of course, unless such a placement is not available or would not be in the best interests of the child. There may however be circumstances where temporary placement with family members would not be safe.

This provision also required that where siblings or any other children raised together in a family relationship are all removed, they must be kept in the same place of safety unless such a placement is not available or would not be in the best interests of the child.

That early draft also made it a criminal offence with a specified sanction for any person who hinders or obstructs any police officer or social worker in the execution of a warrant or in the exercise of his or her powers to remove a child without a warrant. This may be covered by the general section on sanctions at the end of the draft bill (section 177(1)(l)), but it is hard to tell because of the erroneous cross-references. If this is the case, the criminal offence should be listed together with the provisions on removal for clarity.

## Action in respect of alleged offender

**63.** (1) A member of police to whom a report is made in terms of section 59 or to whom a request contemplated in section 60 has been made, may, if he or she is satisfied that it will be in the best interests of the child if the alleged offender is removed from the home or place where the child resides, issue a written notice which –

- (a) specifies the names, surname, residential address, occupation and status of the alleged offender;

Full name and address would seem to be sufficient here; occupation and “status” do not seem relevant.

- (b) calls upon the alleged offender to leave the home or place where the child resides and refrain from entering such home or place or having contact with the child until the court hearing specified in paragraph (c);
- (c) calls upon the alleged offender to appear at a children’s court at a place and on a date and at a time specified in the written notice to advance reasons why he or she must not be permanently prohibited from entering the home or place where the child resides, but the date so specified must be the first court day after the day upon which the notice is issued; and
- (d) contains a certificate under the hand of the member of police that he or she has handed the original of such written notice to the alleged offender and that he or she has explained to the alleged offender the importance thereof.

(2) The member of police must immediately forward a duplicate original of the written notice to the clerk of the children's court.

(3) The mere production to the court of the duplicate original referred to in subsection (2) is prima facie proof of the issue of the original thereof to the alleged offender and that such original was handed to the offender.

(4) Section 55 of the Criminal Procedure Act, applies with the necessary changes, to a written notice handed to an alleged offender in terms of subsection (1).

(5) A children's court before which an alleged offender to whom a written notice in terms of subsection (1) has been issued, appears, may summarily inquire into the circumstances which gave rise to the issuing of the notice.

(6) The court may, after having considered the circumstances which gave rise to the issuing of the written notice and after having heard the alleged offender –

- (a) issue an order prohibiting the alleged offender from entering the home or place where the child resides or from having any contact with the child, or both from entering such home or place and having contact with the child, for such period of time as the court considers appropriate;
- (b) order that the alleged offender may enter the home or the place where the child resides or have contact with the child upon such conditions as would ensure that the best interests of the child are served;
- (c) order that the alleged offender will be responsible for the maintenance of his or her family during the period contemplated in paragraph (a); or
- (d) make such other order with regard to the matter as the court considers appropriate.

What will happen if the alleged offender fails to appear in court on the appointed date? The Children's Court should be empowered to issue a default order in such a case; otherwise the alleged offender will have a motive not to show up.

(7) Misuse of a power referred to in subsection (1) by a member of police constitutes grounds for disciplinary proceedings against such police official as contemplated in section 28 of the Police Act, 1990 (Act No. 19 of 1990).

## **Automatic review of decision to remove a child**

**64.** A decision to remove a child under section 61 or 62 is subject to automatic review by the High Court.



This could be problematic, especially in the case of removal without a warrant, as it is not clear what record there will be to enable the review. Furthermore, any such removal is already subject to reconsideration by the Children's Court at the hearing which must commence within 60 days at the latest – when the court should have more information than was available at the time of the removal. It should also be noted that, in contrast to the requirement of automatic review of the decision to remove a child, there is no provision for automatic review of a decision to remove an alleged offender.

## Application for child protection hearing

65. (1) Before a child is brought before a children's court the designated social worker must within 30 days carry out an investigation of the circumstances of the child concerned and compile a report for submission to the children's court.

The time frame of 30 days should start running from the date on which the investigation was initiated. This is not clear in the draft. South Africa allows 90 days to complete the investigation and compile the report. It has been noted in South Africa that a deadline is essential, as in the past social worker investigations sometimes extended over long time periods. But both the South African law and the Namibian draft fail to say what will happen if the deadline is not adhered to.

The South African Children's Act prescribes the parameters of such social workers reports by regulation. The advantage of this is that reports by social workers will be uniform and much more comprehensive. The Legal Assistance Centre recommends that the Namibia Bill should provide for similar regulations.

(2) If, after an investigation contemplated in this section, the designated social worker finds that the child is not in need of protection, he or she must indicate the reasons for the finding in the report contemplated in subsection (1), which report must be submitted to the children's court for review.

This approach does not appear to envisage any monitoring or follow-up, to see if the recommended services had indeed resolved the problem affecting the child. If there are services which are essential to averting a probability that the child will be determined to be in need of protection, the court should have the power to require participation in these services by court order, to trigger a formal process of monitoring and follow-up. (Compare section 155(8) of the South African Children's Act 2005. The court is empowered in terms of section 70 of the Namibian draft Bill to make certain orders if *the court* determines that a child is not in need of protection after the child protection hearing, but if the *social worker* decides that the child is not in need of protection, the matter will not be before the court.) If the child in question had been removed to a place of safety pending the investigation, then the law should require that the child be returned to the custodian at this stage.

(3) The designated social worker must where necessary indicate in the report contemplated in subsection (1) the measures recommended to assist the family, including counselling, mediation, prevention measures, family reconstruction and rehabilitation, behaviour modification, problem solving and referral to another suitably qualified person or organisation.

(4) If, after an investigation contemplated in subsection (1), the designated social worker finds the child to be in need of protection, the social worker must in the prescribed form apply to the children's court to determine whether the child is in need of protection.

This provision should require that application for the hearing be made immediately upon conclusion of the report, to close off the possibility of delay creeping in between these steps. As for the social worker investigation, the draft is silent on what happens if the prescribed deadlines for the child protection hearing are violated.

(5) On the making of the application for the child protection hearing the children's court must determine the date of the hearing as soon as possible but not later than 30 days from the date on which the application is made, and if the court does not sit on such days, on the next available court day.

(6) A protection hearing must be heard and determined within 90 days from the date on which it commences.

## Notice of hearing

**66.** (1) A children's court must give 14 days notice, of the child protection hearing to the child's parent, which notice must contain –

Must notice be given to one or both parents? Section 1 states that "parent, in relation to a child means a woman or a man in respect of whom parentage has been acknowledged or otherwise established as contemplated in the Child Status Act, 2006, and includes the adoptive parent of a child". But what if one parent has not been involved in the child's life since birth? Or is whereabouts unknown?

- (a) the nature of application;
- (b) the date, time and place of the hearing;
- (c) the basis of the application;
- (e) the reasons for the removal of the child (if any); and
- (f) the types of orders that may be made under section 69 or 70 at the conclusion of the hearing.

(2) The children’s court may, on an oral or written request, designate a person as having sufficient interest in the child protection hearing –

- (a) who is the child’s extended family member; or
- (b) any other person having a close connection with the child.

If such a person is named as a party to the proceedings, this person must certainly be given notice of the hearing – although the draft does not clearly specify this. The draft may contemplate that the person making the request will be the same person named as a party (and so would be before the court already to receive notice of the forthcoming hearing). But this might not always be the case – for example, you could have a situation where the child or the child’s parent suggests that some other family member such as the grandmother should be included in the hearing.

This needs to be harmonized with section 6(3) which says that the child’s “family” must be given an opportunity to express their views in any matter concerning the child and with section 1, which defined family member very broadly as meaning

- a parent of the child;
- any other person who has parental responsibilities and rights in respect of the child;
- a grandparent, brother, sister, uncle, aunt or cousin of the child; or
- any other person with whom the child has developed a significant relationship, based on psychological or emotional attachment, which resembles a family relationship;

One potential concern here is that could be situations where there is no one to make the request. For example, suppose that the child involved is an infant or a very young child, and the parent who has been given notice has reason not to want other family members involved; those other family members might not be aware of the situation at hand. As a safeguard, we suggest that the court should also be allowed to make such a designation on its own motion, on the basis of information in the social worker report, or that the law should clearly empower the social worker to make the request on the basis of information discovered in the investigation.

One idea which should be considered is whether notice and an opportunity to be heard (although not necessarily status as a party) should be given in every case to the child’s “primary caretaker”, who is defined as “a person other than the parent or other legal care-giver of a child, whether or not related to the child, who takes primary responsibility for the daily care of the child with the express or implied permission of the care-giver of the child”. The person who was actually caring for the child on a daily basis immediately prior to the hearing is bound to have an interest in the matter, as well as useful information.

(3) Where a request is made in terms of subsection (2), the court may direct the person making the request to notify the child’s parent and the designated social worker of the request and the court must consider the view of the child’s parents and the designated social worker before making a designation in terms of subsection (2).

This provision requires a person who has requested to be designated as someone who has sufficient interest in the child protection hearing to notify the child’s parent and social worker of the request. This is too informal; this duty of notification should rather rest with the clerk of the court.

(4) A person who has been designated in terms of subsection (3) becomes a party to the child protection hearing.

(5) The children's court must make all reasonable efforts to serve the notice referred to in subsection (1) personally, or by registered post and the court may give directions as to how the notice referred to in subsection (3) must be served.

(6) The children's court must issue a summons directing that the child who is the subject of the hearing be brought before the children's court for the duration of the hearing unless the children's court has reason to believe that the child should not appear due to –

- (a) age;
- (b) ill-health;
- (c) the likelihood that the proceedings will cause undue distress or disturbance to the child; or
- (d) the likelihood that the proceedings will cause a deterioration in the relationship of the child with his or her family.

There could be over-application of the latter two grounds which would undermine the key principle of child participation – particularly in a society where many topics are still considered inappropriate for children. Further guidance on these criteria may be necessary.

#### ADJOURNMENTS

In South Africa, in addition to the general rule that adjournments in children's court matters may not be longer than 30 days, there is a stricter rule for adjournments in child protection hearings. Such adjournments may not be longer than 14 days at a time, and the court is empowered to make a range of orders pertaining to temporary safe care while the matter is pending. The court can order that the child:

- remain in the place of safety where he or she is;
- be transferred to another place of safety;
- remain under the control of the person who was caring for the child prior to the hearing
- be placed under the control of a family member or other relative
- be placed in temporary safe care (if this was not already done).

A similar provision should be considered for Namibia.

## Reports requested by court

67. (1) A children's court may, for the purposes of deciding a matter before it or any issue in the matter, order, if necessary, that a –

- (a) designated social worker carry out a further investigation on the circumstances of the child, and compile a report containing matters the court may require;
- (b) medical practitioner, psychologist, developmental or educational practitioner, to assess a child who is the subject of proceedings and compile a report containing matters the court may require.

The provision on additional reports requested by the court, although generally worded, is contained in the section on children in need of care or protection. It should perhaps be moved to the section on powers of Children's Courts to ensure that it is understood as being available in any Children's Court proceeding.

Since the Children's Court has the power to overrule a parent's refusal of consent for medical treatment in terms of section 165(7) of the draft Bill, that should mean that the court can similarly authorise a medical examination for the purpose of assessment even without parental consent. However, it may be necessary to be more explicit about this since "medical treatment" does not necessarily include "examinations".

The South African Children's Act 38 of 2005 contains a more comprehensive provision on this point. It authorises the court to order "any person" to carry out an investigation and submit a report and recommendations. The court may order a social worker to carry out the investigation, accompanied by a police officer if necessary, and with authority to enter specified premises to investigate the child's circumstances. The social worker may also remove the child if there are legal grounds to do so. The accompanying police officer has power to:

- (a) enter the premises mentioned in the court order and conduct any search;
- (b) question any person;
- (c) request the name, address and identification details of any person on or residing or suspected to be residing on those premises;
- (d) remove any person, from the child's home or place of normal residence in the manner contemplated in section 153 if the police official has a reasonable suspicion that the person –
  - (i) has caused the child harm; or
  - (ii) is likely to cause the child harm if the person is not so removed.
- (e) record any information; and
- (f) carry out any specific instruction of the court.

The police officer is also authorised to use force as reasonably necessary to overcome resistance to an announced intention to enter and search a premises.

This section is complemented by another one on "professional reports", which authorises the court to order certain professionals (social workers, Family Advocates, psychologists, medical practitioners or other suitably qualified persons) to investigate the circumstances of

- (a) the child;
- (b) the parents or a parent of the child;
- (c) a person who has parental responsibilities and rights in respect of the child;
- (d) a care-giver of the child;
- (e) the person under whose control the child is; or
- (f) any other relevant person.

It should be considered whether or not Namibia similarly needs stronger provisions on investigations which are broader with respect to both who can investigate and who can be investigated.

(2) The written report contemplated in subsection (1) must be submitted to the children's court within 5 days before the date of the hearing of the matter.

(3) A copy of the report referred to in subsection (1) must be submitted to the served on the parties at least five days before the hearing.

#### TIMING

There is a possible problem with the timing here. (1) If the court only gets the report 5 days before the hearing, it will not be able to get it to the parties on the same day. (2) The provision as drafted contemplates additional investigations and assessments *prior to the commencement* of the hearing – but it might also be the case that the court needs to adjourn the case to allow for additional investigation or assessment because of issues which come to light during the hearing.

- (4) A person referred to in subsection (1) may, subject to section 68(1) and (2) –
- (a) obtain supplementary evidence or reports from other suitably qualified persons;
  - (b) be required by the court to present the findings of the investigation to the court by –
    - (i) testifying before the court; or
    - (ii) submitting a written report to the court.

(5) Any person requested to report in terms of subsection (2), and who is not in the full-time employment of the state, must be compensated for his or her services in connection with the examination from public funds in accordance with a tariff determined by the minister responsible for justice in consultation with the minister responsible for finance.

## Status of reports

**68.** (1) A written report, purported to be compiled and signed by a medical practitioner, psychologist, designated social worker or other professional person who on the face of the report formed an authoritative opinion in respect of a child or the circumstances of a child involved in a matter before a children's court, or in respect of another person involved in the matter or the circumstances of such other person, is, subject to the decision of the presiding commissioner, on its mere production to the children's court hearing the matter admissible as evidence of the facts stated in the report.

- (2) If a person's rights are prejudiced by a report contemplated in subsection (1) the court must –

- (a) disclose the relevant parts of the report to that person within the prescribed period before to the date of the hearing of the matter if that person is a party to the proceedings; and
- (b) give that person the opportunity –
  - (i) to question or cross-examine the author of the report in regard to a matter arising from the report; or
  - (iv) to refute any statement contained in the report.

The mechanics here are not clear. If the report was sought by the court under section 67, all the parties must already get copies of the entire report 5 days in advance. This would seem to make section 68(2)(a) redundant – unless it refers to persons other than parties.

## Court orders when child in need of protection

**69.** (1) On the completion of a child protection hearing, a children’s court must make an order which is in the best interest of the child.

(2) When making a determination whether a child is in need of protection the court must have regard to the designated social workers report contemplated in section 65.

It might be good for this provision to re-iterate that the court must give due consideration to any views and opinions expressed by the child, or to make an explicit link to the preceding sections on child participation.

- (3) A court which determines that a child is in need of protection may make an order –
  - (a) confirming that the person under whose custody the child is may retain custody of the child, if the court finds that that person is a suitable person to provide for the safety and welfare of the child;
  - (b) that the child be returned to the person under whose care the child was before the child was placed in a place of safety, if the court finds that that person is a suitable person to provide for the safety and welfare of the child;
  - (c) that the person under whose care the child was must make arrangements for the child to be taken care of in a partial care facility at the expense of such person, if the court finds that the child became in need of care and protection because the person under whose care the child was lacked the time to care for the child;

- (d) if the child does not have a parent or care-giver or has a parent or care-giver but that person is unable or unsuitable to care for the child, that the child be placed in –
  - (i) foster care with a suitable foster parent;
  - (ii) a place of safety, pending an application for, and finalisation of, the adoption of the child;
  - (iii) shared care where different care-givers or centres alternate in taking responsibility for the care of the child at different times or periods; or
  - (iv) a children’s home or an educational and vocational centre that provides a programme suited to the child’s needs;
- (e) if the child lives in a child-headed household, that the child remain in that household;
- (f) placing a child in a child-headed household in the care of the child heading the household under the supervision of an adult person designated by the court;
- (g) that the child be placed in a facility designated by the court which is managed by an organ of state or registered, recognised or monitored in terms of any law, for the care of children with disabilities or chronic illnesses, if the court finds that –
  - (i) the child has a physical or mental disability or chronic illness; and
  - (ii) it is in the best interests of the child to be cared for in such facility;
- (h) that the child receive appropriate treatment or attendance, if needs be at state expense, if the court finds that the child is in need of medical, psychological or other treatment or attendance;
- (i) that the child be admitted as an inpatient or outpatient to an appropriate facility if the court finds that the child is in need of treatment for addiction to a dependence-producing substance; or
- (j) interdicting a person from maltreating, abusing, neglecting or degrading the child or from having any contact with the child, if the court finds that –
  - (i) the child has been or is being maltreated, abused, neglected or degraded by that person;
  - (ii) the relationship between the child and that person is detrimental to the welfare or safety of the child; or
  - (iii) the child is exposed to a substantial risk of imminent harm.
- (k) a child protection order, which includes an order –
  - (i) that a child remains in, be released from, or returned to the care of a person, subject to conditions imposed by the court;



- (ii) giving consent to medical treatment of, or to an operation to be performed on, a child;
- (iii) instructing a parent or care-giver of a child to undergo professional counselling, or to participate in mediation, a family group conference, or other appropriate problem-solving forum;

The Namibian draft, unlike the South African law on which it is modelled, does not provide for family group conferencing.

- (iv) instructing a child or other person involved in the matter concerning the child to participate in a professional assessment;
  - (v) instructing a hospital to retain a child who on reasonable grounds is suspected of having been subjected to abuse or deliberate neglect, pending further inquiry;
  - (vi) instructing a person to undergo a specified skills development, training, treatment or rehabilitation programme where this is necessary for the protection or well-being of a child;
  - (vii) instructing a person who has failed to fulfil a statutory duty towards a child to appear before the court and to give reasons for the failure;
  - (viii) instructing an organ of state to assist a child in obtaining access to a public service to which the child is entitled, failing which, to appear through its representative before the court and to give reasons for the failure;
  - (ix) instructing that a person be removed from a child's home;
  - (x) limiting access of a person to a child or prohibiting a person from contacting a child; or
  - (xi) allowing a person to contact a child on the conditions specified in the court order;
- (l) a contribution order in terms of this Act; or
- (m) a supervision order, placing a child, or the parent or care-giver of a child, or both the child and the parent or care-giver, under the supervision of a social worker or other person designated by the court;

The 1994 draft Bill included a somewhat broader option for in-home placements with conditions. It proposed that a court may order that the child remain in or be returned to his or her home "subject to such conditions that the court may find necessary, such as supervision by a social worker and family acceptance of assistance or services designed to help overcome the problems at the basis of the application".

The analogous provision in South Africa (section 155(1)) allows the court, in addition to the specified orders in the list, to make any order which is in the best interests of the child. Namibia should consider a similar "catch-all" provision.

(4) A children's court may withdraw, suspend or amend an order made in terms of subsection (3), or replace such an order with a new order.

(4) The court that makes an order contemplated in subsection (3) may order that the child concerned be kept in place of safety until such time as effect can be given to the court's order.

(5) An order made by the court in terms of subsection (3) –

(a) is subject to such conditions as the court may determine which, in the case of the placement of a child in terms of paragraph (d)(i), (ii), (iii), (iv) or (v) of that section, may include a condition –

(i) rendering the placement of the child subject to supervision services by a designated social worker or authorised officer;

(ii) rendering the placement of the child subject to reunification services being rendered to the child and the child's parents, care-giver or guardian, as the case may be, by a designated social worker or authorised officer; or

(iii) requiring the person in whose care the child has been placed, to co-operate with the supervising designated social worker or authorised officer or to comply with any requirement laid down by the court, failing which the court may reconsider the placement; and

(b) may be reconsidered by a children's court at any time, and be confirmed, withdrawn or amended as may be appropriate.

## Court orders when child not in need of protection

70. If the court determines that the child is not in need of protection, the court may –

(a) dismiss the application and order that the child be returned to the person in whose care the child was, but such order does not constitute a order for the custody of the child; or

(b) issue any of the orders referred to in section 69(3), excluding a placement order, in respect of the child.

Because the court will still have broad powers to make an order in the case where a child is found **not** to be a child in need of protection, there may be objections that this theoretically empowers the court to interfere in even the happiest and safest of homes. It might even be challenged on constitutional grounds as being an interference with the privacy of the home. It would be better to premise this discretion on another conclusion, such as a finding that a child is "at risk", in order to confine the court's power to intervene in some clearly-defined and principled way. In contrast, in South Africa, if the child is found **not** to be in need of care or protection, the court is limited to ordering that the child, if placed in temporary safe care, be returned to the usual abode, or an order pertaining to early intervention services – although this has been criticised as being, on the other hand, too limited.

## Court orders to be aimed at securing stability in child's life

71. (1) Before a children's court makes an order in terms of section 69 for the removal of the child from the care of the child's parent or care-giver, the court must –

- (a) obtain and consider a report by a designated social worker on the conditions of the child's life, which must include –
  - (i) an assessment of the developmental, therapeutic and other needs of the child;
  - (ii) details of family preservation services that have been considered or attempted; and
  - (iii) a documented permanency plan taking into account the child's age and developmental needs aimed at achieving stability in the child's life and containing the prescribed particulars; and

There is a need for greater clarity on the mechanics here. Is this a report from the social worker report on the outcome of the initial investigation? Surely the first report should cover the things listed here. If this is a separate and second report, then this will just drag out the proceedings, as the hearing will have to be postponed while this second report is being prepared. Furthermore, if it is a separate report, then additional time limits will be needed and the Act will have to state what will happen to the child during the interim period while the second report is being compiled. Another problem is that some of the issues which this report are required to cover could not be assessed until after some time had passed. For example, it might not be possible to see if reunification is feasible until some time has passed to see how the family responds to attempted assistance.

- (b) consider the best way of securing stability in the child's life, including whether such stability could be secured by –
  - (i) leaving the child in the care of the parent or care-giver under the supervision of a designated social worker, provided that the child's safety and welfare must receive first priority;
  - (ii) placing the child in a place of safety or a children's home for a limited period to allow for the reunification of the child and the parent or care-giver with the assistance of a designated social worker;
  - (iii) placing the child in alternative care with or without terminating parental responsibilities and rights of the parent or care-giver;
  - (iv) making the child available for adoption; or
  - (v) issuing instructions as to the evaluation of progress made with the implementation of the permanency plan at specified intervals.

One problem here is that adoption may be favoured over long-term foster care by family members unless the option of long-term foster care is specifically included. Such a preference would be a Western bias, however; formal adoption is unpopular in many Namibian communities because it severs a child's ties with the biological family. Consideration should be given to making provision for long-term foster care or kinship care which might be able to provide the child with the same degree of stability as adoption in a manner which is culturally more appropriate.

While the aim of ensuring that children do not languish in limbo is a good one, it may be difficult to stick to permanency plans in an environment where there are early deaths from HIV/AIDS as well as changing household compositions resulting from economic necessity as well as changes in relationships. The law must not be based on a concept of a stable nuclear family composed of married parents and their biological children, which is not the Namibian norm.

(2) A designated social worker facilitating the reunification of a child with the child's family in terms of subsection (1)(b)(ii) must –

- (a) investigate the causes why the child left the family home;
- (b) address those causes and take precautionary action to prevent a recurrence; and
- (c) provide counselling to both the child and the family before and after reunification.

(3) A very young child who has been orphaned or abandoned by its parents must be made available for adoption in the prescribed manner and within the prescribed period except when this is not in the best interests of the child.

(4) When issuing an order involving the removal of the child from the care of the child's parent or care-giver, the court may include in the court order instructions as to the implementation of the permanency plan for the child.

#### **ORDER OF PREFERENCE FOR PLACEMENTS**

The 1994 draft Bill included an order of preference for alternative placements, to place priority on extended family placements and placements in the most home-like environments.

The court was first to consider foster care, giving preference in foster care placements to persons with whom the child has developed a family relationship, even if not related to the child by blood or through marriage, unless such priority would not be in the child's best interests. The draft further specified that a foster care placement involving siblings or other children who have been raised in a family relationship together may not result in the separation of the children unless no other alternative is reasonably available or separation is necessary for the best interests of any of the children. The court was authorised to make a placement in a children's home if foster care is unavailable or inappropriate because of the child's circumstances, or in an educational and vocational training centre if the child was determined to be in need of the care, education, and vocational training provided at such facilities and neither foster care nor a children's home would be appropriate to the child's circumstances. The last option was to place the child under the responsibility of an approved agency (section 45(c)).

### **FAMILY ACCESS TO CHILDREN IN ALTERNATIVE PLACEMENTS**

The 1994 draft Bill included a provision on family access to children in alternative placements:

- (1) To promote family unity and the elimination of the need for state intervention in the family, whenever a child is placed... outside his or her usual home, the children's court shall allow regular access to any or all members of the child's family... and to any other immediate relative of the child, including a step-parent, unless a specific finding is made that such access would be detrimental to the child.
- (2) Conditions on access granted under this section may be imposed in the best interests of the child.

Kenya's Children's Act 2001 also has an access provision:

#### **133. Arrangements for access to children in care.**

- (1) Prior to making a care order, the court shall consider the arrangements the Director has made or proposes to make for affording any individual contact with the child during the term of a care order, and shall invite the parties to the proceedings to comment on the said arrangements and or to make such applications for contact in the manner prescribed in subsection (4).
- (2) Unless a court otherwise directs or it is determined that such contact would be detrimental to the best interests of the child, there shall be a rebuttable presumption of reasonable contact between the child and –
  - (a) the child's parent or guardian;
  - (b) any person who has parental responsibility in respect of the child;
  - (c) the relatives of the child;
  - (d) such other person as the court shall direct.
- (3) Where the court makes an access order under this section it shall determine the frequency and duration of access to the child subject to such conditions as the court may consider appropriate.
- (4) The Director or the child, with the leave of the court, may apply to the court for refusal of access to any individual and upon such application the court, if satisfied that such contact between the child and any individual should be refused shall make an order authorising the Director to refuse to allow contact between the child and the person named in the order.
- (5) A court making a contact order under this section shall have power to vary, suspend or discharge the order or revive the order after it has been discharged on such terms as it shall deem fit; but no contact order shall remain in force beyond the child's eighteenth birthday or after the date of a discharge of a care order.

### **MORE DETAILED PROVISIONS ON ASSISTANCE AIMED AT REUNIFYING THE FAMILY AND REDUCING STATE INTERVENTION**

The 1994 draft Bill provided a more detailed provision on assistance to families in cases where the court has ordered an alternative-care placement OR an in-home placement with conditions (section 48(1)-(2)).

- (1) To promote family unity and the elimination of the need for state intervention in the family, whenever a child is placed... outside his or her usual home or is allowed to remain in or is returned to his or her usual home with conditions, the court shall order the Minister to assist the family in getting access to the services necessary to alleviate the problems giving rise to the need for the out-of home placement or the imposition of in-home conditions.
- (2)(a) Such assistance and services shall in every case include, but not be limited to, regular contact with social workers charged with assisting the child and the family in overcoming their problems.

(b) Such assistance may include, without being limited to, counselling about family violence or appropriate child discipline measures, treatment for alcoholism or drug abuse, skills or other employment training, childcare, basic food and nutrition programmes, or other services appropriate to the family's circumstances.

#### **GUIDELINES FOR COURT ON FACTORS WHICH MAY NOT BE CONSIDERED?**

It has been suggested that there should be a provision stating that a person will not be considered unfit as a parent, custodian, guardian or caretaker of a child solely on the grounds of occupation (legal or illegal) or personal characteristics, although the impact of the occupation or personal characteristics on the child in question may be considered. The purpose of this would be to prevent unfair assumptions being made about persons such as sex workers or shebeen owners or drug dealers; the question of whether or not the child is being well cared for should be based on the facts of the case rather than on moral judgments. However, such a provision would have to be worded very carefully to make sure that it is not applied in a way which might be detrimental to a child.

As noted above, this issue was addressed in Ghana's Children's Act 1998 which provides that a child shall not be considered to be in need of protection solely because the child's mother is a prostitute, so long as the mother exercises proper guardianship and care to protect the child from corrupt influences.

Another example is a situation where the child is suffering from poverty, even though the family is doing the best that it can. This should be a situation where the family is assisted to remain intact rather than a basis for removing the child. The 1994 draft Act provided that "Involuntary poverty alone, or lack of food or shelter or other resources resulting from such poverty alone, does not constitute abuse or neglect ..., nor is it sufficient for the issue of a warrant [for removal of a child] or for the removal of a child...". If such a provision is added, however, it has been suggested that the law make it clear that a child *can* be removed from the home on this ground if the family is not able or willing to accept help to alleviate the situation.

#### **WHO HOLDS PARENTAL RIGHTS AND RESPONSIBILITIES WHEN A CHILD IS IN ALTERNATIVE CARE?**

One question which is not fully addressed in the draft Bill is who holds parental rights and responsibilities when a child is in alternative care. This is covered in respect of foster care (section 91, discussed below in the section on foster care), but not when the child is in another form of alternative care – other than a provision authorising a child's caregiver to consent to medical treatment of the child (but not surgical operations) (section 165(2)).

Under the current Namibian law, certain parental powers are automatically transferred to the alternative care-givers when the child is placed by order of a children's court. In terms of section 59 of the Children's Act 33 of 1960, the child's parent or guardian is automatically divested of the rights of custody and control (including the right to discipline the child); these rights are transferred to the foster parent or facility which is caring for the child. However, this transfer of parental power does not include the power to consent to the child's marriage, or to medical treatment or an operation which involves serious risk to the child's life – but the Minister can, in certain circumstances, give consent for these matters.

The South African Children's Act 2005 contains a more general provision which applies to any situation where a child is in the care of someone without parental responsibilities and rights:

### **32. Care of child by person not holding parental responsibilities and rights**

(1) A person who has no parental responsibilities and rights in respect of a child but who voluntarily cares for the child either indefinitely, temporarily or partially, including a care-giver who otherwise has no parental responsibilities and rights in respect of a child, must, whilst the child is in that person's care –

- (a) safeguard the child's health, well-being and development; and
- (b) protect the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation, and any other physical, emotional or mental harm or hazards.

(2) Subject to section 129, a person referred to in subsection (1) may exercise any parental responsibilities and rights reasonably necessary to comply with subsection (1), including the right to consent to any medical examination or treatment of the child if such consent cannot reasonably be obtained from the parent or guardian of the child.

(3) A court may limit or restrict the parental responsibilities and rights which a person may exercise in terms of subsection (2).

(4) A person referred to in subsection (1) may not –

- (a) hold himself or herself out as the biological or adoptive parent of the child; or
- (b) deceive the child or any other person into believing that that person is the biological or adoptive parent of the child.

Earlier versions of the draft Bill contained the following provision on this point:

### **70. Transfer of certain parental powers at placement**

(1) When a child is the subject of an order under... this act, guardianship of the child shall, subject to subsection (3), be transferred to the Minister.

(2) If a child is placed in foster care, a place of safety, a children's home, or an educational and vocational training centre under... this act or under the Criminal Procedure Act, 1977 (No. 51 of 1977), any existing right of custody or control over that child, shall, subject to subsection (3), be divested from the parent or guardian and be vested in the foster parent or the board of the place of safety, the children's home or the educational and vocational training centre.

(3) Custody, guardianship or control transferred or vested under subsection (1) or (2) shall not include the power to deal with the property of the child or to consent to the marriage or adoption of the child.

(4) The board of a children's home or educational and vocational training centre may authorise its manager to exercise any of the powers vested in it with regard to the care of a child.

(5) A foster parent, a place of safety, a children's home, or an educational and vocational training centre in whose care a child has been placed shall be authorised to obtain –

- (a) basic medical treatment for the child if reasonable grounds exist to believe that he or she needs such medical care; or
- (b) a medical operation if there are reasonable grounds to believe that the child –
  - (i) urgently needs the operation, and
  - (ii) that deferring the operation to permit consultation with the person or persons from whom custody and control have been divested or with the Minister would prejudice the child or young person's health or welfare.

(6) Powers transferred pursuant to this section shall only be exercised in the best interests of the child.

Namibia should consider including some comparable provision on this issue, which would also be helpful in cases of long-term foster care.

## Duration and extension of orders

72. (1) An order made by a children's court in terms of section 69 –

(c) lapses on expiry of –

- (i) two years from the date the order was made; or
- (ii) such shorter period for which the order was made; and

(b) may be extended by a children's court for a period not exceeding two years at a time.

(2) When deciding on an extension of the period of a court order in terms of subsection (1), the court must take cognisance of the views of –

- (a) the child;
- (d) the parent and any other person who has parental responsibilities and rights in respect of the child;
- (c) where appropriate, the management of the centre where the child is placed; and
- (d) any alternative care-giver of that child.

(3) A court order referred to in subsection (1) may not extend beyond the date on which the child in respect of whom it was made reaches the age of 18 years.

### MONITORING

The question is whether there is a need for any mandatory monitoring provisions in the case of alternative care placements, or in cases where there has been an in-home placement with conditions.

The 1994 draft Bill provided for periodic reviews of placements at which the social worker responsible for the case would be required to present follow-up reports:

#### 50. Periodic review of placements

(1) The circumstances of a child placed under section 45 [order which can be made at the conclusion of a child protection enquiry] outside his or her usual home or in the home with conditions shall be reviewed by the court no later than three months after the initial placement and **at least once every six months thereafter for two years, for a total review period of 27 months**, to determine, at each review, whether family unity no longer means that the child will be a child in need of protection or care, in which case the court-ordered placement shall be ended under section 51.

(2) The purposes of the periodic review under this section are –

- (a) to monitor the child's safety and well-being; and
- (b) to ensure that the child and his or her family are receiving the services necessary to permit the child's return to his or her usual home, or the cessation of conditions on an in-home placement, as soon as possible consistent with the child's safety and well-being.



- (3) (a) The notice and summons provisions of section 42 regarding the child and his or her family shall apply mutatis mutandis to the periodic review.
- (b) The person or persons with whom, or the board of the facility in which, a child has been placed, shall also be given notice of periodic reviews.
- (c) Summonses to appear at each periodic review shall also be issued to the social worker or social workers assigned to the child and family.
- (4) At each periodic review, the court shall specifically inquire of the social worker assigned to the case what efforts have been undertaken to facilitate the child's return to his or her usual home or the ending of conditions for the child's remaining in the home.
- (5) The court may request any of the examinations, investigations, reports, or testimony identified in section 43 [procedures at the underlying enquiry] to be conducted or prepared and submitted at any periodic review.
- (6) The provisions of section 43 regarding the child's testimony and presence of others at court proceedings shall apply to periodic reviews.

#### **51. Orders after periodic reviews**

- (1) At the conclusion of each periodic review other than the final one..., the children's court may make any order pursuant to section 45 [orders in child protection hearings], or may order that the child be discharged from placement and returned or to the custody of his or her parents, or to his or her usual home.
- (2) Unless an order for discharge from placement is made under subsection (1), the court shall make appropriate access orders and assistance orders....
- (3) No child may be placed for adoption earlier than the final periodic review... except for a child who has been determined to be an abandoned child... .

#### **52. Orders after final periodic review**

- (1) In the report for the child's final periodic review..., the social worker assigned to monitor the placement... shall specifically consider adoption and discuss whether adoption would be in the best interests of the child.
- (2) At the conclusion of the last periodic review..., the children's court shall, after determining what is in the best interests of the child, make an order –
  - (a) that the child be returned to his or her home, with or without conditions...;
  - (b) if there is clear and convincing evidence that the child may not be safely returned to his or her home, that the child be considered for adoption:
  - (c) if neither of these options is appropriate, that out-of-home placement... be continued, with periodic reviews every six months...:
 Provided that if none of these options in the child's best interests at the time, the court shall make any other appropriate placement....
- (3) If out-of-home placement is ordered or continued in accordance with this section, appropriate access and assistance orders... shall be made or continued accordingly.
- (4) If out-of-home placement is ordered or continued in accordance with this section, the court shall explicitly consider the possibility of return home or adoption at each subsequent periodic review.....

While this proposed system of 6-monthly reviews might be too onerous, the question of what sort of monitoring is appropriate to ensure the child's well-being and to advance the goal of family reunification.

The Task Force assembled by the Ministry to examine an earlier draft of the Bill recommended that there should be a social worker monitoring report after 9 months, and a periodic review by the court at one year from the placement. The final periodic review would be after another year, with a similar procedure. Periodic reviews would require that all relevant persons be given notice and opportunity to be heard if they wish, while the supervising social worker would be required to attend court for the reviews. (Social workers could be authorised to give notice of the

proceedings to the necessary persons by hand or by registered post, since they will be seeing most of them during the monitoring process anyway.) The social worker should also be authorised to request a transfer of placement at any stage if the initial placement is not working out.

Kenya's Children's Act 2001 has more open-ended provisions on mandatory monitoring. The court when making a "care order" for a child "shall make such further orders or directions requiring the Director or his representative to supervise the mode of compliance with such orders and to make such recommendations as the Director or his representative shall consider relevant to the court in respect of the order, including applying for the variation or discharge of the order". The law additionally states that "it shall be the duty of the Director or his representative to supervise and monitor the care provided to the child concerned" and "to periodically assess the condition and circumstances of the child".

## **Register of persons unsuitable to work with children**

**73.** (1) The Ministry must keep a register, of persons unsuitable to work with children, (hereinafter referred to as the Child Protection Register).

(2) The Child Protection Register must be kept confidential and information in it may be accessed and disclosed only as provided for in this Act.

(3) The Minister must take adequate steps –

(a) to protect the information in the Child Protection Register; and

(b) if the Child Protection Register is kept in electronic format, to secure the Register from unauthorised intrusion.

## **Contents of Child Protection Register**

**74.** The Child Protection Register must be a record of persons found in terms of section 77 to be unsuitable to work with children, and must reflect –

(a) the full names, surname, last known physical address and identification number of the person;

(b) the fingerprints of the person;

(c) a photograph of the person, if available;

(d) a brief summary of the reasons why the person was found to be unsuitable to work with children;

(e) in the case of a person convicted of an offence against a child, particulars of the offence of which he or she has been convicted, the sentence imposed, the date of conviction and the case number; and

(f) such other prescribed information.

## Finding persons unsuitable to work with children

75. (1) A finding that a person is unsuitable to work with children may be made by –
- (a) a children’s court;
  - (b) any other court in any criminal or civil proceedings in which that person is involved either as a party or a witness; or
  - (c) any forum established or recognised by law in any disciplinary proceedings concerning the conduct of that person relating to a child.
- (2) A finding in terms of subsection (1) may be made by a court or a forum contemplated in subsection (1) of its own motion or on application by –
- (a) an organ of state involved in the implementation of this Act;
  - (b) a prosecutor, if the finding is sought in criminal proceedings; or
  - (c) a person having a sufficient interest in the protection of children.
- (3) Evidence as to whether a person is unsuitable to work with children may be heard by the court or forum either in the course of or at the end of its proceedings.
- (4) In criminal proceedings, a person must be found unsuitable to work with children –
- (a) on conviction of murder, attempted murder, rape, sexual abuse or assault with the intent to do grievous bodily harm with regard to a child; or
  - (b) if a court makes a finding and gives a direction in terms of section 77(6) or 78(6) of the Criminal Procedure Act, that the person is by reason of mental illness or mental defect not capable of understanding the proceedings so as to make a proper defence or was by reason of mental illness or mental defect not criminally responsible for the act which constituted murder, attempted murder, rape, sexual abuse or assault with the intent to do grievous bodily harm with regard to a child.
- (5) Any person who has been convicted of murder, attempted murder, rape, sexual abuse or assault with the intent to do grievous bodily harm with regard to a child during the five years preceding the commencement of this Chapter, is deemed to have been found unsuitable to work with children.
- (6) A finding in terms of subsection (1)(b) that a person is unsuitable to work with children is not dependent upon a finding of guilty or innocent in the criminal trial of that person.

Criticism was levelled against the similar South African legislation that the offences in respect of which a person may be found to be unsuitable to work with children are too limited (murder, attempted murder, rape, sexual abuse or assault with intent to do grievous bodily harm). The South African regulations have made an attempt to widen the net of offences committed in relation to children in respect of which a person may be found by a court or other forum to be unsuitable to work with children. If the provision on the National Child Protection Register is retained, the Legal Assistance Centre recommends that the following offences should be included:

- (a) murder;
- (b) rape;
- (c) culpable homicide involving gross negligence;
- (d) indecent assault;
- (e) incest;
- (f) kidnapping;
- (g) any statutory sexual offence;
- (h) any offence relating to the manufacture, distribution or possession of child pornography;
- (i) any offence relating to the trafficking of children;
- (j) abduction, excluding the wrongful removal or retention of a child by a parent with parental responsibilities, whether domestic or as contemplated in the Hague Convention on International Child Abduction;
- (k) assault with intent to cause grievous bodily harm;
- (l) common assault;
- (m) crimen iniuria; or
- (n) any attempt to commit any of the offences listed in paragraphs (a) to (m).

## Disputes concerning findings

76. The person in respect of whom a finding in terms of section 75 has been made may –
- (a) appeal against the finding to a higher court, if the finding was made by a court, or
  - (b) have the finding reviewed by a court, if the finding was made by a forum contemplated in that section.

## Findings to be reported to Minister

77. (1) The registrar of the relevant court, or the relevant administrative forum, or, if the finding was made on application in terms of section 75, the person who brought the application, must notify the Minister in writing –

- (a) of any finding in terms of section that a person is unsuitable to work with children; and
- (b) of any appeal or review lodged by the affected person.

(2) The Minister must enter the name of a person found unsuitable to work with children as contemplated in section 75 in the Child Protection Register –

- (a) as soon as the time for noting of an appeal or review has expired; or
- (b) if an appeal or review has been noted, as soon as the appeal or review proceedings have been concluded and the finding confirmed.

## Consequences of entry of name in Child Protection Register

78. (1) A person whose name appears in the Child Protection Register may not-
- (a) manage or operate, or participate or assist in managing or operating, an institution providing welfare services to children, including a place of safety, shelter, children's home, educational and vocational centre, school, club or association providing services to children;
  - (b) work with or have access to children at an institution providing welfare services to children, including a place of safety, shelter, children's home, educational and vocational centre or a school, club or association providing services to children, either as an employee, volunteer or in any other capacity;
  - (c) be permitted to become the foster parent, family care-giver or adoptive parent of a child; or

It is not clear what the reference to a "family care-giver" means. Suppose a man is convicted of the rape of a child – does this provision mean that he would be denied parental rights and responsibilities over his own children as an automatic result?

- (d) work in any other form of employment or activity as may be prescribed.

(2) A person managing or operating or who participates or assists in managing or operating an institution providing welfare services to children, including a place of safety, shelter, children's home, educational and vocational centre or a school, club or association providing services to children, may not allow a person whose name appears Child Protection Register to work with or have access to children at the centre, facility, shelter or school, either as an employee, volunteer or in any other capacity.

Some places which provide short-term care for children – such as crèches and day-care centres – might not be included, since these could be run in some cases by a single individual and not set up as "associations". Entry in the Register should also clearly disqualify someone from working in a Woman Child Protection Unit, or any police unit which investigates crimes against children, although this would not clearly fall under the present wording (unless such institutions were named as "designated child protection organisations"). It is also odd that there is no explicit requirement for checking the Register with regard to employees of the Ministry of Gender Equality and Child Welfare (or other ministries) who work with children. It is questionable as to whether this would fall under the existing wording.

(3) A child protection organisation designated by the Minister by regulation may not allow a person whose name appears in the Child Protection Register to work with or have access to children on its behalf, either as an employee, volunteer or in any other capacity.

In Hong Kong, persons who are considered unsuitable to work with children are also considered unsuitable to work with mentally-incapacitated persons.

## Disclosure of entry of name in Child Protection Register

79. (1) If the name of a person is entered in the Child Protection Register and that person –

- (a) works with or has access to children at an institution providing welfare services to children, including a place of safety, shelter, children’s home, educational and vocational centre or a school either as an employee, volunteer or in any other capacity, that person must disclose that fact to the person who manages or operates the institution, centre, facility, shelter or school;
- (b) works with or has access to children on behalf of a designated child protection organisation either as an employee, volunteer or in any other capacity, that person must disclose that fact to the organisation; or

(2) A person contemplated in subsection (1) who fails to disclose the fact that his or her name is entered in the Child Protection Register is guilty of misconduct and his or her services may be terminated as a result thereof.

In South Africa, the South African Law Reform Commission recommended that any prospective foster or adoptive parent, prospective volunteer or applicant for employment or voluntary service in a designated child care employment setting or category of work should be required to produce a certificate confirming that his or her name does not appear on such a list or register – instead of placing the duty on the prospective employer to check the register. The Commission suggested that this would be the least invasive way of applying this protective measure.

## Access to Child Protection Register

80. (1) Only the following persons have access to the Child Protection Register:

- (a) the Minister; and
- (b) staff members in the Ministry designated by the Minister;

(2) The Minister may, on such conditions as the Minister may determine, allow officials of a ministry responsible for education access to the Child Protection Register for the purpose of implementing section 78 in relation to schools.

## Establishment of information in Child Protection Register

81. (1) Before a person is allowed –

- (a) to work with or have access to children at an institution providing welfare services to children, including a place of safety, shelter, children's home, educational and vocational centre or a school, the person managing or operating the institution, centre, facility, shelter or school must establish whether or not that person's name appears in the Child Protection Register; or
- (b) to work with or have access to children on behalf of a designated child protection organisation, the organisation must establish whether or not that person's name appears in the Child Protection Register.

(2) Within 12 months of the commencement of this Chapter –

- (a) the person managing or operating an institution, centre, facility, shelter or school contemplated in subsection (1)(a) must establish whether the name of any person who works with or has access to children at the institution, centre, facility, shelter or school appears in the Child Protection Register; and
- (b) a designated child protection organisation contemplated in subsection (1)(b) must establish whether the name of any person who works with or has access to children on behalf of the organisation appears in the Child Protection Register.

(3) Anyone has the right, upon presentation of sufficient proof of his or her identity, to establish whether or not his or her name appears in the Child Protection Register, and if so, the reasons why his or her name was entered in the Child Protection Register.

(4) Inquiries in terms of subsection (1), (2) or (3) must be directed in writing to the Minister on a confidential basis.

(5) In the event of an inquiry made to the Minister in terms of –

- (a) subsection (1), the Minister must respond in writing within 21 working days by indicating whether the person's name appears in the Child Protection Register or not;
- (b) subsection (2), the Minister must respond in writing within six months by indicating whether the person's name appears in the Child Protection Register or not; or

Surely such a long time period is not required to check a computerised list for names – particularly if the safety of children is at stake.

- (c) subsection (3), the Minister must respond in writing within 21 working days by indicating whether the person's name appears in the Child Protection Register, and if so, the reasons why his or her name was entered in the Register.

## **Disclosure of names in Child Protection Register prohibited**

**82.** (1) A person may not disclose the fact that the name of a particular person appears in the Child Protection Register except –

- (a) within the scope of that person's powers and duties in terms of this Act or any other law;
- (b) to a body referred to in section 81(1) or (2) on written request by such person or institution;
- (c) by a person referred to in section 81(3); or
- (d) when ordered by a court to do so.

(2) The general rule with regard to the disclosure of information in the Child Protection Register is that it must be in the best interests of the child, unless the information is disclosed following an inquiry in terms of section 81.

(3) The Minister must inform a person found unsuitable to work with children when that person's name and particulars are entered in the Child Protection Register.

## **Removal of name from Child Protection Register**

**83.** (1) A person whose name appears in the Child Protection Register may in terms of subsection (2) apply for the removal of his or her name and any information relating to that person from the Child Protection Register.

(2) Application for the removal of a name and particulars from the Child Protection Register may be made –

- (a) to any court, including a children's court;
- (b) to the Minister, if the entry was made in error; or
- (c) to the High Court if the Minister refuses an application in terms of paragraph (b).

(3) An application in terms of subsection (1) to remove a person's name and particulars from the Child Protection Register on the ground that the affected person has been rehabilitated, may only be made after at least five years have lapsed since the entry was made and after considering the prescribed criteria.

(4) The name and particulars of a person convicted of an offence with regard to any child more than once, regardless of whether the convictions occurred on the same day or not, may not be removed from the Child Protection Register.



# CHAPTER 8

## FOSTER CARE, PLACES OF SAFETY, PLACES OF CARE, SHELTERS, CHILDREN'S HOMES AND EDUCATIONAL AND VOCATIONAL TRAINING CENTRES

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A recent Namibian study by international consultant Andrew Dunn recommended that the care of orphans and vulnerable children by relatives should be placed in a different category from the current concept of foster care used in Namibia, and subjected to different and simpler procedures that will still protect the rights of the child and transfer certain parental responsibilities to the care-givers. The study suggested that this would entail changes in the grant system, as well as give a stronger role to families, communities and traditional leaders in placing children. A revised system which made explicit provision for kinship care could also require registration of such kinship care arrangements, and assessment or monitoring by social workers, to ensure that the situation is in the child's best interest. A study focusing more specifically on foster care in Namibia has been commissioned by UNICEF and is currently underway.

### Foster care

84. (1) A child is in foster care if the child has been placed in the care of a person who is not the parent or guardian of the child in terms of an order of a children's court.

(2) A children's court may place a child in foster care with a family member who is not the parent or guardian of the child.

(3) Before a children's court places a child in foster care, the court must follow the children's court processes stated in Chapter 7 to the extent that the provisions of that Chapter are applicable to the particular case.

Chapter 7 refers to the procedures for finding a child in need of protection and ordering that the child be placed in alternative care. Under what other circumstances could a child be placed in foster care?

## **Application for approval as prospective foster parent**

**85.** (1) A person who wishes to be approved as a prospective foster parent must make an application, accompanied with information which may be required, with a designated social worker.

(2) The designated social worker must, in the prescribed manner, assess prospective foster parents for compliance with this Act.

(3) The Minister must approve a person in respect of whom an assessment has been made and who complies with the requirements of this Act as a prospective foster parent, subject to such conditions as the Minister may consider necessary to impose.

(4) A person unsuitable to work with children may not be approved as a prospective foster parent.

(5) The Minister must keep a register, in the form and manner determined by the Minister, of prospective foster parents approved as such in terms of this section.

(6) The register contemplated in subsection (5), must contain prescribed information.

## **Prospective foster parent**

**86.** A prospective foster parent must be –

- (a) a fit and proper person to be entrusted with the foster care of the child;
- (b) willing and able to, undertake parental rights and responsibilities, and exercise and maintain those rights and responsibilities; and
- (c) properly assessed by a designated social worker for compliance with paragraphs (a) and (b).

## **Determination of placement of child in foster care**

**87.** (1) Before a children's court places a child in foster care by court order, the court must consider a report by a designated social worker about –

- (a) the cultural, religious and linguistic background of the child; and
- (b) the availability of a suitable person with a similar background to that of the child who is willing and able to provide foster care to the child.

(2) A child may be placed in the foster care of a person from a cultural, religious and linguistic background different to that of the child, but only if –

- (a) there is an existing bond between that person and the child; or
- (b) a suitable and willing person with a similar background is not readily available to provide foster care to the child.

Is this social worker report separate from the one which assesses whether or not the child is in need of protection? Or should these matters be included in the social worker report which is prepared for the court in the initial enquiry? (See sections 60(1) and 65 above.) If this report is a separate one, then an adjournment might be required, which would add delays to the placement process.

## Number of children to be placed in foster care

- 88.** Not more than three children may be placed in foster care with a person, except where –
- (a) the children are siblings or related; or
  - (b) the court considers this for any other reason to be in the best interest of all the children.

The analogous South African provision sets the limit at six children. One question is how this will be measured. The draft says that no more than three children will be placed in foster care “with a person”. What if a married couple apply to be foster parents together – can three children be placed with each of them for a total household of six? Another issue is whether or not the number of children other than foster children already in the foster household should be taken into consideration. For example, should a foster parent who is already caring for three of her own children be treated the same as a foster parent who has no children of her own?

## Duration of foster care placements

**89.** (1) A children’s court may, despite the provisions of section 72(1) regarding the duration of a court order, after placement of a child in foster care with a person other than a family member for more than two years and after having considered the need for creating stability in the child’s life, order that –

- (a) no further social worker supervision is required for that placement;
- (b) no further social worker reports are required in respect of that placement; and
- (c) the foster care placement subsists until the child turns 18 years, unless otherwise directed.

(2) A children’s court may, despite the provisions of section 72(1) regarding the duration of a court order and after having considered the need for creating stability in the child’s life, place a child in foster care with a family member for more than two years or extend such an order for more than two years at a time, if –

- (a) the child has been abandoned by the biological parents;
- (b) the child's biological parents are deceased;
- (c) there is for any other reason no purpose in attempting reunification between the child and the child's biological parents; and
- (d) it is in the best interest of the child.

(3) Despite the provisions of subsections (1) and (2), a designated social worker must visit a child in foster care at least once every two years to evaluate the placement.

The provisions for extended foster care by family members seem stricter in some respects than those for extended foster care by non-family members. Initial placements with relatives (but not non-relatives) may be for longer than two years. But no reasons are required to extend placements with non-family members to age 18, and formal supervision and reporting end. With family members, specific reasons are required for extended placements, and formal supervision and reporting do not end. It is not clear that extensions up until the child turns 18 is allowed where the foster parent is a family member, although this might be included in extensions for "more than two years at a time". The reasons behind these different approaches are not clear. This seems particularly odd since most foster parents are extended family members in practice, and since extended placement with family members would seem less disruptive for a child than extended placements with non-family members. It has been suggested that monitoring should be less frequent in any situation where children are placed in foster care with their own relatives. If the first monitoring by a social worker after the initial placement reveals a satisfactory situation, then the law could dispense with the need for ongoing monitoring which would otherwise be required. This could help to reduce the administrative burden on social workers.

How will foster grants be affected by long-term extensions of foster placements?

## Reunification of child with biological parent

**90.** (1) If a children's court placing a child in foster care is of the view that reunification between the child and the child's biological parents is possible and in the best interest of the child, the court must issue the placement order subject to conditions providing for a designated social worker to facilitate such reunification as contemplated in section 69(5)(a)(ii).

(2) If the child has not been reunited with the child's biological parents two months before the expiry of the initial court order or any extension of the order, the designated social worker appointed to facilitate the reunification must submit a report to the children's court –

- (a) explaining why the child was not reunited with the biological parents; and
- (b) recommending any steps that may be taken to stabilise the child's life.

- (3) The children’s court considering the report may –
- (a) order that the designated social worker must continue facilitating the reunification; or
  - (b) order the termination of the reunification services if there are no prospects of reunification.

Why does this special emphasis on reunification apply only to foster care placements? A court may include conditions relating to reunification services in any placement order (in terms of section 69(5)(a)(ii)), but this kind of social worker report on the success or failure of such initiatives is required only in respect of foster care. (Compare this section to section 71, which discusses the steps which a social worker must take to attempt reunification after short term placement of a child in a place of safety or a children’s home but requires no report on the success or failure of these steps.)

There should be an exception for an order or an extension which expires only after the child turns 18.

If reunification has been achieved, there should be some continued monitoring to see if the child remains safe.

## **Responsibilities and rights of foster parent**

**91.** The foster parent of a child has those parental responsibilities and rights in respect of the child as set out in –

- (a) the order of the children’s court placing the child in the foster care of that foster parent;
- (b) an order of the children’s court amending the initial order; and
- (c) a parenting plan, if any, between the parent or guardian of the child and the foster parent.

As noted above in respect of alternative care placements in general, the draft Bill may not adequately address the question of parental rights and responsibilities when a child is in foster care.

In terms of section 59 of the Children’s Act 33 of 1960, the child’s parent or guardian is automatically divested of the rights of custody and control (including the right to discipline the child) and these rights are transferred to the foster parent or facility which is caring for the child. However, this transfer of parental power does not include the power to consent to the child’s marriage, or to medical treatment or an operation which involves serious risk to the child’s life – but the Minister can, in certain circumstances, give consent for these matters.

In this draft Bill, Ministerial authorisation for taking a child out of Namibia is addressed by section 115. However, it is not clear how this fits together with section 173, which requires permission from a person with relevant parental rights and responsibilities, or court authorisation for a child to leave the country.

## Termination of foster care

92. (1) Foster care may be terminated by a children's court only if it is in the best interest of the child.

(2) Before terminating the foster care of a child, the court must take into account all relevant factors, including –

- (a) the bond that exists between the child and the child's biological parent, if the biological parent reclaims care of the child;
- (b) the bond that developed between –
  - (i) the child and the foster parent; and
  - (ii) the child and the family of the foster parent; and
- (c) the prospects of achieving permanency in the child's life by –
  - (i) returning the child to the biological parent;
  - (ii) allowing the child to remain permanently in foster care with the foster parent;
  - (iii) placing the child in any other care; or
  - (iv) adoption of the child.

This section refers to permanent foster care, but the draft Bill otherwise provides for this only by means of extension of normal foster care placement orders.

## Places of safety

93. (1) A place of safety is used for the temporary reception and care of children –

- (a) removed in terms of section 61 or 62;
- (b) in terms of an order under the Criminal Procedure Act;
- (c) awaiting trial or sentence;
- (d) awaiting placement; or
- (e) for any other prescribed purpose.

(2) A person approved for purposes of foster care may in accordance with conditions imposed in the approval act as a place of safety.

(3) The Minister may, out of moneys appropriated by Parliament for the purpose, establish and maintain places of safety of varying classifications based on different children’s needs and the interests of community safety sufficient to adequately accommodate all children who have to be placed in such places and if the children cannot be accommodated in any other places of safety approved under subsection (4).

(4) The Minister may –

- (a) approve the use of a children’s home as a place of safety;
- (b) in consultation with the Minister responsible for education, approve the use of a school hostel as a place of safety; or
- (c) in consultation with the Minister responsible for housing, approve the use of any other appropriate state-owned building or place as a place of safety.

This provision would cover state-owned hospitals. But the law should perhaps make provision for private hospitals or other private facilities to be registered as places of safety if needed.

(5) A child must be placed in a place of safety –

- (a) in the community or region in which the child normally resides; and
- (b) if it is consistent with the best interests of the child and the interest of community safety, with an individual or a family approved for the purposes of foster care, in preference to placement in a place of safety approved under subsection (4).

(6) A place of safety or a place of detention established or deemed to have been established under section 38 of the Children’s Act, and which is in existence at the date of commencement of this Act, is as from that date regarded to be a place of safety established and maintained in accordance with subsection (3).

It was recommended by the Task Force convened by the Ministry to advise on a previous draft of the Bill that the law should require that children in conflict with the law need to be held separately from children who come to places of safety in terms of the Child Care and Protection Act. This requirement would have to be worded carefully, to define what “separate” means. For example, what if they stayed in separate rooms or buildings but had meals or recreation together?

## Places of care

**94.** (1) A place of care is used for the care, whether for or without reward, of more than six children on behalf of their parents or care-givers during specific hours of the day or night, or for a temporary period, in terms of a private arrangement between the parents or care-givers and such person, but excludes the care of a child –

by a school as part of tuition, training and other activities provided by the school;

- (b) as a boarder in a school hostel or other residential facility managed as part of a school;  
or
- (c) by a hospital or other medical facility as part of the treatment provided to the child.

(3) A facility established or service provided by an organ of state or a non-governmental organisation for the provision of partial care only qualifies for funding from money appropriated by Parliament if it complies with the requirements of this Act.

The term “partial care” has been copied from the South African law and should be replaced by the term “place of care” as used elsewhere in the Namibian draft.

(4) A place of care, other than one maintained and controlled by the state or the one approved in terms, may only be used as a place of care if it –

- (a) is registered as such under this Act; and
- (b) is operated in compliance with all conditions of registration.

(5) A place of care registered or deemed to have been registered under section 42 of the Children’s Act, and which is in existence at the date of commencement of this Act, is as from that date regarded to be a place of care registered in accordance with subsection (4).

## Shelters

**95.** (1) A shelter is a facility located at a specific place for the purpose of providing basic services, including overnight accommodation to street children, and other children, who voluntarily attend the facility but who are free to leave.

(2) A shelter established by an organ of state or a non-governmental organisation only qualifies for funding from money appropriated by Parliament for that purpose if it complies with the requirements of this Act.

(3) Any person may establish or operate a shelter if the shelter –

- (a) is registered in terms of law;
- (b) is managed and maintained in accordance with any conditions subject to which the shelter is registered.

(4) An existing shelter registered in terms of law and operated in accordance with the registration certificate is from the date of commencement of this section regarded to have been registered in terms of this section.



## Children's homes

96. (1) A children's home is a facility for the reception and provision of residential care of children –

- (a) other than in their family environment;
- (b) on a shared basis with the parent or other person having parental responsibilities;
- (c) pending their placement;
- (d) assisting them to reintegrate with their families and the community;
- (e) the reception, development and secure care of children awaiting trial or sentence;
- (f) the reception, development and secure care of children in terms of an order –
  - (i) under the Criminal Procedure Act;
  - (ii) in terms of section 69 placing the child in a children 's home which provides a secure care programme; or
- (g) for any other purpose that may be prescribed.

The list here seems to have some confusion – subsections (a) and (b) would seem to characterise all placements, while the other items in the list refer to the purposes of placement in a children's home. Does subsection (c) refer to the use of a children's home as a place of safety? If so, then it seems to be adequately covered by the provision on places of safety. The context of subsection (d) is also not clear, as this is a principle in respect of most placements in alternative care. Another question which may need clarification is: when can a child be placed in a children's home rather than in foster care? Can a children's home be used only where there is a need for "secure care", as referred to in subsection (f)(ii)? A previous draft had an order of preference for placements of children in need of protection.

With respect to provisions (e) and (f) above, are children's home suitable for the secure care of children awaiting trial or children convicted of crimes?

(2) The Minister may, out of moneys appropriated by Parliament for the purpose, establish and maintain children's homes sufficient to accommodate all children who have to be placed in such a home and cannot be accommodated in other children's homes registered under section 101.

(3) A place, other than one maintained and controlled by the state, may only be used as a children's home if it –

- (a) is registered as such in terms of this Act; and

(b) is operated in compliance with the conditions of registration.

(4) A child must, if possible, be placed in a children's home in the community or region in which the child normally resides.

(5) A children's home established and maintained under section 41(3)(a) of the Children's Act, and which is in existence at the date of commencement of this Act, is from that date regarded to be a children's home established and maintained in accordance with subsection (2).

(6) A children's home registered or deemed to have been registered under section 42 of the Children's Act, and which is in existence at the date of commencement of this Act, is as from that date regarded to be a children's home registered in accordance with subsection (3).

## **Educational and vocational training centres**

**97.** (1) An educational and vocational training centre is used for the reception, care and training of children –

- (a) in terms of an order under the Criminal Procedure Act;
- (b) in terms of an order under section 69 placing the child in an educational and vocational training centre;
- (c) in terms of section 107 transferring a child; or
- (d) awaiting trial or sentence;
- (e) with behavioural and emotional difficulties; or
- (f) for any other prescribed purposes.

(2) The Minister responsible for education, after consultation with the Minister, must, from moneys appropriated by parliament for that purpose establish and operate educational and vocational centres for the reception care and training of children contemplated in subsection (1).

(3) The Minister may, after consultation with the minister responsible for education, approve the use of any school administered by that minister as a vocational and educational training centre for any or all of the purposes for which such training centres may be used in terms of subsection (1).

(4) An education and vocational training centre –

- (a) must be managed and maintained in accordance with this Act; and
- (b) must comply with the prescribed standards and the structural, safety, health and other requirements prescribed by the law applicable in the area where the centre is situated.

(5) Any accredited organisation may establish or operate a educational and vocational centre provided that the centre –

- (a) is registered with the Minister;
- (b) is managed and maintained in accordance with this Act and any conditions subject to which the centre is registered; and
- (c) complies with the prescribed standards.

(6) The Minister must keep and maintain a record of all available educational and vocational centres.

(7) A school of industries or a reform school established and maintained under section 39 of the Children's Act, and which is in existence at the date of commencement of this Act, is from that date regarded to be an educational and vocational training centre approved under subsection (2).

## **Minimum standard for child reception homes**

**98.** (1) Premises or places used as places of safety, places of care, shelters, children's homes or an educational and vocational centres must have –

- (a) a safe area for the children to play;
- (b) adequate space and ventilation;
- (c) safe drinking water;
- (d) hygienic and adequate toilet facilities;
- (e) access to disposal of refuse services or other adequate means of disposal of refuse generated at the facility; and
- (f) a hygienic area for the preparation of food for the children.

(2) The Minister may, after consultation with the minister responsible for health and social services, prescribe additional standards with which child reception homes contemplated in subsection (1) must comply.

## **Management boards for children's homes and educational and vocational training centres**

**99.** (1) Every children's home and educational and vocational centre must have a management board consisting of not less than three and not more than nine members.

- (2) The members of a management board are appointed by –
- (a) the minister responsible for education, in the case of an educational and vocational centre established by the minister; and
  - (b) the Minister, in the case of a children’s home established by the Minister; and
  - (c) the registration holder in accordance with the prescribed procedures, in the case of privately operated children’s homes and educational and vocational centres.

(3) When appointing members of the management board, fair representation of all stakeholders including the community in which the home or centre is situated must be ensured.

Who identifies or defines the stakeholders? There is no overarching definition and people might disagree on who should be included.

- (4) A person unsuitable to work with children may not be appointed as a board member.
- (5) The board exercises powers and perform duties conferred on it in terms of this Act.

The Task Force assembled by the Ministry to advise on earlier versions of the draft Bill suggested that a reasonable degree of sustainability should be added to the requirements for registration of institutions for alternative care, to reduce the problem of government being saddled with the financial support of private institutions which threaten closure after failing to get continued funding.

## **Application for registration of places of care, shelters, children’s homes and educational and vocational training centres**

**100.** (1) A person who wishes to register a place of care, shelter, children’s home or an educational and vocational training centre must make an application, in the prescribed form and manner, to the Minister.

- (2) The Minister may, before considering any application for registration under subsection (1), require the applicant to –
- (a) show that there is a reasonable need for a place of care, shelter, children’s home or an educational and vocational training centre; and
  - (b) furnish any information which is relevant to the application.

## Registration of places of care, shelters, children’s homes and educational and vocational training centres

101. (1) The Minister –

- (a) may, in the granting of an application for registration under section 100, impose such conditions as he or she considers appropriate to promote the best interests of the child;
- (b) must register a place of care, shelter, children’s home or an educational and vocational training centre if the Minister has reason to believe that the place, home, shelter or centre will be managed and operated in the best interests of the children who will be accommodated there; and
- (c) must issue a certificate of registration in respect the place of care, shelter, children’s home and educational and vocational training centre registered under paragraph (a), and that certificate is valid for a period of one year from the date of its issue.

(2) The Minister may at any time amend a certificate of registration referred to in subsection (1)(c) to impose additional conditions or to withdraw certain conditions on the exercise of powers by the place of care, shelter, children’s home or educational and vocational training centre.

(3) At least three months before to the date of expiry of the certificate of registration referred to in subsection (1)(c), the holder of the certificate of registration may apply for the renewal of that certificate, and the Minister must renew that certificate if he or she is satisfied that the place, home, shelter or centre concerned continues to comply with the requirements for registration.

(4) The Minister may on application by the holder of certificate of registration amend the certificate by written notice to that person.

The registration process as currently drafted does not apply to places of safety. Should places of safety be included? Or are these to be identified only from within the other categories of institutions which are already registered (such as children’s homes) or already established under some other law (such as state hospitals)? Is it possible that there are families willing to take children in on a temporary basis as a “place of safety” who would not be willing to register for longer-term foster care?

The Task Force assembled by the Ministry to advise on earlier versions of the draft Bill suggested that registration should be indefinite (instead of annually renewable) since certificates of registration can be revoked on reasonable grounds at any time – so long as the new law provides for regular inspections and monitoring. The similar provision in the South African Children’s Act provides for registrations which are valid for 5-year periods.

## **Cancellation of certificate of registration**

**102.** (1) The Minister may at any time, after giving a written notice to the holder of the registration certificate, cancel the certificate –

- (a) if the registered facility is not maintained in accordance with this Act or any other law;
- (b) if the holder of the certificate of registration fails to comply with the condition of the certificate; or
- (c) for any other reasonable cause.

(2) The Minister may not cancel a certificate of registration unless he or she has given the holder of the certificate a reasonable opportunity to be heard.

(3) The notice referred to in subsection (1) must clearly indicate the reasons for the proposed cancellation and specify the date on which the cancellation is to take effect, but the effective date of cancellation must not be earlier than three months from the date of the notice, unless the Minister and the manager of the place of safety, place of care, shelter, children's home or the educational and vocational training centre, as the case may be, agree to a different date.

(4) The person operating a place of safety, place of care, shelter, children's home or educational and vocational training centre, referred to in subsection (3) may, during the three months' period referred to in that subsection, present to the Minister information opposing the proposed cancellation, and the Minister must consider such information in deciding whether to cancel the registration or rescind the notice.

## **Voluntary closure of a place of care, shelter, children's home or an educational and vocational training centre**

**103.** The holder of a certificate of registration may close the facility in respect of which the certificate is held, by –

- (a) written notice to the Minister or other person authorised by the Minister; and
- (b) surrendering the certificate to the Minister.

## **Notice of enforcement**

**104.** The Minister may by written notice instruct –

- (a) a person operating an unregistered place of care, shelter, children's home or an educational and vocational centre to –
  - (i) stop operating that activity;

- (ii) to apply for registration in terms of this Act within a period specified in that notice;
- (b) a person operating a registered place of care, shelter, children's home or educational and vocational centre in contravention of conditions of registration, to comply with the conditions.

(2) A person who is instructed in terms of subsection (1), may be given permission to operate the activity contemplated in that subsection during the period of the notice and if that person applies for a certificate of registration until that person's application has been dealt with under this Act.

## **Transfer of child in event of cancellation certificate of registration**

**105.** If a children's home or an educational and vocational centre is closed due to cancellation in terms of section 102 every child placed in that centre must be transferred in accordance with section 107.

The Legal Assistance Centre suggests making the section equally applicable to the voluntary closure of such institutions in terms of section 103.

## **Inspection of place of safety, place of care, shelter, children's home and an educational and vocational training centres**

**106.** (1) To the extent that this section authorises the interference with the privacy of persons homes, correspondence or communications as contemplated in Article 13(1) of the Namibian Constitution, this section is enacted on the authority of Sub-Article (2) of that Article.

(2) A designated social worker or a person authorised by the Minister or an staff member of a local authority authorised as such may enter a place of safety, place of care, shelter, children's homes or educational and vocational training centre, or any place which on reasonable suspicion is being used as an unregistered place of safety, place of care, shelter, children's home or educational and vocational training centre –

- (a) to inspect that place and its management; or
- (b) to observe or interview any child.

(3) Identification in the form determined by the Permanent Secretary must be issued to each person authorised in terms of subsection (2).

(4) When inspecting a place the person authorised in terms of subsection (2) must, on demand, produce the identification issued in terms of subsection (3).

(5) A person authorised in terms of subsection (2) may for the purposes of that subsection –

(a) determine whether the place concerned complies with –

(i) any structural, safety, health and other requirements as may be required by any law; and

(ii) the provisions of this Act;

(b) require a person to disclose information, either orally or in writing, and either alone or in the presence of a witness, about any act or omission which, on reasonable suspicion, may constitute an offence in terms of this Act, or a contravention of this Act or of a condition of registration, and require that any disclosure be made under oath or affirmation;

(c) inspect, or question a person about any record or document that may be relevant for the purpose of paragraph (b);

(d) copy any record or document referred to in paragraph (c), or remove such record or document to make copies or extracts;

(e) require a person to produce or deliver to a place specified by the social worker or an officer authorised under this subsection (2), any record or document referred to in paragraph (c) for inspection;

(f) inspect, question a person about and if necessary remove, any article or substance which, on reasonable suspicion, may have been used in the commission of an offence in terms of this Act or of a condition of registration;

(g) record information by any method, including by taking photographs or making videos;  
or

(h) exercise any other power or carry out any other duty that may be prescribed.

(6) A person authorised in terms of subsection (1) must –

(a) provide a receipt for any record, document, article or substance removed in terms of subsection (5)(d) or (f); and

(b) return anything removed within a reasonable period unless seized for the purpose of evidence.

(7) A person authorised in terms of subsection (2) must submit a report to the Minister, as may be appropriate, on any inspection carried out by that person in terms of this section.

(8) A person commits an offence if that person –

(a) obstructs or hinders any person in the exercise of his or her powers under this section;



- (b) fails to produce any child or book or document in his or her care or possession whose production has been requested by a person authorised to make such a request under this section;
- (c) falsely claims to be a person authorised in terms of subsection (2); or
- (d) fails to comply with an instruction or notice issued in terms of this section.

(9) A person convicted of an offence in terms of subsection (8) is liable to a fine not exceeding N\$20 000 or to imprisonment for a period not exceeding five years or to both the fine and imprisonment.

#### **CHANGES IN PLACEMENTS**

Once a child has been placed in alternative care by an order of a children's court, the Minister has the power to effect changes in the placement by several different methods:

- (1) transfer
- (2) removal
- (3) provisional transfer
- (4) discharge.

These four procedures are drawn in large part from the South African model. However, the reasons for the differences between them are not immediately clear. In most cases, the Minister can act on a social worker's report, without the need for confirmation from the children's court; a removal requires no such report and no notice to any of the child's family members. It would be useful to re-consider the purpose and process for these procedures and to ensure that they are clarified in the final Bill.

It also appears advisable to have a social worker assist in all movements of a child where the Minister/Commissioner of Child Welfare is involved. Furthermore, an attempt to reunite the child with the child's family members, where this is applicable, should not be limited to only certain types of movement. Instead this should apply to all situations where changes in placement are being contemplated. Any movement of a child (except an emergency removal) should only be made after an assessment of the best interests of the child.

## **Transfer of a child**

**107.** (1) The Minister may by order in writing, transfer any child from a place of safety, foster home, children's home or educational and vocation training centre to another placement.

If the transfer is to a parent, guardian or former care-giver and without conditions, how is this different from a permanent discharge? Is the idea that monitoring will continue until such time as there is a full discharge?

(2) If the order referred to in subsection (1) transfers a child to the care of the child's parents, guardian or former care giver under supervision of a social worker, the order must specify the conditions with which the child and the parent, guardian or care-giver must comply.

(3) If any requirement referred to in subsection (2) is contravened, the designated social worker concerned may bring the child before a children's court, which may, after an inquiry, vary the order issued by the Minister or make a new order in terms of section 69.

(4) Before the Minister issues an order in terms of subsection (1), a designated social worker must report to the Minister on consultations with –

- (a) the child;
- (b) the parent or primary care-giver of the child, if available;
- (c) the child and the place, home or centre or person in whose care that child has been placed; and
- (d) the child and the place, home, centre or person to whom the child is to be transferred.

The statute should require that this is in the form of a written report.

(5) If the Minister transfers a child from a secure place of safety, children's home or educational and vocational training centre to a less restrictive one the Minister must be satisfied that the transfer will not be prejudicial to other children.

(6) An order in terms of subsection (1) may not be carried out without ratification by a children's court if the child is transferred –

- (a) from the care of a person to a children's home or educational and vocational training centre; or
- (b) from the care of a children's home and educational and vocational training centre to a secure care facility or more restrictive one.

Secure care facilities are not covered by the draft. Subsection (6)(b) speaks of a transfer from an educational and vocational training centre to a more restrictive facility. It is not clear what this would be – a prison?

It is not clear from the wording of the draft Bill whether court confirmation of a transfer from a children's home to an educational and vocational centre is required – although the general import of section 107(6) is to require court authorisation for transfers from less restrictive placements to more restrictive ones? Should such a transfer require confirmation by a children's court?

(7) An order in terms of subsection (1) may not have the effect of extending the original placement order made by the court in terms of section 69 unless the order has been extended in terms of section 70.

(8) A transfer of a child from or to an educational and vocational training centre can only be done after consultation with the minister responsible for education.

## Removal of child in foster care, place of safety, children's home or educational and vocational centre

**108.** (1) The Minister or the commissioner may, in the best interest of a child at any time whilst the child is in foster care, place of safety, children's home or educational or vocational training centre, issue a notice directing that the child, pending any action in terms of subsection (3) –

- (a) be removed from such place, home, centre or person in whose care or the child is; and
- (b) be put in a place, home, centre, shelter or private home or any other place specified in the notice.

(2) The commissioner of the children's court issuing a notice in terms of subsection (1) must order the clerk of the children's court to submit a report to the Minister on the reasons for the notice.

(3) The Minister must, within six months from the date on which a child has been removed and put in care in terms of subsection (1) and after such inquiry as the Minister may consider necessary –

- (a) transfer the child in terms of section 107;
- (b) discharge the child from alternative care in terms of section 109 ; or
- (c) order that the child be returned to foster care, place of safety, children's home or educational or vocational training centre or person in whose care or temporary care the child was immediately before the notice in terms of subsection (1) was issued.

If a child is **transferred** under section 107 – even if it just because the place in question is closing or has had its certificate cancelled – a social worker must do consultations with the parents, etc. But in terms of this section, the Minister can **remove** a child from a placement without consulting anyone for the next 6 months. This seems incongruous. Why is it necessary to provide for such a short-term removal when section 111 allows for provisional transfers? This seems to subvert the safeguards in sections 107 and 111, at least for the 6-month period in question.

In South Africa, the corresponding procedure is somewhat different. There, the responsible government official may remove a child from an alternative care placement to temporary safe care (ie a place of safety) for up to six months, until the same official makes a decision (after any necessary enquiry) on a formal transfer, a discharge or a return to the previous placement. This is more analogous to the procedures for temporary removal of a child from the home pending a children's court enquiry and appears to be designed to address reports of potential problems which require urgent action:

### **Removal of child already in alternative care**

**173.** (1) The provincial head of social development in the relevant province may, in the best interest of a child at any time whilst the child is in alternative care, issue a notice directing that the child, pending any action in terms of subsection (2) –

- (a) be removed from the child and youth care centre or person in whose care or temporary safe care the child is; and
  - (b) be put in temporary safe care at a place specified in the notice.
- (2) The provincial head of social development must, within six months from the date on which a child has been moved and placed in temporary safe care in terms of subsection (1) and after such inquiry as the provincial head of social development may consider necessary –
- (a) transfer the child in terms of section 171;
  - (b) discharge the child from alternative care in terms of section 175; or
  - (c) issue a notice directing that the child be returned to the child and youth care centre or person in whose care or temporary safe care the child was immediately before the subsection (1) notice was issued.

The South African provision authorises transfer under this section only to a temporary place of safety. The Namibian section is broader, and overlaps with the provision on transfer, which is confusing. It might also be helpful to articulate the purposes of this provision.

## **Provisional transfer from foster care, place of safety, children's home or educational and vocational centre**

**111.** (1) The Minister may, in the best interest of a child at any time whilst the child is in alternative care, issue a notice directing that a child be provisionally transferred from foster care, place of safety, children's home or an educational or vocational training centre into another form of care that is not more restrictive, as from a date specified in the notice, for a trial period of not more than six months.

What is the goal of the trial period? to see if the new placement is suitable? When is a provisional transfer rather than a transfer appropriate?

- (2) A notice in terms of subsection (1) may be issued only after –
- (a) prescribed procedures have been followed –
    - (i) to assess the best interest of the child; and
    - (ii) to reunite the child with the child's immediate family or the family members, if applicable; and
  - (b) a report on such assessment and reunification has been submitted to and considered by the Minister.

It would seem that the two preliminary steps set forth here – assessment and attempted reunification with the child's family – should be involved in any movement of the child, except an emergency removal.

- (3) A notice in terms of subsection (1) is subject to the condition that –
- (a) the provisional transfer must be managed under the supervision of a designated social worker to establish and test the feasibility of –
    - (i) reunification of the child with the child’s immediate family or other family members;
    - (ii) the child’s integration into another family; or
    - (iii) a transfer of the child to another children’s home or educational and vocational training centre or any other form of placement;

This social worker supervision would seem advisable for any transfer.

- (b) the Minister may at any time revoke the provisional transfer; and
- (c) the Minister must revoke the transfer if the child and the designated social worker so request.

(4) The Minister may at the end of or at any time during the trial period referred to in subsection (1) confirm the child’s placement or permanent discharge in terms of section 112.

(5) A notice in terms of subsection (1) must be considered proof of eligibility for any form of state support which would have been payable if the transfer had been permanent.

## Discharge of a child

**112.** The Minister may issue a notice directing the child be discharged from foster care, place of safety, children’s home or an educational and vocational centre as from the date specified in the notice.

(3) A notice under subsection (2) may only be issued after the prescribed procedures have been carried out to –

- (a) assess the best interest of the child;
- (b) to reunite the child with the child’s immediate family or family members; and
- (c) a report of assessment has been made by a designated social worker

(4) A notice in terms of subsection (1) relieves the foster parent, place of safety, children’s home or an educational and educational and vocational centre from any further responsibilities with respect to the child.

There should be some provisions for transitional social worker monitoring after a discharge to ensure that the problems which led to the placement have not recurred. This would be especially important where the discharge was not preceded by a transitional arrangement in terms of section 111.

## Remaining in alternative care beyond age of 18 years

**113.** (1) A child placed in foster care, place of safety, children's home or an educational vocational centre is entitled, after having attained the age of 18 years, to remain in that care until the end of the year in which that person has attained the age of 18 years.

This is presumably subject to the rules on duration and extension of orders in section 72, but the relationship between these two sections needs to be made clear.

(2) The Minister may on application by a child placed in a place of safety, foster care, children's home or an educational vocational centre allow that child to remain in that care until the end of the year in which that person has attained the age of 21 years if –

- (a) the current alternative care-giver is willing and able to care for that person; and
- (b) the continued stay in that care is necessary to enable that person to complete his or her education or training.

If the age of majority is lowered from 21 to 18, that change need not affect this section. Even though the age of majority has been lowered to age 18 in South Africa, this section is mirrored in the South African law.

### RIGHT OF APPEAL

There are several important follow-up decisions in this part of the draft Bill which can be made by the Minister without ratification by a Children's Court – including provisional transfer, transfer, removal, discharge and extension of care until age 21. Ratification is generally only required if the move is to a more restrictive form of care. However, the Namibian draft omits to provide a right of appeal for such decisions, as the corresponding chapter of the South African law has done:

#### Appeal against and review of certain decisions

**177.** (1) A child or person aggrieved by a decision or action in terms of this chapter may lodge an appeal against that decision in the prescribed form within 90 days with the MEC for social development [a higher official], who must decide on the appeal within 90 days of receipt thereof.

(2) A child or person who is not satisfied with the outcome of an appeal lodged as contemplated in subsection (1) may apply to the competent division of the High Court to review that decision.

The right of appeal is an important safeguard and a similar mechanism should be provided in the Namibian law.

## **Death of a child in foster care, place of safety, children's home and educational and vocational centre**

**114.** If a child who has been placed in foster care, place of safety, children's home or educational and vocational centre dies the management of that home or centre or the person in whose care the child was placed must immediately report the matter to a member of police and the designated social worker.

A requirement of immediate notification of the child's parents and/or other family members should be added here. The South African law requires the report of serious injury or death of a child in alternative care, and a police investigation if there is a death other than by natural causes.

## **Child in place of safety, children's home and educational vocational centre prohibited from leaving Namibia**

**115.** (1) A child in foster care, place of safety, children's home or educational and vocational centre may not leave Namibia without the permission of the Minister.

(2) In granting the approval in terms of subsection (1) the Minister may impose terms and conditions to protect the child's best interest.

How does this fit together with section 173, which requires permission from a person with relevant parental rights and responsibilities, or court authorisation for a child to leave the country?

## **Leave of absence from foster care, place of safety, children's home or educational and vocational training centre**

**116.** (1) Leave of absence may, subject to subsection (2) and such limitations and conditions as may be prescribed, be granted to a child in a foster care, place of safety, children's home or educational and vocational centre –

- (a) by the management of a children's home or an educational and vocational training centre in whose care the child has been placed;
- (b) by the person in whose care the child has been placed; and
- (c) by the Minister in the case of a child in a place of safety, children's home, educational and vocational training centre, shelter or private home or any other place pending a decision or court order concerning the placement of the child, but excludes care of a child in a prison or police cell.

(2) If a child has been placed under the supervision of a designated social worker, leave of absence may only be granted with the approval of that social worker.

(3) The management or person referred to in subsection (1), or designated social worker may at any time cancel any leave of absence granted in terms of subsection (1).

(4) In the case of foster care, the supervising designated social worker may at any time cancel any leave of absence granted in terms of subsection (1).

(5) When a child's leave of absence has been cancelled, the management or person referred to in subsection (1), or the designated social worker must request that the child be returned to the place of safety, children's home, educational and vocational centre or person.

It is not clear when a formal leave of absence must be granted and when the person exercising parental authority by means of the placement could simply agree to an absence – such as allowing the child to go on a weekend sports tour with a school team.

## **Apprehension without warrant of child absent without authorisation from place of safety, children's home, educational and vocational training centre or placement**

**117.** (1) A member of the police or a designated social worker may without a warrant apprehend any child who is absent without authorisation from foster care, a place of safety, a children's home, an educational and vocational training centre or an any other place in which the child has been placed pending a decision or court order concerning the placement of a child.

The corresponding South African provision reads as follows:

(1) Any police official or designated social worker may apprehend a child in alternative care who –

- (a) has absconded from the child and youth care centre or person in whose care or temporary safe care that child has been placed; or
- (b) has been granted leave of absence by the child and youth care centre or person in whose care or temporary safe care that child has been placed and who on cancellation or expiration of such leave of absence fails to return to that centre or person.

(2) If a police official or designated social worker contemplated in subsection (1) has reasonable grounds to believe that a child is in or on certain premises, the police official or designated social worker may, without a warrant, enter and search the premises for the purpose of apprehending the child.

(3) A police official referred to in subsection (1) may use such force as may be reasonably necessary to overcome any resistance against the entry or search of the premises as contemplated in subsection (1), including the breaking of any door or window of such premises: Provided that the police official shall first audibly demand admission to the premises and notify the purpose for which he or she seeks to enter such premises.

The wording of these provisions is clearer than the Namibian draft. The power of search and entry should perhaps be added to the Namibian draft, along with a power to use reasonable force to apprehend the child if necessary.



(2) A child who is apprehended under subsection (1) must be brought before a commissioner within five days for an enquiry as to the reason for the unauthorised absence.

(3) A child may, depending on his or her best interests, until he or she is brought before a commissioner in terms of subsection (2), be returned to the person from whom or place, home or training centre from where he or she left, or be kept in a place of safety.

(4) During an enquiry under subsection (2) a commissioner –

(a) must give the child an opportunity to explain his or her unauthorised absence; and

(b) may, in the best interests of the child, allow the child to give the explanation referred to in paragraph (a) without the presence of his or her parents, a guardian, foster parents or members of or representatives of the board or manager of the place of safety, the children's home or the educational and vocational training centre concerned.

(5) A Commissioner may, after an enquiry under subsection (4), make an order in the best interests of the child, requiring –

(a) that the child be returned, on such conditions as the commissioner may consider necessary, to the person from whom or the place of safety, the children's home or the educational and vocational training centre from which he or she was absent; or

(b) that the place of safety, the children's home or the educational and vocational training centre or the placement of the child be changed.

If the placement is changed, the child's family and the person in whose care the child was immediately before the placement should be notified immediately if they are not present at the enquiry.

(6) A person who directly or indirectly counsels, induces or aids any child who is absent without authorisation from a place of safety, a children's home, an educational and vocational training centre, an in-home placement or foster care referred to in subsection (1) not to return to the care thereof, or who prevents him or her from returning to such care after the order under subsection (5)(a) has been made, commits an offence and is liable on conviction to a fine not exceeding N\$20 000 or to imprisonment for a period not exceeding five years or to both the fine and imprisonment.

## Delegation

**118.** (1) The Minister may, by agreement with a local authority council, assign the performance of some or all of the functions contemplated in sections 100, 101, 102, 103, 104, 105 and 106 to a local authority if the Minister is satisfied that the local authority has the capacity to perform the functions concerned.

(2) The local authority to in subsection (1) may delegate any power conferred or duty assigned to him or her in terms of this section to its staff members.

(3) A delegation in terms of subsection (2) –

(a) is subject to any limitations, conditions and directions which the delegating official may impose;

(b) must be in writing; and

(c) does not divest the delegating official of the responsibility concerning the exercise of the power or the performance of the duty.

(4) The delegating official may-

(a) confirm, vary or revoke any decision taken in consequence of a delegation in terms of this section, subject to any rights that may have accrued to a person as a result of the decision; and

(b) at any time withdraw a delegation.

(5) An applicant aggrieved by a decision of a local authority with regard to matters referred to in the sections referred to in subsection (1), may lodge an appeal with the local authority council against that decision.

# CHAPTER 9

## CONTRIBUTION ORDERS

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### Issue of contribution orders

**119.** (1) A children’s court may make an contribution order instructing a respondent to pay a sum of money or a recurrent sum of money towards the maintenance or treatment of, or the costs resulting from the other special needs of a child –

- (a) placed in a place of safety, a children’s home or educational and vocational centre; or

Why is foster care excluded, since foster care grants are a major state expense?

- (b) temporarily removed by order of the court from the child’s family for treatment, rehabilitation, counselling or another reason; or

- (c) as a short-term emergency contribution towards the maintenance or treatment of, or the costs resulting from, the other special needs of a child in urgent need.

It is not clear what situation this third category refers to.

This approach is in some respects both broader and narrower than the approach taken currently under the Children’s Act 33 of 1960, which defines a “contribution order” as “an order for the payment or recurrent payment of a sum of money as a contribution towards the maintenance of a child in a place of safety or in any custody wherein he was placed under this Act or the Criminal Procedure Act, 1955, or towards the maintenance of a pupil”.

This provision, which is modelled on a similar one in the South African Children’s Act 38 of 2005, says that the order can be made against a “respondent”. This term is not defined in the Namibian draft. In the South African law, it is defined as follows:

**‘respondent’** means any person legally liable to maintain or to contribute towards the maintenance of a child for whose maintenance, treatment or special needs a contribution order is sought or has been made in terms of Chapter 10.

Similarly, the current Children’s Act 33 of 1960 includes the following definition:

**“respondent”** means any person legally liable to maintain or to contribute towards the maintenance of a child or of a pupil for whose maintenance a contribution order is sought or was made.

A similar definition needs to be incorporated into the Namibian draft, preferably in the provisions on contribution orders to avoid cross-referencing.

A person legally liable to maintain a child would normally include both of the child's parents, or the child's guardian. If there is no parent or guardian, or if they are not financially able to contribute, the duty would move to the child's next nearest relative in the same way as an obligation to pay maintenance.

(2) A contribution order takes effect from the date on which it is made unless the court orders that it takes effect from an earlier or later date.

(3) If a court other than the court which made a contribution order varies, suspends, rescinds or revives the order in terms of subsection (3), the clerk of the first-mentioned court must immediately inform the clerk of the last mentioned court of such variation, suspension, rescission or revival.

## Jurisdiction

**120.** (1) A contribution order may be made, varied, suspended, rescinded or revived by the children's court of the area in which –

- (a) the respondent is ordinarily resident, carries on business or is employed; or
- (b) the child involved in the matter is ordinarily resident.

(2) A provisional contribution order may be made by a children's court having jurisdiction in terms of subsection (1)(b) against a respondent resident in any country which is a proclaimed country within the meaning of the Reciprocal Enforcement of Maintenance Orders Act, 1995 (Act No. 3 of 1995).

## Contribution order

**121.** (1) A contribution order must direct the person against whom it is made to pay, in such manner and at such times as the court concerned may determine, the amount specified in that order to an officer of the court granting or confirming the order, or to such other officer as the court may determine.

(2) A children's court may, in such circumstances and subject to such conditions as may be prescribed, grant a contribution order for the maintenance of a person who is 18 years of age or older.

## Effect of contribution order

**122.** (1) A contribution order and a provisional contribution order have the effect of a maintenance order and a provisional maintenance order in terms of the Maintenance Act 2003 (Act No. 9 of 2003) and the Reciprocal Enforcement of Maintenance Orders Act, 1995 (Act No. 3 of 1995), as the case may be.

(2) Sections 33 and 39 of the Maintenance Act, read with such changes as the context may require, apply to a person who refuses or fails to comply with a contribution order.

## Attachment of wages of respondent

123. (1) A children's court which has made a contribution order against a respondent may –
- (a) order the employer of the respondent –
    - (i) to deduct the amount of the contribution which that respondent has been ordered to pay, from the respondent's wages, salary or remuneration; and
    - (ii) to such person or institution specified in the order; or
  - (b) vary, suspend or rescind such an order or revive the order after it has been rescinded.

Subsection 123(1)(b) does not seem to belong in the section on attachment of wages.

- (2) The employer must promptly pay any amount deducted under an order in terms of subsection (1) to such person or institution as may be specified in the order.

It is not clear why the draft Bill does not simply incorporate by reference all the enforcement mechanisms available under the Maintenance Act, with the necessary changes. One distinction is that the provision on attachment of wages for a contribution order is more stringent than the procedure in the Maintenance Act which allows attachment of wages in respect of a maintenance order only after there has been a default. While the Legal Assistance Centre believes that this approach should have been applied in the Maintenance Act, it is not clear why the option of attaching wages in advance of a default is being applied here after being rejected for maintenance orders. Section 65 of the current Children's Act 33 of 1960 allows for attachment of wages at any stage in respect of contribution orders, whether or not there has been a default, so the proposed draft may just be following the current law with respect to this distinction.

It would be better to use the broader term "remuneration" or "emoluments" instead of "wages". Note that the Maintenance Act 9 of 2003 refers to "emoluments", defined as "any salary, wages, allowances, or any other form of remuneration or any other income which is paid periodically to any person, whether expressed in money or not". The Labour Act of 11 of 2007 defines "remuneration" similarly as "the total value of all payments in money or in kind made or owing to an employee arising from the employment of that employee".

## Change of residence or work by respondent

124. A respondent against whom a contribution order is in force must –
- (a) give notice, in writing, to the clerk of the children's court which made the order of any change in that person's residential address or place of work; and
  - (c) state in that notice the new residential address or the name and address of the new employer, as the case may be.

The sanction for failure to comply is listed below in section 177 as being an unspecified fine or imprisonment for up to 10 years. This seems unduly harsh. As a point of comparison, section 45 of the Maintenance Act provides for a similar criminal offence: “Any person who refuses or fails to give notice of any change of his or her place of residence or employment as required by section 17(5) commits an offence and is liable to a fine not exceeding N\$2 000 or to imprisonment for a period not exceeding six months.” (It would be better to place the sanction together with the offence rather than in an omnibus section with difficult cross-referencing.)

## Appeals

**125.** (1) A person who is aggrieved by the granting or refusal by a magistrate’s court of an application for a contribution order or by the variation, suspension, rescission or revival of that order may appeal to the High Court as if it were an appeal against a civil judgment of a magistrate’s court.

(2) If an appeal is brought by a person against whom a contribution order was made, the Minister must be cited as the respondent in the appeal.

## Service of process, execution of contribution orders and costs

**126.** (1) A summons, a subpoena or a notice in connection with any proceedings under this Chapter may be served by any a member of the police without charging any fee in the manner provided for by the rules made under the Magistrates’ Courts Act for the service of similar documents in civil proceedings in magistrates’ courts, unless any other manner of service has been prescribed.

(2) A writ of attachment in execution of a contribution order must be executed by the messenger of the magistrate’s court of the district in which the property to be attached is situated, and the messenger’s fees and charges for the execution must be paid out of the proceeds of the sale of any such property attached in execution and must be levied in addition and in preference to the amount payable under the contribution order, and if no such sale in execution is held, such fees must be payable by the respondent.

(3) Except as provided in subsection (2), a party to the proceedings under this Chapter including an appeal, must not recover any costs from any other party, and must not pay any court fee in connection with the issue or lodgement of any document in any such proceedings.

# CHAPTER 10

## ADOPTION OF CHILDREN

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### Adoption orders

**127.** On application by any person desirous of being authorised to adopt a child, the children's court may, subject to the provisions of this Act, make an adoption order authorising the applicant to adopt that child.

### Child who may be adopted

**128.** (1) A child in the following circumstances may be adopted:

- (a) the child does not have a parent and has no guardian or caregiver willing to adopt the child;
- (b) the whereabouts of the child's parent or guardian cannot be established;
- (c) the child has been abandoned; or
- (d) the child is in need of a permanent alternative placement.

(2) A designated social worker must make an assessment of whether a child may be adopted.

### Persons who may adopt a child

**129.** (1) A child may be adopted by –

- (a) a husband and wife, jointly;
- (b) a husband or a wife, whose spouse is the parent of the child;
- (c) the foster parent of the child;
- (d) a widower, widow, divorced or unmarried person; or
- (e) the kinship care-giver of the child.

## WHO CAN ADOPT?

There is some overlap of concepts here, as foster parents and other care-givers would almost certainly also be married, single, divorced or widowed. It is also confusing to list foster parents and caregivers in this way, as it might be understood to imply that they have some automatic right or preference in respect of adoption, whereas the best interests standard should be applied in all cases.

“Husband and wife” should be defined in the same way as “marriage”, to include spouses in customary and religious unions. (In terms of draft section 1, “marriage” means “a marriage in terms of any law of Namibia and includes a marriage recognised as such in terms of any tradition, custom or religion of Namibia and any marriage in terms of the law of any country, other than Namibia, which marriage is recognised as a marriage by the laws of Namibia”.)

The concept “kinship caregiver” needs to be defined if it remains in the final draft. It might be more appropriate to refer to the child’s “primary caretaker”.

The corresponding provision in South Africa allows joint adoption by “partners in a permanent domestic life-partnership” and “other persons sharing a common household and forming a permanent family unit”. This covers, for example, persons cohabiting as husband and wife without being formally married, as well as other family arrangements – such as joint adoption by siblings who share a household, joint adoption by a mother and her adult son or daughter, or joint adoption by a husband and his multiple customary wives. It could also apply to same-sex couples. The key issue would seem to be the ability of the individuals in question to provide appropriate nurture for the child as a family unit.

The South African Law Reform Commission recommended: “The best interest of the child test is apposite in the consideration of whether persons who share a household, but who are not living in a conjugal relationship, should be permitted to adopt jointly. It is submitted that the best interest criterion should outweigh the consideration of the particular type of relationship between the two parties *inter se*.”

(2) A prospective adoptive parent must be a person –

- (a) fit and proper to fulfil parental responsibilities and rights;
- (b) willing and able to exercise, undertake and maintain parental responsibilities and rights;
- (c) 18 years of age and older; and
- (d) properly assessed by a designated social worker for compliance with paragraphs (a) and (b).

(3) A person who wishes to be approved as a prospective adoptive parent, must in the prescribed manner make an application to a designated social worker for an assessment contemplated in subsection (2).

(4) A designated social worker must assess, a prospective adoptive parent for compliance with subsection (2).

(5) The name and other identifying information of a person approved as prospective adoptive parent must be entered in adoption register referred to in section 130.



(6) A person may not be disqualified from adopting a child by reason of the person's financial status.

(7) A person unsuitable to work with children is not a fit and proper person to adopt a child.

#### **CULTURAL MATCHING**

In South Africa, the 2005 Children's Act specifically allows the social worker to consider the "cultural and community diversity" of the child and the prospective adoptive parents. This is for the purpose of considering "matching" between the child and the parents, although there is nothing absolutely forbidding adoptions across racial, language or cultural boundaries. In Namibia, this consideration appears to be subsumed under the requirement that the adoptive parent be a fit and proper person to care for the child, and the requirement in section 137(1)(b) below that the child's cultural and religious ties must be taken into consideration.

#### **ADOPTIONS BY NON-NAMIBIANS RESIDENT IN NAMIBIA**

Adoptions by non-Namibians resident outside Namibia are covered by the section on intercountry adoption. It should be noted that the provisions on eligibility for domestic adoption contains no citizenship or residency requirements, but refer only to "persons". This means that a non-Namibian resident in Namibia could adopt a Namibian child under Namibian law. The Hague Convention would not apply in this case. Cabinet suggested at one stage that any adoptions by non-Namibians should require Ministerial approval. This would appear to be unnecessary in respect of domestic adoptions, as the Children's Court must already take into consideration all relevant factors, including (as discussed below) the preservation of the child's identity, language and cultural and religious ties. In light of the *Detmold* case, this flexible approach appears to be best way to protect the child's best interests, in contrast to rigid rules about the adoptive parents' citizenship or residency status.

#### **AGE REQUIREMENTS**

Namibia follows South Africa in simplifying specific age requirements for adoption, leaving issues such as the age gap between adoptive parent and child to the discretion of the social worker and Children's Court. Other countries have retained more specific rules about minimum and maximum age, and age gaps between adoptive parent and child – especially where a single parent wishes to adopt a child of the same sex.

## **Adoption Register**

**130.** (1) The Minister must keep a register of children who may be adopted and prospective adoptive parents (referred to in this Act as the "adoption register").

(2) The name and other identifying information of a child may be entered into adoption register if the child is adoptable.

(3) The name and other identifying information of a child must be removed from the adoption register if the child has been adopted.

- (4) Registration of a person as a prospective adoptive parent referred to in section 129 –
- (a) is valid for a period of three years;
  - (b) may be renewed as prescribed;
  - (c) ceases –
    - (i) on written notice of withdrawal being given to the Minister;
    - (ii) on the death of the registered person;
    - (iii) on cancellation by the Minister if the registered person is no longer –
      - (aa) a fit and proper person to be entrusted with full parental responsibilities and rights in respect of a child; and
      - (bb) willing and able to undertake, exercise and maintain those responsibilities and rights.
    - (v) if a child contemplated in section 58 is removed from the care of that registered person; or

This cross-reference should rather refer to Chapter 7 of the Act on children in need of care or protection, as the removal referred to could take different forms.

- (vi) if the registered person is convicted of an offence involving violence.

(5) Only the Minister and officials in the Ministry designated by the Minister have access to the adoption register.

The Namibian draft refers only to the “name and other identifying information” of the prospective adoptive parents. The corresponding South African provision requires that the register indicate whether the prospective adoptive parent is a citizen or permanent residents of South Africa so that the Register can be used to check for the availability of suitable local adoptive parents before considering intercountry adoption. A similar approach would be useful in Namibia.

It would be useful to give this register a different name to distinguish it from the “adoption register” where information about completed adoptions is recorded. South Africa terms the discussed here a “Register of Adoptable Children and Prospective Adoptive Parents”.

## Adoption plans

**131.** (1) Before the making of an adoption order, parties to the adoption may agree on an adoption plan.

(2) An adoption plan is a plan agreed to by two or more of the parties to the adoption of a child that includes –

- (a) the making of arrangements for the exchange of information between the parties in relation to any one or more of the following:
  - (i) the child's medical background or condition,
  - (ii) the child's development and important events in the child's life,
  - (iii) the means and nature of contact between the parties and the child, and
- (b) any other matter relating to the adoption of the child.

(3) Without limiting the matters for which an adoption plan may be made, an adoption plan may state the ways in which the child is to be assisted to develop a healthy and positive cultural identity and for links with that heritage to be fostered.

(4) An adoption plan –

- (a) must be in writing;
- (b) takes effect only if made an order of court;
- (c) may be amended or terminated only by an order of court on application –
  - (i) by a party to the agreement; or
  - (ii) by the adopted child; and
- (d) is to contain the prescribed particulars.

(5) An agreement contemplated in subsection (1) may not be entered into without the consent of the child if the child is of an age, maturity and stage of development to understand the implications of such an agreement.

(6) The designated social worker facilitating the adoption of the child must assist the parties in preparing an adoption plan and counsel them on the implications of such an agreement.

(7) A court may, when granting an application for the adoption of the child, confirm an adoption plan which is in the best interests of the child.

## **Consent to adoption**

**132.** (1) The children's court may only make an adoption order, if consent for the adoption has been given by –

- (a) each parent of the child regardless of whether the parents are married or not, but where the parent of the child to be adopted is a minor, that parent must be assisted by the parent or guardian;

### CONSENT OF PARENTS WHO ARE MINORS

Commentary on the corresponding South African provisions on this issue provides a useful statement of the pros and cons of the proposed approach:

In our view it is good practice, where possible, for the guardian if a young parent to be involved in the process surrounding adoption, as he or she may be an essential source of emotional and practical support and can provide much-needed help after the decision regarding whether or not to consent to adoption has been made. However, making the involvement of a guardian mandatory could cause grave problems in some cases, for example where the guardian has died or is missing; there the young parent, usually the mother, has left home due to abuse and is adamant that her parent should not be contacted; or where the guardian is exerting undue pressure on the young parent to give or withhold consent.

It would seem to be wiser to encourage the minor parent to involve her own parent or guardian if appropriate through counselling, but to allow the minor parent to have the final say on consent and on whether the issue will be discussed with parent or guardian.

- (b) a person who holds guardianship in respect of the child; and
- (c) the child, if the child is –
  - (i) 14 years of age or older and is of sufficient maturity and stage of development to understand the effect of giving consent; or
  - (ii) under the age of 14 years, but is of an age, maturity and stage of development to understand the implications of that consent.

### CONSENT OF CHILD

The Namibian draft on this point does not make sense as it stands. It requires a determination that the child has the requisite maturity and stage of development for both children under age 14 and children over age 14. This makes the age a meaningless dividing line. The corresponding provisions in South Africa requires that all children 10 years of age or older must consent to the adoption, without any further finding. The consent of younger children may be required IF the court finds that they have sufficient age, maturity and stage of development to understand the implications of the consent. The South African Law Reform Commission suggested a completely open-ended requirement, whereby any child must consent to being adopted if he or she “is of sufficient maturity to understand the implications of being adopted and giving consent to such adoption”. The Legal Assistance Centre suggests that Namibia take a similarly open-ended approach, which is in essence what the current confusing provision does, or else follow the South African example of setting an age above which consent is required of all children while consent is required of younger children based on a finding regarding their maturity.

(2) Subsection (1) does not include a parent or a person referred to in section 133, and a child may be adopted without the consent of such parent or person.

(3) Before consent for the adoption of the child is granted in terms of subsection (1), the social worker facilitating the adoption of the child must counsel the parents of the child and, where applicable, the child on the decision to make the child available for adoption.

(4) If the parent of a child wishes the child to be adopted by a particular person the parent must state the name of that person in the consent.

(5) The eligibility of the person contemplated in subsection (4) as an adoptive parent must be determined in terms of section 129(2).

(6) Consent referred to in subsection (1) and given –

(a) inside Namibia, must be –

- (i) signed by the person consenting in the presence of a commissioner of the children's court;
- (ii) signed by the child in the presence of a commissioner of the children's court if the consent of the child is required in terms of subsection (1)(c);
- (iii) verified by a commissioner of the children's court in the prescribed manner; and
- (iv) filed by the clerk of the children's court pending an application for the adoption of the child; or

(b) outside Namibia, must be –

- (i) signed by the person consenting in the presence of the prescribed person;
- (ii) verified in the prescribed manner and by the prescribed person; and
- (iii) submitted to and filed by a clerk of the children's court pending an application for the adoption of the child.

(7) The court may on good cause shown condone any deficiency in the provision of a consent given outside Namibia in that the consent –

(a) was not signed in the presence of the prescribed person; or

(b) was not verified in the prescribed manner or by the prescribed person.

(8) A person referred to in subsection (1) who has consented to the adoption of the child may withdraw the consent within 60 days after having signed the consent, after which the consent is final.

#### **60-DAY WAITING PERIOD**

In South Africa, the 60-day waiting period provided for in the Children's Act 2005 was a continuation of an existing practice, whereas in Namibia this is a new innovation.

The South African Law Reform Commission found that many respondents recommended against the retention of the 60-day 'cooling-off' period for the following reasons: (a) the uncertainty caused by the delay is traumatic to both adoptive parents and birth parents; (b) the waiting period can hamper bonding between the prospective adoptive parents and the child; (c) the objective of the waiting period could be served by counselling to birth parents, to ensure that the decision to give a

child up for adoption has been thoroughly considered; and (d) some Commissioners of Child Welfare place babies in places of safety during this 60-day period which has a negative impact on the bonding process. On the other hand, some persons consulted argued for the retention of the 60-day period. Reasons offered were (a) it is important to observe the placement and to establish whether or not bonding has taken place during this 60-day period; (b) the circumstances of the birth mother might also change and cause her to want to withdraw her consent; (c) a lifetime decision like adoption should be well-considered by all parties involved; and (d) adoptive parents can be counselled to accept this risk and the waiting period gives them sufficient time to evaluate the success of the placement before the adoption is finalised. Some persons consulted suggested a much shorter period, such as 30 days. The Commission ultimately recommended the retention of the 60-day cooling off period, having been persuaded that proper pre –and post-adoption counselling should prevent difficulties from arising.

The 60-day period is retained in the South African Children’s Act 2005, and it has been asserted that this is a positive outcome:

The decision to give a child up for adoption is difficult and needs careful consideration on the part of the consenting party. The 60 days is a cooling-off period which gives the consenting party an opportunity to fully reflect on their decision before it becomes final. It also offers a safeguard against any form of pressure which may have been brought to bear on the consenting party, and may have led to an ill-formed or premature decision to give the child up for adoption.

## When consent not required

133. (1) The consent of a parent or guardian to a child’s adoption is not required –
- (a) if that parent or guardian –
    - (i) is incompetent to give consent due to mental incapacity;
    - (ii) has abandoned the child,
    - (iii) after reasonable inquiry, cannot be found or identified;
    - (iv) has abused or deliberately neglected the child, or has allowed the child to be abused or deliberately neglected;
    - (v) has consistently failed to fulfil his or her parental responsibilities towards the child during the last 12 months;
    - (vi) has been divested by an order of court of the right to consent to the adoption of the child; or
    - (vii) has failed to respond to a notice of the proposed adoption referred to in section 136 within 30 days of service of the notice; or

It may be necessary to provide guidelines on what time period and degree of effort must be spent in attempting to locate parents whose whereabouts are unknown. For example, regulations could require a police search over a specified time period, or announcements in the media in a prescribed form over a prescribed period.

- (b) if the child is an orphan and has no guardian or caregiver who is willing and able to adopt the child and the court is provided with certified copies of the child's parent's or guardian's death certificate or such other documentation as may be required by the court.

(2) If the parent referred to in subsection (1) is the biological father of the child, the consent of that parent to the adoption is not necessary if –

- (a) that biological father is not married to the child's mother or was not married to her at the time of conception or at any time thereafter, and has not acknowledged in a manner set out in subsection (3) that he is the biological father of the child;
- (b) the child was conceived from an incestuous relationship between that biological father and the mother; or
- (c) the court, following an allegation by the mother of the child, finds on a balance of probabilities that the child was conceived as a result of the rape of the mother, but such finding does not constitute a conviction for the crime of rape.

(3) A person referred to in subsection (2)(a) can for the purposes of that subsection acknowledge that he is the biological father of a child –

- (a) by giving a written acknowledgment that he is the biological father of the child either to the mother or the clerk of the children's court before the child reaches the age of six months;
- (b) by voluntarily paying maintenance in respect of the child;
- (c) by paying damages in terms of customary law; or
- (d) by causing particulars of himself to be entered in the registration of birth of the child in terms of the Births, Marriages and Deaths Registration Act, 1963 (Act 81 of 1963).

A man can be named as the father on the child's birth certificate only with the mother's consent. But with the other forms of acknowledgement of paternity, what if a man does these things but the mother denies that he is the father?

(4) A children's court may on a balance of probabilities make a finding as to the existence of a ground on which a parent or person is excluded in terms of this section from giving consent to the adoption of a child.

## **Unreasonable withholding of consent**

**134.** (1) If a parent or person referred to in section 133 withholds consent for the adoption of a child a children's court may, despite the absence of such consent, grant an order for the adoption of the child if the court finds that –

- (a) consent has unreasonably been withheld; and
- (b) the adoption is in the best interests of the child.

(2) In determining whether consent is being withheld unreasonably, the court must take into account all relevant factors, including –

- (a) the nature of the relationship during the last two years between the child and the person withholding consent and any findings by a court in this respect; and
- (b) the prospects of a sound relationship developing between the child and the person withholding consent in the immediate future.

### **THE RIGHTS OF UNMARRIED FATHERS IN RESPECT OF ADOPTION**

The original starting point in both Namibia and South Africa was the common law, which view children born outside of marriage as “illegitimate”. They could not inherit from their fathers unless they were clearly named in a will, and their fathers had no rights to access, custody or guardianship. The common law obviously discriminated against these children as well as against their fathers.

In Namibia, discrimination against children born outside marriage and their fathers was removed by the Children’s Status Act 6 of 2006. This law states that, regardless of who has guardianship of a child born outside marriage, “unless the children’s court orders otherwise, the written consent of both parents is required for the adoption of the child, subject to the provisions for dispensing with any required consent contained in the law on adoption”.

In South Africa, in the 1997 *Fraser* case, the Constitutional Court held that the provisions of the Child Care Act that did not take into consideration the consent of an unmarried father to the adoption of his child were unconstitutional. The judgment stated that “the effect of the section allowing the child to be adopted by a third party without the consent of the father was to discriminate unfairly against fathers of certain children on the grounds of gender or marital status. The section drew a simplistic distinction between married and unmarried fathers, and between the fathers and mothers of extra-marital children, without reference to the circumstances of the particular case.” The Court gave Parliament two years in which to develop an alternative approach, but it warned that a blanket rule which treated all parents equally would be just as unlikely to produce the desired result:

Why should the consent of a father who has had a very casual encounter on a single occasion with the mother have the automatic right to refuse his consent to the adoption of a child born in consequence of such a relationship, in circumstances where he has shown no further interest in the child and the mother has been the sole source of support and love for that child? Conversely, why should the consent of the father not ordinarily be necessary in the case where both parents of the child have had a long and stable relationship over many years and have equally given love and support to the child to be adopted? Indeed, there may be cases where the father has been the more stable and more involved parent of such a child and the mother has been relatively uninterested in or uninvolved in the development of the child. Why should the consent of the mother in such a case be required and not that of the father?

The Court noted that statutory and judicial responses to these problems in other jurisdictions are “nuanced”, having regard to factors such as the duration and the stability of the relationship between the parents, the age of the child, the intensity or otherwise of the bonds between parent and child, the reasons why the relationship between the parents was not formalised by marriage and the best



interests of the child. The Court also directed Parliament to note that “the question of parental rights in relation to adoption bears directly on the question of gender equality” and urged Parliament to be “acutely sensitive to the deep disadvantage experienced by the single mothers in our society” and to ensure that law reforms on the issue did not “exacerbate that disadvantage”.

In California, if one parent has custody, and the other parent (a) fails to communicate with or support the child for one year and (b) fails to respond to a notice of the adoption, the consent of the non-custodial parent is no longer needed. While this might have particular applicability to single fathers, it is a gender-neutral rule which could apply to single or divorced parents.

## PARENTAL CONSENT

The provisions on parental consent in the current draft should be compared to the following provision on parental consent which was recommended by the Task Force for inclusion in an earlier version of the draft Bill:

*(1) No consent shall be required from a natural parent of a child where the pregnancy is a result of rape or incest committed by that parent, regardless of whether a criminal charge was laid in respect of such offence, if the court is satisfied that the pregnancy did in fact result from rape or incest .*

*(2) No consent shall be required from a natural parent of a child unless –*

*(a) he or she is listed as the parent of the child on the child’s birth certificate;*

*(b) he or she is married to the custodial parent of the child under civil or customary law, or was married to the custodial parent within six months of the child’s birth;*

*(c) he or she has publicly acknowledged parentage; or*

*(d) he or she has taken steps to establish legal responsibility for the child.*

*(3) No consent shall be required from a natural parent of a child if –*

*(a) the parent in question cannot be found or is otherwise unavailable and will not become available;*

*(b) the parent in question is not competent to give consent due to a mental condition rendering him or her incapable of appreciating the nature and effect of the action in question;*

*(c) the parent in question is aware of the existence of the child in question but has had no contact with that child for a period of at least one year and was not prevented from doing so by circumstances beyond his or her control;*

*(d) the court finds that the parent in question has seriously or persistently abused, ill-treated or neglected the child; or*

*(e) the court finds that the parent in question has caused or conduced to the seduction, abduction or sexual exploitation of the child or the commission of immoral acts by the child.*

*(5) Where the natural parent is a minor, the children’s court shall specifically determine whether he or she has sufficient maturity to give consent freely and with understanding of its consequences and, upon a finding of sufficient maturity, the consent of the minor parent’s guardian shall not also be required.*

*(6) The court can overrule a lack of consent if it determines that the parent in question is withholding consent unreasonably.*

*(7) Consent to an adoption which will be in the best interests of a child may be withheld by a non-custodial parent only where that parent is willing, fit and able to assume custody of the child himself or herself.*

It would also be easier to follow the provisions on consent if the basic rules on consent and their exceptions were meshed into a single section on consent, instead of being contained in separate provisions.

## Application for adoption

135. (1) An application for the adoption of a child must –

- (a) be made in the prescribed manner to a children’s court in the district in which the child normally resides;
- (b) be accompanied by a report, in the prescribed format, by a designated social worker containing –
  - (i) information on whether the child is adoptable;
  - (ii) information on whether the adoption is in the best interests of the child; and
  - (iii) prescribed medical information in relation to the child.
- (c) be accompanied by an assessment referred to in section 129;
- (d) by an adoption plan, if any; and
- (e) contain such prescribed particulars.

(2) An applicant does not have access to any document lodged with the court by other parties except with the permission of the court.

## Notice of application

136. (1) The children’s court may not make an adoption order unless 30 days notice of the application for the adoption order has been given to each person whose consent to the adoption is required in terms of section 132.

(2) The notice referred to in subsection (1) must –

- (a) inform the person whose consent is sought of the proposed adoption of the child; and
- (b) request the person contemplated in paragraph (a), to consent or withhold consent for the adoption, or, if that person is the biological father of the child to whom the mother is not married, request him to consent to or withhold consent for the adoption;

Why is the unmarried biological father singled out here? He is already covered in the consent section above.

(3) If a person on whom a notice in terms of subsection (1) has been served fails to comply with a request contained in the notice within 30 days, that person must be regarded as having consented to the adoption.

(4) If it appears to the court to be necessary in the interests of justice so to do, the court may direct that notice of an application for an adoption order be given to any specified person.

Can a mother give consent for a baby to be put up for adoption at the time of the child's birth, or even prior to the birth, before a specific adoption proceeding begins? If so, does that mother still need notice of the proceeding? What if the 60-days waiting period for withdrawing consent has already expired?

## Consideration of adoption application

**137.** (1) When considering an application for the adoption of a child, the court must take into account all relevant factors, including the following:

- (a) that the adoption is in the best interests of the child;
- (b) that the child's given name or names, identity, language and cultural and religious ties must, as far as possible, be identified and preserved, and for this purpose the court must have regard to designated social workers report made in terms of section 129(2);

The corresponding South African provision requires consideration only of the "religious and cultural background" of the child, the child's parents and the adoptive parents.

What will happen where a child has already been in foster care with parents of a different culture? While background matching is appropriate, inter-racial and cross-cultural adoptions should still be possible where this is in the child's best interests. Application of the standard "as far as possible" might in some circumstances conflict with the standard of placing the child's best interests at the heart of the decision.

- (c) if the child is able to form his or her own views on a matter concerning his or her adoption, he or she must be given an opportunity to express those views freely and those views are to be given due weight in accordance with the developmental capacity of the child and the circumstances,
- (d) all reasonable preferences expressed by a parent and stated in the consent; and
- (e) a report contemplated in section 135(1)(b).
- (f) an adoption plan, if any;

(2) A children's court considering an application may not make an order for the adoption of a child unless –

- (a) subject to section 133, consent for the adoption has been given in terms of section 132; and
- (d) consent has not been withdrawn in terms of section 132(8).

(3) Where an application for an order of adoption is filed and all the applicable requirements of this Act have been complied with, a children's court may, having regard to all the circumstances of the case, make an order of adoption.

In California, the adoption agency working on the placement is required to conduct a criminal background check on prospective adoptive parents and consider that information in assessing their suitability. They may not place a child with a home with an adult who has been convicted of child abuse or neglect, spousal abuse, crimes against a child, including child pornography, or for a crime involving violence, including rape, sexual assault, or homicide. This might be a good requirement to consider in the case of Namibia, possibly as part of a simpler substitute for the proposed National Child Protection Register.

## Effect of adoption order

**138.** (1) Except when provided otherwise in the order or in an adoption plan confirmed by the court an adoption order terminates –

- (a) all parental responsibilities and rights any person had in respect of the child immediately before the adoption;
- (b) all claims to contact with the child by any family member of a person referred to in paragraph (a);
- (c) all rights and responsibilities the child had in respect of a person referred to in paragraph (a) or (b) immediately before the adoption; and
- (d) any previous order made in respect of the placement of the child.

(2) An adoption order –

- (a) confers full parental responsibilities and rights in respect of the adopted child on the adoptive parent;
- (b) confers the surname of the adoptive parent on the adopted child, except when otherwise provided in the order;
- (c) does not permit any marriage or sexual intercourse between the child and any other person which would have been prohibited had the child not been adopted; and
- (d) does not affect any rights to property the child acquired before the adoption.

(3) An adopted child must for all purposes be regarded as the child of the adoptive parent and an adoptive parent must for all purposes be regarded as the parent of the adopted child.

Does this mean that a foreign child adopted by Namibian parents would automatically become Namibian by descent? If the acquisition of citizenship is not included, it should be specifically provided for.

The Task Force which examined an earlier draft of the Bill made two recommendations which are not included here: (1) Allow adopted children to retain the right of intestate inheritance (inheritance in the absence of a will) from their natural parents. (2) Rather than prescribing a surname, let the adoptive surname be any surname chosen by the adoptive parents – including a hyphenated combination of the names of the adoptive spouses, or of the birth surname and the surname of the adoptive parent(s).

## Rescission of adoption order

**139.** (1) A High Court or children's court may rescind an adoption order on application by –

- (a) the adopted child;
- (b) a parent of the adopted child or other person who had guardianship in respect of the child immediately before the adoption; or
- (c) the adoptive parent of the child.

(2) An application in terms of subsection (1) must be lodged within a reasonable time not exceeding two years from the date of the adoption.

(3) An adoption order may be rescinded only if –

- (a) rescission of the order is in the best interests of the child; and
- (b) the applicant is a parent of the child whose consent was required for the adoption order to be made, but whose consent was not obtained; or

(c) at the time of making the adoption order the adoptive parent did not qualify as such in terms of section 129.

(5) Notice of an application for rescission of an adoption order must be given to –

- (a) the adoptive parent of that child, if any other person brings the application;
- (b) all persons who have consented to the adoption in terms of section 132 or who have withheld consent to the adoption in terms of section 132, if the child or the adoptive parent brings the application;

- (c) the competent authority in the case of an inter-country adoption; and
- (d) any other person whom the court finds has a sufficient interest in the matter.

Two years seems a long time for discovery that a required consent was not given or that the adoptive parents were not qualified, and rescission in such circumstances could disrupt the life of a settled child.

## Effect of rescission

- 140.** (1) As from the date on which the rescission of an adoption order takes effect –
- (a) the effects of the adoption order as set out in section 138(2) and (3) no longer applies in respect of the child concerned; and
  - (b) all responsibilities, rights and other matters terminated by section 138(1) in respect of the child are restored.
- (2) When rescinding an adoption order the court may –
- (a) make an appropriate placement order in respect of the child concerned; or
  - (b) order that that child be kept in a place of safety until an appropriate placement order can be made.

## Recording of adoption in births register

**141.** (1) After an adoption order has been made by a children's court in respect of a child whose birth has been registered in Namibia, the adoptive parent of the child must apply in terms of the applicable law to the minister responsible for home affairs to record the adoption and any change of surname of the child in the births register.

- (2) An application in terms of subsection (1) must be accompanied by –
- (a) the relevant adoption order as registered by the adoption registrar;
  - (b) the birth certificate of the child;
  - (c) the prescribed birth registration form; and
  - (d) a fee prescribed in terms of any applicable law, if any.

## **Registration of birth and recording of adoption of child born outside Namibia**

**142.** (1) After an adoption order has been made by a children's court in respect of a child born outside Namibia, the adoptive parent of the child must apply in terms of any applicable law to the minister responsible for home affairs to register the birth of the child and to record the adoption of the child in the birth register.

- (2) An application in terms of subsection (1) must be accompanied by –
  - (a) the relevant adoption order as registered by the adoption registrar;
  - (b) the birth certificate of the adopted child or, if the birth certificate is not available –
    - (i) other documentary evidence relating to the date of birth of the child; or
    - (ii) a certificate signed by a commissioner of a children's court specifying the age or estimated age of the child;
  - (c) the prescribed birth registration form, completed as far as possible and signed by the adoptive parent; and
  - (d) a fee prescribed in terms of any applicable law, if any.

## **Adoption register**

**143.** (1) The Minister must, in the prescribed manner, record information pertaining to and keep a register of –

- (a) the registration numbers allocated to records of adoption cases;
  - (b) the personal details of adopted children, of their biological parents and of their adoptive parents;
  - (c) particulars of successful appeals against and rescissions of adoption orders; and
  - (d) all other prescribed information in connection with adoptions.
- (2) A clerk of the children's court must –
- (a) keep a record of all adoption cases by a children's court, including all adoption orders issued by the court, in the prescribed manner;
  - (b) as soon as is practicable after an adoption order has been issued, forward the adoption order, a copy of the record of the adoption inquiry and other prescribed documents relating to the adoption to the adoption registrar; and
  - (c) in the case of an inter-country adoption, forward copies of the documents referred to in paragraph (b) to the Minister.

## Access to adoption register

**144.** (1) The information contained in the adoption register may not be disclosed to any person, except –

- (a) to an adopted child after the child has reached the age of 18 years;
- (b) to the adoptive parent of an adopted child after the child has reached the age of 18 years;
- (c) to the biological parent or a previous adoptive parent of an adopted child after the child has reached the age of 18 years, but only if the adoptive parent and the adopted child give their consent in writing;
- (d) for any official purposes subject to conditions determined by the Minister;
- (e) by an order of court, if the court finds that such disclosure is in the best interests of the adopted child; or
- (f) for purposes of research, but information that would reveal the identity of an adopted child or his or her adoptive or biological parent may not be revealed.

(2) The Minister may require a person to receive counselling before disclosing any information contained in the adoption register to that person in terms of subsection (1) (a), (b), (c) or (e).

(3) Despite subsection (1), an adopted child or an adoptive parent is entitled to have access to any medical information concerning –

- (a) the adopted child; or
- (b) the biological parents of the adopted child, if such information relates directly to the health of the adopted child.

(4) Despite subsection (1), parties to an adoption plan as contemplated in section 131 are entitled to have access to such information about the child as has been stipulated in the agreement.

## No consideration in respect of adoption

**145.** (1) A person may not –

- (a) give or receive, or agree to give or receive, any consideration, in cash or in kind, for the adoption of a child in terms of Chapter 10; or
- (b) induce a person to give up a child for adoption in terms of Chapter 9.



- (2) Subsection (1) does not apply to –
  - (a) the biological mother of a child receiving compensation for –
    - (i) reasonable medical expenses incurred in connection with her pregnancy, birth of the child and follow-up treatment;
    - (ii) reasonable expenses incurred for counselling; or
    - (iii) any other prescribed expenses;
  - (b) a legal representative, psychologist or other professional person receiving fees and expenses for services provided in connection with an adoption;
  - (c) an organ of state; or
  - (d) any other prescribed persons.

The Task Force which examined an earlier draft of the Bill recommended that the law should require that any payments from the adoptive parents to the biological parents be arranged through the Ministry to allow for monitoring to prevent abuse. In California, prospective adoptive parents may not make payment for expenses contingent on consent to the adoption, nor may the birth mother receive payments from multiple prospective adoptive families.

## Advertising

**146.** (1) A person may not publish or cause to be published in any form or by any means an advertisement dealing with the placement or adoption of a specific child.

- (2) Subsection (1) does not apply in respect of –
  - (a) the publication of a notice in terms of this Act or a court order;
  - (b) other forms of prescribed advertisements.

# CHAPTER 11

## INTER COUNTRY ADOPTIONS

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The purpose of this part of the draft Bill is to provide for the implementation of the Hague Convention. The Legal Assistance Centre suggests that Namibia seek technical assistance from the Hague Convention to ensure that our draft will be adequate for implementation of the Convention once it is agreed to by Namibia. It should be noted that signature of the Hague Convention would not require Namibia to enter into agreements for intercountry adoptions with all other countries which have signed the convention. Namibia could limit adoption of Namibian children to a selection of countries under the Convention with which it has reached agreements, to simplify procedures.

### **Adoption in Namibia of child from Namibia by person in a foreign country**

147. (1) A person habitually resident in a foreign country who wishes to adopt a child habitually resident in Namibia must apply to the competent authority of the country concerned.

(2) If the competent authority of the foreign country concerned is satisfied that the applicant is fit and proper to adopt, it must prepare a report on that person in accordance with the prescribed requirements and transmit the report to the Minister.

(3) If a child is available for adoption, the Minister must prepare a report on the child in accordance with the prescribed requirements and transmit it to the competent authority of the foreign country.

(4) If the competent authorities concerned both agree to the adoption, the Minister must refer the application for adoption together with all relevant documents and the reports contemplated in subsections (2) and (3) to the children's court for consideration in terms of section 137.

(5) The court may make an order for the adoption of the child if the requirements of section 129 regarding persons who may adopt a child are complied with, the application has been considered in terms of section 137 and the court is satisfied that –

- (a) the adoption is in the best interests of the child;
- (b) the child is in Namibia;
- (c) the child is not prevented from leaving Namibia –

- (i) under a law of the Namibia; or
  - (ii) because of an order of a court in Namibia;
- (e) the arrangements for the adoption of the child are in accordance with the prescribed requirements;
- (e) the competent authority of the foreign country concerned has agreed to the adoption of the child;
- (f) the Minister has agreed to the adoption of the child; and
- (g) the name of the child has been in the adoption register for at least 60 days and a fit and proper adoptive parent for the child is not available in Namibia.

(6) The Minister may withdraw its consent to the adoption of the child within a period of 140 days from the date on which the Minister has consented to the adoption, if it is in the best interests of the child to do so

(7) In the event of the Minister withdrawing its consent, the child must be returned to the Namibia in the prescribed manner.

(8) An order of court contemplated in subsection (5) takes effect only after the period referred to in subsection (6) has lapsed and the Minister has not withdrawn its consent within the stated period.

(9) This section does not apply to a child habitually resident in Namibia and who is to be placed for adoption outside Namibia with a family member of that child or with a person who will become an adoptive parent jointly with the child's biological parent.

(10) The provisions of Chapter 8 apply to the adoption of a child referred to in subsection (9).

(11) If the children's court has approved the adoption of a child in terms of section 137 the Minister may issue an adoption compliance certificate.

Kenya has ratified the Hague Convention. Intercountry adoptions of Kenyan children are permitted only where spouses apply jointly to adopt the child. Should Namibia apply a similar restriction?

## **Adoption in a foreign country of child from a foreign country by person in Namibia**

**148.** (1) A person habitually resident in Namibia who wishes to adopt a child habitually resident in a foreign country must apply to the Minister.

(2) If the Minister is satisfied that the applicant is fit and proper to adopt, the Minister must prepare a report on that person in accordance with the requirements of the foreign country concerned and transmit the report to the competent authority of that country.

(3) If an adoptable child is available for adoption, the competent authority of the foreign country concerned must prepare a report on the child in accordance with the prescribed requirements and transmit it to the Minister.

(4) If the competent authorities concerned both agree to the adoption, the competent authority of that country will refer the application for adoption for the necessary consent in that country.

Some countries require parents who want to adopt to complete a specific training course which provides them with information on possible stumbling blocks in adoptive relationships and how to deal with them. Such courses could also provide tips on how to preserve the child's connection with his or her home country in the case of inter-country adoption. Namibia might want to consider introducing training or counselling to similar effect.

## Recognition of inter-country adoptions

149. (1) The adoption in a convention country of a child habitually resident in that convention country by a person habitually resident in Namibia is recognised in the Namibia if an adoption compliance certificate issued in that country is in force for the adoption.

(2) The adoption in a convention country of a child habitually resident in that convention country by a person habitually resident in another convention country is recognised in Namibia if an adoption compliance certificate issued in the convention country where the adoption was granted is in force for the adoption.

(4) If an adoption compliance certificate was not issued in the relevant convention country as contemplated in subsection (1) or (2), the Minister may issue a declaration recognising the adoption.

(5) A declaration in terms of subsection (3) is, upon production by any person in a court, admissible as evidence in any proceedings before the court

(5) The adoption of a child referred to in subsections (1) and (2) must not be recognised if a declaration is made in terms of section 153 that an adoption has no effect in Namibia.

## Evidential value of adoption compliance certificate

**150.** (1) Subject to section 153, an adoption compliance certificate is evidence, for the purposes of the laws of Namibia, that the adoption to which the certificate relates –

- (a) was agreed to by the competent authorities of the countries mentioned in the certificate; and
- (b) was carried out in accordance with the Hague Convention on Inter-country Adoption and the laws of the countries mentioned in the certificate.

## **Recognition of inter-country adoption of child from non-convention country**

**151.** The Minister may issue a declaration recognising the adoption of a child in a non-convention country if –

- (a) the adoption is in accordance with and has not been rescinded under the law of the country in which the adoption order was made; and
- (b) the adoption in that country has the same effect it would have had if the order had been made in Namibia.

## **Effect of recognition of inter-country adoption**

**152.** If the adoption of a child is recognised in terms of section 149 or 151, the adoption has in Namibia the effects set out in section 138.

## **Refusal to recognise inter-country adoption or Article 27 decision**

**153.** (1) The Minister may declare that an adoption to which section 149 or 151 applies or a decision made in terms of article 27 of the Hague Convention on Inter-country Adoption may not be recognised in Namibia if the adoption or decision is manifestly contrary to public policy in Namibia, taking into account the best interests of the relevant child.

(2) If the Minister declares that an adoption or decision referred to in subsection (1) may not be recognised, the adoption or decision has no effect in Namibia.

## **Application to children's court for inter-country adoption of child**

**154.** (1) In the event of a refusal to recognise an inter-country adoption as contemplated in section 153, an application for the adoption of a child from a convention country or a non-convention country may be made to the children's court.

(2) Chapter 8 applies with the necessary changes which the context may require, to the adoption of a child referred to in subsection (1).

## Access to information

155. Subject to the provisions with regard to access to the adoption register, read with such changes as the context may require, the Minister may disclose to a inter-country adopted person who is 18 years of age or older any information in the records of the Ministry, concerning that person's origin.

The Task Force which examined an earlier version of the draft Bill recommended that the statute should make clear where records concerning intercountry adoption will be kept, to facilitate examination of these records by the adopted child when he or she comes of age. Otherwise, the adoptive child may not know which country holds the records.

## Prohibition on processing or facilitating inter-country adoption

156. A person may not process or facilitate an inter-country adoption otherwise than in terms of this Chapter.

It is not clear whether this would be a criminal offence, as no penalty is specified.

### ADOPTION OF REFUGEE CHILDREN

The Task Force which examined an earlier version of the draft Bill recommended that there should be special provisions regarding adoption of refugee children. The first priority should be an attempt to reunite such children with their biological family or extended family, if this is in the best interests of the child. The second preferred option should be to place the child in his or her 'home community' if possible.

### MONITORING

In the USA, the Secretary of State is required to prepare an annual report recording the number of intercountry adoptions involving immigration to the United States; the number of intercountry adoptions involving emigration from the United States; the number of disrupted placements and the details about the disrupted placements; the average time required for completion of a Hague Convention adoption, by country; the list of accredited agencies which may arrange intercountry adoptions; and the range of adoption fees charged. Monitoring of this nature might also be useful in Namibia.

# CHAPTER 12

## CHILD TRAFFICKING

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### Trafficking in children prohibited

**157.** (1) A person may not traffic a child or allow a child to be trafficked.

(2) It is no defence to a charge of contravening subsection (1) that –

(a) a child who is a victim of trafficking or a person having control over that child has consented to –

(i) the intended exploitation; or

(ii) the adoption of the child facilitated or secured through illegal means; or

(b) the intended exploitation or adoption of a child referred to in paragraph (a) did not occur.

(3) In order to establish the liability, in terms of subsection (1), of an employer or principal, the conduct of an employee or agent of or any other person acting on behalf of the employer or principal may be attributed to the employer or principal if that person is acting –

(a) within the scope of his or her employment;

(b) within the scope of his or her actual or apparent authority; or

(c) with the express or implied consent of a director, member or partner of the employer or principal.

(4) A finding by a court that an employer or principal has contravened subsection (1) serves as a ground for revoking the licence or registration of the employer or principal to operate.

### Behaviour facilitating trafficking in children prohibited

**158.** (1) A person may not –

(a) knowingly lease or sublease or allow any room, house, building or establishment to be used for the purpose of harbouring a child who is a victim of trafficking; and

(b) advertise, publish, print, broadcast, distribute or cause the advertisement, publication, printing, broadcast or distribution of information that suggests or alludes to trafficking by any means, including the use of the Internet or other information technology.

(2) Every Internet service provider operating in Namibia must report to the Namibia Police Force any site on its server that contains information in contravention of subsection (1).

## Assistance to child who is victim of trafficking

159. (1) With due regard to the safety of a child and without delay –

- (a) the minister responsible for foreign affairs must facilitate the return to Namibia of a child who is a citizen or permanent resident of Namibia and who is a victim of trafficking; and
- (b) the minister responsible for foreign affairs must –
  - (i) facilitate and accept the return of a child contemplated in paragraph (a);
  - (ii) issue such travel documents or other authorisations as may be necessary to enable such a child to travel to and enter Namibia;
  - (ii) at the request of another state that is a party to the UN Protocol to Prevent Trafficking in Persons or to an agreement relating to trafficking in children, verify that the child who is a victim of trafficking is a citizen or permanent resident of Namibia ; and
  - (iv) upon the child's entry into Namibia refer the child to a designated social worker for investigation in terms of section 60.

(2) If it is essential in the best interests of a child who has been trafficked, the Minister must authorise an adult at state expense to escort the child from the place where the child was found to the place from which the child was trafficked.

- (b) The Minister may not act in terms of paragraph (a) unless he or she is satisfied that the parent, guardian, care-giver or other person who has parental responsibilities and rights in respect of the child does not have the financial means to travel to the place where the child is in order to escort the child back.

It has been noted in South Africa that its comparable provisions regarding assistance to children who are victims of trafficking are not sufficiently comprehensive. They do not provide for privacy of legal proceedings involving victims of trafficking, and they fail to address the comprehensive range of services for victims of trafficking recommended in the Protocol on Trafficking: provision of appropriate housing, counselling, information on the victim's rights in a language the victim understands, medical and psychological services, material assistance and employment, educational and training opportunities.

## Trafficking of child by parent, guardian or other person who has parental responsibilities and rights in respect of child

160. If a court has reason to believe that the parent or guardian of a child or any other person who has parental responsibilities and rights in respect of a child, has trafficked the child or allowed the child to be trafficked, the court may –

- (a) suspend all parental responsibilities and rights of that parent, guardian, or other person; and



- (b) place that child in temporary safe care, pending an inquiry by a children's court.

## Reporting of child who is victim of trafficking

**161.** An immigration official, member of police, social worker, medical practitioner or registered nurse who comes into contact with a child who is a victim of trafficking in Namibia must refer that child to a designated social worker for investigation in terms of section 60.

It has been noted in South Africa that there is, oddly, no requirement that the trafficking case be referred to the police. The Namibian legislation should correct its similar omission.

## Child who is victim of trafficking found in Namibia

**162.** (1) A child who is a victim of trafficking –

(a) must be referred to a designated social worker for investigation in terms of section 60 and

(b) may, pending such investigation, be placed in a place of safety .

(2) If, after an investigation contemplated in subsection (1), an illegal foreign child is brought before the children's court, the court may order that the child be assisted in applying for asylum in terms of Namibia Refugees (Recognition and Control) Act, 1999 (Act No. 2 of 1999).

(3) A finding in terms of section 69 that an illegal foreign child who is a victim of trafficking is a child in need of care and protection serves as authorisation for allowing the child to remain in Namibia for the duration of the children's court order.

## Repatriation of child who is victim of trafficking

**163.** (1) The Minister may not return a child contemplated in section 162(2) to his or her country of origin or the country from where the child has been trafficked without giving due consideration to –

(a) the availability of care arrangements in the country to which the child is to be returned;

(b) the safety of the child in the country to which the child is to be returned; and

(c) the possibility that the child might be trafficked again, harmed or killed.

(2) If it is essential in the best interests of a child who has been trafficked, the Minister must authorise an adult at state expense to escort the child from the place where the child was found to the place from which the child was trafficked.

(3) The Minister may not act in terms of paragraph (a) unless he or she is satisfied that the parent, guardian, care-giver or other person who has parental responsibilities and rights in respect of the child does not have the financial means to travel to the place where the child is in order to escort the child back.

## Extra-territorial jurisdiction

**164.** A citizen or permanent resident of Namibia, a juristic person or a partnership registered in terms of any law in Namibia that commits an act outside the Republic which would have constituted an offence in terms of this Chapter had it been committed inside Namibia, is commits an offence as if the offence had been committed in Namibia and is liable on conviction to the penalty prescribed for that offence.

The proposed provisions in the draft Child Care and Protection Bill are supplemented by the Prevention of Organised Crime Act 29 of 2004, a Namibian law which has been passed by Parliament but is not yet in force. This law is intended to give overall effect to the United Nations Convention against Transnational Organised Crime.

Section 1 of this law defines trafficking as in section (a) of the UN Protocol:

“trafficking in persons” means the recruitment, transfer, harbouring or receipt of persons by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation and includes any attempt, participation or organising of any of these actions. Exploitation includes, at a minimum, the exploitation or the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs”.

This definition fails to include the two key points from sections (b) and (c) of the definition in the UN Protocol, where subsection (b) states that the consent of a victim is irrelevant where any of the coercive means set forth have been applied, and subsection (c) stating that trafficking of a child is present even if it does not involve any of the listed means.

# CHAPTER 13

## PROTECTIVE MEASURES IN RESPECT OF CHILDREN

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### Consent to medical treatment and surgical operation

165. (1) Despite any law to the contrary –

- (a) A child may consent to his or her own medical treatment or to the medical treatment of his or her child if –
  - (i) the child is 14 years of age or older; and
  - (ii) the child is of sufficient maturity and has the mental capacity to understand the benefits, risks, social and other implications of the treatment.

This standard raises the question of *who will make the determination* of whether the child has the requisite understanding. The draft Bill is not clear on this point. Would the medical practitioner make the determination? Would it require a finding by a Children's Court? What course of action would be available where the child or the child's parents disagreed with the decision on whether the child was mature enough to make a medical decision alone?

- (b) A child may consent to the performance of a surgical operation on him or her or his or her child if –
    - (i) the child is 14 years of age or older; and
    - (ii) the child is of sufficient maturity and has the mental capacity to understand the benefits, risks, social and other implications of the surgical operation; and
  - (c) the child is duly assisted by his or her parent or guardian.
- (2) The parent, guardian or care-giver of a child may, subject to section 5, consent to the medical treatment of the child if the child –
- (a) has not attained the age of 14 years; or
  - (b) is older than age referred to in paragraph (a) but is of insufficient maturity or is unable to understand the benefits, risks and social implications of the treatment.
- (3) The parent or guardian of a child may consent to a surgical operation on the child if the child –

- (a) has not attained the age of 14 years; or
- (b) is older than the age referred to in paragraph (a) but is of insufficient maturity or is unable to understand the benefits, risks and social implications of the operation.

(4) The superintendent of a hospital or the person in charge of the hospital in the absence of the superintendent may consent to the medical treatment of or a surgical operation on a child if –

- (a) the treatment or operation is necessary to preserve the life of the child or to save the child from serious or lasting physical injury or disability; and
- (b) the need for the treatment or operation is so urgent that it cannot be deferred for the purpose of obtaining consent that would otherwise have been required.

It should be noted that the Task Force which advised on an earlier version of the draft Bill recommended that the wording of the Bill should make it possible for Regional Directors to give consent in respect of clinics and Hospital Superintendents in respect of hospitals.

(5) The Minister may consent to the medical treatment of or surgical operation on a child if the parent or guardian of the child –

- (a) unreasonably refuses to give consent or to assist the child in giving consent;
- (b) is incapable of giving consent or of assisting the child in giving consent;
- (b) cannot readily be traced; or
- (d) is deceased.

(6) The Minister may consent to the medical treatment of or surgical operation on a child if the child unreasonably refuses to give consent.

(7) A High Court or children’s court may consent to the medical treatment of or a surgical operation on a child in all instances where another person that may give consent in terms of this section refuses or is unable to give such consent.

It may be that the courts were intended to have power to overrule refusal of consent by a parent **or** a child, in which case the drafting of this provision should be clarified by altering “another person” to “any person”. It would also be helpful if the law clarified who is empowered to seek Ministerial authorisation or a court order overruling the decision of the parent or child. The parent seeking to overrule the child? The child seeking to overrule the parent? Anyone with an interest in the child’s welfare? The medical practitioner?

(8) A parent, guardian or care-giver of a child may not refuse to assist a child in terms of subsection (3) or withhold consent in terms of subsections (4) and (5) by reason only of religious or other beliefs, unless that parent or guardian can show that there is a medically accepted alternative choice to the medical treatment or surgical operation concerned.

#### **WHAT IF THE PARENT OR GUARDIAN WANTS THE TREATMENT OR SURGERY TO TAKE PLACE, BUT THE CHILD REFUSES?**

This situation has arisen in England, for example, in the case of a child with an eating disorder. The existing Namibian Children's Act is silent on this issue, while the draft Child Care and Protection Bill is somewhat unclear.

In England, it has been held that medical treatment can proceed if anyone who is legally competent to give consent has given such consent; the doctor needs only one valid consent, and does not have to wait until the child and the parents reach agreement. Under this approach, the child would acquire a right to refuse in the face of parental consent only upon reaching the age of majority.

However, the wording of the relevant provisions in the draft Bill appear to split decision-making power so a parent or guardian "may" give consent to medical treatment or an operation *only* in cases where a child has *not* fulfilled the necessary criteria (ie, is not at least 14 years old and has sufficient maturity and the mental capacity to understand the "benefits, risks, social and other implications" of the proposed intervention. However, as noted above, the parent or guardian must "duly assist" a child who does meet these criteria in the case of a surgical operation (but not in the case of medical treatment).

The Minister has the power to overrule a child's refusal of consent where this refusal to consent is "unreasonable". The High Court or a Children's Court can overrule a refusal of consent by a parent or guardian, but the draft Bill is silent on whether the courts can similarly overrule a child's refusal of consent.

#### **STERILIZATION**

Note that consent to sterilization of a child is a special case which involves a protective procedure in terms of the Abortion and Sterilization Act 2 of 1975. This Act defines sterilization as "*a surgical operation performed for the purpose of making the person on whom it is performed incapable of procreation, but does not include the removal of any gonad.*" Section 4(1) of that Act provides as follows:

- A sterilization shall not be performed on any person who for any reason is incapable of consenting or incompetent to consent thereto, unless –
- (a) two medical practitioners, of whom one shall be a psychiatrist, have certified in writing that the person concerned is capable of procreating children and –
    - (i) is suffering from a hereditary condition of such a nature that if he or she were to procreate a child, such child would suffer from a physical or mental defect of such a nature that it would be seriously handicapped; or
    - (ii) due to a permanent mental handicap or defect is unable to comprehend the consequential implications of or bear the parental responsibility for the fruit of coitus;
  - (b) the person who may in law consent to an operation beneficial to that person has granted written consent to the sterilization; and
  - (c) the Minister has granted written authority for the sterilization.

The Task Force assembled to advise the Ministry on an earlier draft of the Bill recommended the following points for consideration:

- (1) **Sterilization of a minor child or an adult who has a serious and irreversible mental illness or disability** should be allowed only in a case where a panel consisting of a psychiatrist, two medical practitioners, and a social worker [*or another specified list of persons*] have convened a meeting and recommended sterilisation after taking specified factors into consideration such as the person's age and their degree of mental incapacity. Sterilisation should be allowed where the following circumstances are satisfied –
    1. The person in question is incapable of making his or her own decision on contraception and sterilisation and is not expected to develop mentally to a sufficient degree to make an informed judgement about contraception or sterilisation;
    2. The person in question
      - (a) suffers a hereditary condition of such a nature that if he or she were to procreate, the resulting child would suffer from a physical or mental defect of such a nature that it would be seriously handicapped; or
      - (b) failure to sterilize could jeopardise the life of the person in question, or could cause serious and irreparable harm to his or her physical health; or
      - (c) is unable to comprehend the consequential implications of sexual intercourse and would be unable to bear any meaningful form of parental responsibility for a child;
    - AND
    - (d) no other safe and effective method of contraception except sterilisation can be employed, and it is not possible to prevent the person in question from engaging in sexual intercourse without unreasonably restricting his or her freedom.
  3. The parents or guardian of the person in question have consented to the sterilization, or, in a case where no responsible parent or guardian can be found, a Commissioner of Child Welfare has given consent in a proceeding at which the person in question has independent legal representation.
- (2) Parents or guardians should be able to **authorise sterilization of a minor child other than a minor child who has a serious and irreversible mental illness or deficiency** only in a case where a panel consisting of a psychiatrist, two medical practitioners and a social worker (or another specified list of persons) has convened a meeting and certified that sterilization would be in the best interests of the person concerned because failure to do so would
  - (a) jeopardise the child's life or cause serious and irreparable harm to his or her physical health; and
  - (b) there are compelling reasons why the decision cannot be delayed until the child has reached the age of 18 AND
  - (c) there is no other less drastic alternative which would adequately serve the child's best interests.

A possible additional safeguard would be to allow sterilization in such circumstances only where it has been confirmed by a children's court proceeding in which the child has independent legal representation. It is envisaged that cases in this category which would qualify for sterilization would be extremely rare.

- (3) There should be a procedure for overruling a refusal by a parent or guardian to allow sterilization in a case where the panel concerned believes that sterilization would be in the best interests of the child or the mentally incapacitated child/adult. This should be done only after a court proceeding at which both parent/guardian and child/incapacitated adult have independent legal representation.

## HIV-testing

166. (1) Subject to section 165, a child may not be tested for HIV except when –
- (a) it is in the best interests of the child and consent has been given in terms of subsection (2); or
  - (b) the test is necessary in order to establish whether –
    - (i) a health worker may have contracted HIV due to contact in the course of a medical procedure with any substance from the child’s body that may transmit HIV; or
    - (ii) any other person may have contracted HIV due to contact with any substance from the child’s body that may transmit HIV, provided the test has been authorised by a court.

The Legal Assistance Centre suggests that the references to “may have contracted HIV” should be changed to may have been exposed to HIV” for two reasons: (1) the persons in question may have been exposed to HIV from more than one source. It might be impossible to establish as a fact that they have “contracted” HIV from the child in question. (2) The primary utility of authorising such a test would be to provide information necessary to determine whether or not it was necessary to administer PEP. This makes sense only if someone has *been exposed to HIV* but has not yet *contracted* it.

Another basis for authorising HIV testing should be if the child is pregnant. Then an HIV test would be necessary to determine whether or not steps needed to be taken to prevent mother-to-child transmission.

- (2) Consent for a HIV-test on a child may be given by –
- (a) the child, if the child is –
    - (i) 16 years of age or older; or
    - (ii) under the age of 14 years and is of sufficient maturity to understand the benefits, risks and social implications of such a test;
  - (b) the parent or care-giver, if the child is under the age of 14 years and is not of sufficient maturity to understand the benefits, risks and social implications of such a test;
  - (c) the Minister, if the child is under the age of 14 years and is not of sufficient maturity to understand the benefits, risks and social implications of such a test;
  - (d) the superintendent or person in charge of a hospital, if –

- (i) the child is under the age of 14 years and is not of sufficient maturity to understand the benefits, risks and social implications of such a test; and
  - (ii) the child does not have a parent or care-giver; or
- (e) a children's court, if –
- (i) consent in terms of paragraph (a), (b) or (c) is unreasonably withheld; or
  - (ii) the child or the parent or care-giver of the child is incapable of giving consent.

## **HIV-testing for foster care or adoption purposes**

**167.** If HIV-testing of a child is done for foster care or adoption purposes, the state must pay the cost of such tests where circumstances permit.

## **Counselling before and after HIV-testing**

**168.** (1) A child may be tested for HIV only after proper counselling, by an appropriately trained person, of –

- (a) the child, if the child is of sufficient maturity to understand the benefits, risks and social implications of such a test; and
  - (b) the child's parent or care-giver, if the parent or care-giver has knowledge of the test.
- (2) Post-test counselling must be provided by an appropriately trained person to –
- (a) the child, if the child is of sufficient maturity to understand the implications of the result; and
  - (b) the child's parent or care-giver, if the parent or care-giver has knowledge of the test.

## **Confidentiality of information on HIV/AIDS status of children**

**169.** (1) A person may not disclose the fact that a child is HIV-positive without consent given in terms of subsection (2), except –

- (a) within the scope of that person's powers and duties in terms of this Act or any other law;
- (c) when necessary for the purpose of carrying out the provisions of this Act;
- (c) for the purpose of legal proceedings; or



- (d) in terms of an order of a court.
- (2) Consent to disclose the fact that a child is HIV-positive may be given by –
  - (a) the child, if the child is –
    - (i) 12 years of age or older; or
    - (ii) under the age of 12 years and is of sufficient maturity to understand the benefits, risks and social implications of such a disclosure;
  - (b) the parent or care-giver, if the child is under the age of 12 years and is not of sufficient maturity to understand the benefits, risks and social implications of such a disclosure;
  - (c) the superintendent or person in charge of a hospital, if –
    - (i) the child is under the age of 12 years and is not of sufficient maturity to understand the benefits, risks and social implications of such a disclosure; and
    - (ii) the child does not have a parent or care-giver; or
  - (e) a children’s court, if –
    - (i) consent in terms of paragraph (a), (b), or (c) is unreasonably withheld and disclosure is in the best interests of the child; or
    - (ii) the child or the parent or care-giver of the child is incapable of giving consent.

Why is the relevant age in respect of decision-making on disclosure age 12 as compared to age of 14 when it comes to consent to the test?

## **Application to terminate or suspend parental responsibilities and rights**

This provision seems to belong together with provisions on alternative care, since it will usually be applied in that context.

- 170.** (1) The Minister may apply to a High Court or a children’s court for an order –
- (a) suspending for a period, terminating or transferring any or all of the parental responsibilities and rights which a specific person has in respect of a child; or
  - (b) restricting or circumscribing the exercise by that person of any or all of the parental responsibilities and rights which that person has in respect of a child.

(2) An application in terms of subsection (1) may be brought without the consent of a parent or care-giver of the child if the child, at the time of the application –

- (a) is older than seven years and has been in alternative care for more than two years;
- (b) is older than three years, but not older than seven years, and has been in alternative care for more than one year; or
- (c) is three years or younger and has been in alternative care for more than six months.

(3) When considering an application the court must—

- (a) be guided by the principles set out in Chapters 2 and 3 to the extent that those principles are applicable to the matter before it; and
- (b) take into account all relevant factors, including—
  - (i) the need for the child to be permanently settled, preferably in a family environment, taking into consideration the age and stage of development of the child;

Some argue that the emphasis on permanency is Western in orientation, and fails to acknowledge the fact that child-rearing practices in some African communities are more fluid.

- (ii) the success or otherwise of any attempts that have been made to reunite the child with the person whose parental responsibilities and rights are challenged;
- (iii) the relationship between the child and that person;
- iv) the degree of commitment that that person has shown towards the child; and
- (v) the probability of arranging for the child to be adopted or placed in another form of alternative care.

(4) Section 29 (Application for guardianship), read with such changes as the context may require, applies in respect of any proceedings in terms of this section.

This cross-reference is taken from the South African model and makes no sense in the Namibian context. There is no corresponding section in the Namibian draft.

## Child-headed household

171. (1) The Minister may recognise a household as a child-headed household if –
- (a) the parent or care-giver of the household is terminally ill or has died;
  - (b) no adult family member is available to provide care for the children in the household; and
  - (c) a child has assumed the role of care-giver in respect of a child in the household.

The corresponding provision in South Africa requires that the child who is acting as the care-giver must be at least 16. The Namibian approach of avoiding a specific age limit seems preferable here, as it allows for each case to be assessed on the basis of the relevant child's maturity. The South African provision also allows for designation of a child-headed household where the parent or care-giver has abandoned the household (in addition to cases where this parent or care-giver is terminally ill or has died). South Africa adds a fourth criterion, which is that the recognition as a child-headed household must be in the best interests of the children in the household. These additions should be considered for the Namibian law.

(2) A child-headed household must function under the general supervision of an adult designated by –

- (a) a children's court; or
- (b) an organ of state or a non-governmental organisation determined by the Minister.

(3) The organ of state or non-governmental organisation contemplated in subsection (2) may collect and administer for the child-headed household any social security grant or other grant or assistance to which the household is entitled.

The corresponding provision in South Africa states that either the child heading the household or the supervising adult may collect and administer any such grants. Where a supervising adult collects the grant, that adult will be accountable for the use of the money to the Minister, or to the group which appointed him or her. The South African provision also requires that the supervising adult must be a "fit and proper person", and not named in the National Child Protection Register as a person unsuitable to work with children.

(4) The adult referred to in subsection (2)(a) and the organ of state or non-governmental organisation referred to in subsection (2)(b) may not take any decisions concerning a child-headed household and the children in such household without consulting –

- (a) the child at the head of the household; and
- (b) given the age, maturity and stage of development of the other children, also those other children.

(5) The child heading a child-headed household may take all day-to-day decisions relating to the household and the children in the household as if that child is an adult care-giver.

The corresponding provision in South Africa allows the child heading the household (or any of the other children with sufficient age, maturity and development) to make a complaint about the supervising adult to the agency or NGO who appointed that person, if they are not satisfied with the manner in which that supervising adult is performing his or her duties.

(8) The child heading the household or, given the age, maturity and stage of development of the other children, such other children, may report the supervising adult to the organ of state or non-governmental organisation referred to in subsection (2)(b) if the child or children are not satisfied with the manner in which the supervising adult is performing his or her duties.

Namibia might benefit from a similar provision. Designated social workers and the children's court could be possible recipients of complaints as well.

(6) A child-headed household may not be excluded from any aid, relief or other programme for poor households provided by an organ of state solely by reason of the fact that the household is headed by a child.

## Unlawful removal or detention of child

**172.** (1) A person may not without lawful authority or reasonable grounds –

(a) remove a child from the control of a person who has lawful control of the child; or

(b) detain a child with the result that the child is kept out of the control of a person entitled to lawful control of the child.

(2) For the purposes of subsection (1) a person must be regarded as detaining a child if that person –

(a) causes the child to be detained; or

(b) induces the child to remain with him or her or any other person.

## Unlawful taking or sending of child out of Namibia

**173.** (1) A person may not take or send a child out of Namibia –

(a) in contravention of an order of a court prohibiting the removal of the child from Namibia; or

(b) without consent –

(i) obtained from persons holding relevant parental responsibilities and rights in respect of that child; or

(ii) of a court.

- (2) For the purposes of subsection (1) a person must be regarded as –
- (a) taking a child out of Namibia if that person –
- (i) causes the child to be taken, or in any way assists in taking the child, out of Namibia; or
  - (ii) causes or induces the child to accompany or to join him or her or any other person when departing from Namibia; or
- (b) sending a child out of Namibia if that person causes the child to be sent, or in any way assists in sending the child, out of Namibia.

#### **SPECIAL REPORTING REQUIREMENTS FOR CHILDREN LIVING APART FROM OR EXTENDED FAMILY MEMBERS**

The Children's Act 33 of 1960 currently in force in Namibia contains special reporting requirements pertaining to infants (defined as children under the age of 7). Anyone other than a parent who receives an infant and cares for the infant apart from the infant's parents for longer than thirty days must give notice of this to the nearest Commissioner of Child Welfare. Anyone who has delivered an infant to someone to be cared for apart from the infant's parents for longer than thirty days (or for an unspecified period) is also expected to give a written notice to the nearest Commissioner of Child Welfare. However, these notice provisions do **not** apply in cases where infants are cared for by a grandfather, grandmother, brother, sister, uncle or aunt of the infant or the husband or wife or widower or widow of any such relative.

The purpose of these special reporting requirements is not specified, but they could have been intended as a mechanism for preventing trafficking in infants (including the sale of infants for adoption), for preventing inappropriate informal arrangements or for ensuring that children and their maintenance grants are not separated.

Tracking could be done at least once each term for children who are in school as a part of school registration. (Tracking is already an implicit part of the monitoring of child maintenance grants, although the system is not yet properly computerised and coordinated to allow efficient cross-checking with other records.) Other enforcement mechanisms could focus on children who are not in school, who are probably the most vulnerable and could benefit from being tracked for numerous purposes. The registration of orphans and vulnerable children (OVCs) could be incorporated into such a tracking system. This approach would, of course, be useless where parents are the problem, but there are other legal tools for that situation.

However, even the use of tracking initiatives, such a law would be difficult to enforce. For instance as the number of OVCs increases, there will eventually be too many OVCs living with people other than extended family members to monitor. A further difficulty would be deciding how far to go in excluding extended family members from the reporting requirements, to suit Namibia's diverse cultural practices. For example, in some communities, normal child-rearing arrangements might involve extended family members who would not be considered so close to a child in other communities. On the other hand, although difficult to enforce, such a reporting requirement could provide an extra tool in a situation where other wrongdoing is suspected but not provable.

There is no special reporting provision of this nature in the draft Bill. The pros and cons of this protective mechanism should be considered.

## Corporal punishment

**174.** (1) A person who has control of a child, including a person who has parental responsibilities and rights in respect of the child, must respect the child's right to physical integrity as conferred by section 12(1)(c), (d) and (e) of the Constitution.

The constitutional right to dignity should be cited here. The cross-references to Article 12 are erroneous.

(2) Any legislation and any rule of common or customary law authorising corporal punishment of a child by a court, including the court of a traditional leader, is hereby repealed to the extent that it authorises such punishment.

(3) A person may not administer corporal punishment to a child at any place of safety, shelter, children's home, place of care or an educational and vocational centre.

(4) The minister responsible for education must take all reasonable steps to ensure that –

(a) education and awareness-raising programmes concerning the effect of subsections (1), (2) and (3) are implemented across the country; and

(b) programmes promoting appropriate discipline at home and at school are available across the country.

## Child safety at place of entertainment

**175.** (1) A person providing entertainment to children on any premises or in any enclosure must comply with subsection (2) if –

(a) access to the premises or enclosure where the entertainment is provided requires the use of stairs, escalators, lifts or other mechanical means;

(b) the majority of the people attending the entertainment are children; and

(c) the number of people, including children, who attend the entertainment exceeds 50.

(2) A person providing entertainment to children in the circumstances specified in subsection (1) must—

(a) determine the number of people, including children, who can safely be accommodated on the premises or in the enclosure and each part of the premises or enclosure;

(b) station a sufficient number of adult attendants to prevent more people, including children, being admitted to the premises or enclosure, or any part of the premises or enclosure, than the number of people determined in terms of paragraph (a);

- (c) control the movement of people admitted to the premises or enclosure, or any part of the premises or enclosure, while entering or leaving the premises or enclosure or that part of the premises or enclosure; and
  - (d) take all reasonable precautions for the safety of the children and other people attending the entertainment.
- (3) Alcohol or tobacco products may not be sold to children at places of entertainment.

The corresponding provision in South Africa prohibits alcohol from being sold, served or made available” to children at such entertainments.

(4) If the person providing the entertainment is not the owner of the premises or enclosure where the entertainment is provided, the owner or the owner’s agent must take all reasonable steps to ensure that subsections (2) and (3) are complied with.

(5) A person authorised by a local authority or a regional council in case where there is no local authority, in whose area a premises or enclosure is situated where entertainment described in subsection (1) is or is to be provided, or on reasonable suspicion that such entertainment is or is to be provided, may enter such enclosure in order to inspect whether subsections (2) and (3) are complied with.

(6) Section 304 (2) and (3), read with such changes as the context may require, applies to any inspection in terms of paragraph (a) of this subsection.

This is a cross-reference copied from the South African legislation. It relates to provisions on identity cards for persons carrying out inspections and the powers of the person doing the inspection. The Namibian law probably also needs a section on inspection powers which could apply to inspections of any registered facilities, but currently contains no such provision.

The provision as currently drafted is very narrow in its application. An earlier draft of the Child Care and Protection Act – in a provision very similar to that already in existence under the Children’s Act 33 of 1960 – applied more broadly, to any performance, entertainment or event where the majority of persons expected to attend would be children. It required the host to ensure that there were a sufficient number of properly instructed adult attendants on the premises –

- (a) to prevent more people from entering any part of the premises than it can properly accommodate;
- (b) to control people as they are entering or leaving the premises or any part of the premises; and
- (c) to take all other reasonable precautions for the safety of the children.

Failure to comply with this requirement was a crime, as well as grounds for the cancellation of any licence issued under any law for the type of entertainment in question and a disqualification from obtaining any similar licence for the next 5 years. This draft provision also authorised police to enter the premises to ensure compliance with the statutory requirements.

The Task Force which advised on an earlier draft Bill suggested that the host should also have the responsibility to “ensure the safety, security and well-being of the children in attendance”.

## Worst forms of child labour prohibited

176. (1) A person may not

- (a) use, procure, offer or employ a child for purposes of commercial sexual exploitation;
- (b) use, procure, offer or employ a child for illicit activities, including drug production and trafficking;
- (c) force a child to perform labour for that or any other person, whether for reward or not; or
- (d) encourage, induce or force a child, or allow a child, to perform labour that –
  - (i) by its nature or circumstances is likely to harm the health, safety or morals of a child; or
  - (ii) places the child's well-being, education, physical or mental health, or spiritual, moral or social development at risk.

The law should perhaps differentiate between *causing or allowing* the child to beg and *forcing* a child to beg for the benefit of another (economic exploitation). If a parent *forces* a child out on the street to collect money, this is economic exploitation which should be prohibited. However, it may be a different matter if a child is simply accompanying a desperate parent who is begging (such as woman sitting on the pavement to beg with her baby at her side). Investigation may be warranted to see if the child is a child in need of protection, but there would seem to be no purpose to be served by arresting the parent in such a situation. The Task Force which advised on an earlier draft Bill recommended that forcing or allowing a child to beg should be an offence, along with other economic exploitation, but that this should not include a child who is simply there for child care purposes while a parent or caregiver begs.

(2) Subsection (1)(c) does not prevent the performance of labour by a child, whether for reward or not –

- (a) subject to the Labour Act, 1992 (Act No. 6 of 1992) in an advertisement, in sport or in an artistic or cultural event, provided that such engagement does not place the child's well-being, education, physical or mental health or spiritual, moral or social development at risk; or
- (b) in work which is carried out within the framework of a programme means a trust, company or other association of persons established for a public purpose and the income and property of which are not distributable to its members or office-bearers except as reasonable compensation for services rendered and that is designed to promote personal development and vocational training.

What is this exception aimed at? Cooperatives perhaps?



No child should be able to perform any “forced labour”. However, the question arises as to when a parent has authority to consent to certain activities by a child or even an infant – such as participation in a baby beauty pageant, allowing the child to model or be filmed or photographed for an advertisement, acting in a play, film or other performance.

If such activities are considered to be “work” or “employment”, then they would be completely prohibited for children under age 14 by the Labour Act 2007 (discussed above). If they are not considered to fall into the category of “work” or “employment”, then they would be completely unregulated. This leaves open the question as to whether someone who allows a child to participate in such activities has any obligation to ensure that any money made from such activities is held in trust for the child until the child reaches majority (if substantial sums are involved), or otherwise used for the benefit of the child.

The Task Force which advised on an earlier draft Bill recommended that the sections on child performances need to be re-drafted with a focus on harm, exploitation and interference with education and development – and to exempt seemingly harmless activities like school concerts, and beauty contests. The Task Force also recommended that allowance should be made for children to participate in activities such as modelling, advertising, acting, etc. (This issue was also identified at the 2001 Heja Lodge consultative meeting as one which requires attention.)

As a very important form of follow-up, any child victim of any of the prohibited forms of child labour should be referred to a social worker for investigation, to see if the child is in need of protection or some form of rehabilitation. Social workers should establish transition programmes to help these children and their families, instead of focusing only on action against the perpetrator of the crime.

(3) The Minister must take all reasonable steps to assist in ensuring the enforcement of the prohibition on the worst forms of child labour, including steps providing for the confiscation in terms of the Prevention of Organised Crime Act, 1998 (Act No. 29 of 2004), of assets acquired through the use of such child labour.

The provisions in this section seem to be vague to support criminal charges.

# CHAPTER 14

## GENERAL PROVISIONS

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### Offences and penalties

The extensive cross-referencing makes the Act very difficult to follow. It would be better to put the penalties with the offences. This would also avoid the danger of mis-referencing. The list below is copied from the South African law and does not relate correctly to the provisions in the Namibian draft which appear to define offences.

- 177.** (1) A person commits an offence if that person –
- (a) commits an act in contravention of the prohibition set out in section 12 (2), (3), (4), (6), (7), or (8);
  - (b) contravenes a provision of section 32 (4), 74, 116 (1), 123 (1), (2) or (3), 127, 133 (1), 249, 250 (1), 252, 273, 301, 302 or 303;
  - (c) fails to comply with section 12 (5), 12 (9), 57 (2), 124, 126 (1), 134 (1) or 232 (6);
  - (d) fails to comply with a request in terms of section 57 (1);
  - (k) knowing that a child in alternative care has absconded from or failed to return to that care, directly or indirectly counsels, induces or aids that child not to return to such care, or harbours or prevents the child from returning to that care;
  - (l) hinders or obstructs –
    - (i) a police official or designated social worker in the execution of a warrant issued in terms of section 151 (2);
    - (ii) a police official, social worker or authorised officer when removing a child to temporary safe care in terms of section 152 (1);
  - (m) hinders or interferes with a person in the execution of official duties in terms of section 304;
  - (n) fails to comply with a request of a person in the execution of his or her official duties in terms of section 50 (4) or section 304 or furnishes false or misleading information to such a person when complying with such a request;

- (o) falsely professes to be a person authorised in terms of section 50 (4) or 304 or an assistant of such a person;
- (p) has been issued with a written notice as contemplated in section 153 (1) and –
  - (i) refuses to leave the home or the place where the child resides; or
  - (ii) has contact with the child in contravention of the written notice;
- (q) contravenes or fails to comply with an order of a High Court, Divorce Court in a divorce case and children’s court issued in terms of this Act, including section 153 (6), or contravenes or fails to comply with any condition contained in such order;
- (r) commits an act in contravention of the prohibition set out in section 285 (1); or
- (s) commits an act in contravention of the prohibition set out in section 284 (1).

(2) A person unfit to work with children is guilty of an offence if that person –

- (a) operates or assists in any way in operating a partial care facility, child and shelter or drop-in centre;
- (b) assumes the foster care or temporary safe care of a child; or
- (c) applies for the foster care, temporary safe care or adoption of a child.

(3) A parent, guardian, other person who has parental responsibilities and rights in respect of a child, care-giver or person who has no parental responsibilities and rights in respect of a child but who voluntarily cares for the child either indefinitely, temporarily or partially, is guilty of an offence if that parent or care-giver or other person –

- (a) abuses or deliberately neglects the child; or
- (b) abandons the child.

(4) A person who is legally liable to maintain a child is guilty of an offence if that person, while able to do so, fails to provide the child with adequate food, clothing, lodging and medical assistance.

(5) A person who is the owner, lessor, manager, tenant or occupier of any premises on which the commercial sexual exploitation of a child has occurred is guilty of an offence if that person, on gaining information of that occurrence, fails to promptly take reasonable steps to report the occurrence to the Namibian Police.

[What about reporting other forms of prohibited child labour?](#)

(6) Subject to subsection (8), a person convicted of an offence in terms of subsection (1), (2), (3), (4) or (5) is liable to a fine or to imprisonment for a period not exceeding ten years, or to both a fine and such imprisonment.

(7) A person convicted of an offence in terms of subsection (1), (2), (3), (4) or (5) more than once is liable to a fine or imprisonment for a period not exceeding 20 years or to both a fine and such imprisonment.

## **Delegation of powers and duties by Minister**

**178.** (1) The Minister may delegate any power conferred on or assign any duty imposed on the Minister in terms of this Act, to –

- (a) a staff member in the Ministry;
- (b) any organ of state, by agreement with that organ of state.

(2) A delegation in terms of subsection (1) –

- (a) is subject to any limitations, conditions and directions which the Minister may impose;
- (b) must be in writing;
- (c) may include the power to sub-delegate; and
- (d) does not divest the Minister of the responsibility concerning the exercise of the power or the performance of the duty.

(3) The Minister may confirm, vary or revoke any decision taken in consequence of a delegation or sub-delegation in terms of this section, subject to any rights that may have accrued to a person as a result of the decision.

(2) The Minister may –

- (a) not delegate a power or duty –
  - (i) to make regulations; or
  - (ii) to publish notices in the *Gazette*;
- (b) at any time withdraw a delegation.

## Regulations

This section has been copied from the South African legislation and not adapted to the Namibian draft Bill. To make the provisions on regulations more manageable, the Legal Assistance Centre suggests placing at the end of each Chapter of the Act the authorisation for regulations pertaining to that Chapter.

**179.** (1) The minister responsible for justice, after consultation with the Minister, may make regulations concerning –

- (a) the procedures to be followed at or in connection with the proceedings of children's courts and the powers, duties and functions of clerks of the children's court in as far as they relate to the proceedings of children's courts;
- (b) the form of any application, authority, certificate, consent, notice, order, process, register or subpoena to be made, given, issued or kept;
- (c) the carrying out and monitoring of investigations in terms of section 50 (2), procedures regulating such investigations and the gathering of evidence;
- (c) the holding of pre-hearing conferences in terms of section 69, procedures regulating such conferences and information that must be submitted to a children's court;
- (e) the holding and monitoring of lay-forums in terms of sections 70 and 71, procedures regulating such lay-forums and information that must be submitted to a children's court;
- (f) special requirements that apply to persons facilitating in matters involving the alleged abuse of children;
- (g) documents in connection with matters brought to a children's court and records of the proceedings of children's courts, including regulations determining –
  - (i) the person by whom, the period for which and the manner in which those documents and records must be kept; and
  - (ii) access to those documents and records;
- (g) the keeping of records with regard to matters brought to and dealt with by the children's court;
- (i) the submission of court statistics and progress reports on those matters to the Magistrates' Commission established by section 2 of the Magistrates Act;

- (j) the payment of remuneration to persons who are not in the employ of the state as contemplated in sections 49, 50, 62, 69, 70 and 71; and
- (2) The Minister may make regulations in terms of section 306 concerning—
  - (a) the procedure to be followed and the fees to be paid in connection with the lodging and consideration of applications for registration in terms of this Chapter and for the renewal of such registrations;
  - (b) the different types of partial care that may be provided in terms of such registrations;
  - (c) the procedure to be followed and the fees to be paid in connection with the lodging and consideration of appeals in terms of this Chapter;
  - (d) the management of partial care facilities; and
- (3) The Minister, after consultation with the Minister for Justice may make regulations
  - (a) prescribing procedures for determining whether a child has been abandoned or orphaned;
  - (b) prescribing procedures for determining whether a child has been abandoned by a parent or other person who has parental responsibilities and rights in respect of the child;
  - (c) determining procedures to be followed to locate persons whose whereabouts are unknown for obtaining their consent to adoptions;
  - (d) prescribing procedures for determining the age of a child;
  - (e) determining procedures for payment for adoption services undertaken by persons or organisations to prevent conflict of interests from arising.
- (4) The Minister, after consultation with the Minister of Justice in the case of regulating of court orders, may make regulations in terms of section 306 prescribing—
  - (a) limitations or conditions for leave of absence from alternative care
  - (b) the manner in which children in alternative care must be transferred or provisionally transferred, removed or permanently discharged from alternative care or their residential care programmes changed;
  - (c) fees payable to a child and youth care centre on transfer or provisional transfer of a child in alternative care to that centre;
  - (d) the manner in which applications for extension of alternative care beyond 18 years of age are to be made; and

- (5) The Minister may make regulations regarding –
- (a) any matter referred to in sections 160 and 253;
  - (b) any matter that may be prescribed by the Minister in terms of this Act, after consultation with the Minister of Justice where courts, court orders and the review of decisions by the courts are regulated;
  - (c) codes of ethical practice for persons operating and assisting in the operation of child and youth care centres, partial care facilities, shelters and drop-in centres;
  - (d) procedures for the interview of persons to be employed or engaged in child and youth care centres, partial care facilities, shelters and drop-in centres;
  - (e) prescribing the manner and format in which the Child Protection Register must be established and maintained;
  - (f) prescribing criteria for finding persons unsuitable to work with children;
  - (g) prescribing the procedure to be followed and the time periods to be adhered to when reporting a finding that a person is unsuitable to work with children to the Minister;
  - (h) prescribing criteria for the assessment of applications for the removal of names of persons from Child Protection Register;
  - (i) the minimum requirements with which early childhood development services or programmes must comply; this is not otherwise covered in the law
  - (j) the procedure to be followed and the fees to be paid in connection with the lodging and consideration of applications for registration relating to paragraphs in terms of this Chapter and for the renewal of such registrations;
  - (k) fees for appeals
  - (l) format and content of certificates
  - (m) methods and formats for compliance with conditions
  - (n) the assessment and compulsory monitoring of early childhood development services or programmes offered at partial care facilities and child and youth care centres; and
  - (o) members of boards, quorum matters, training of staff
  - (p) generally any other ancillary or incidental administrative or procedural matter that it is necessary to prescribe for the proper implementation or administration of this Act.
  - (q) relating to any matter which is required or permitted to be prescribed in terms of this Act;

- (r) generally relating to any other matter which is necessary or expedient for the effective implementation of this Act and to achieve its purposes;
- (s) in consultation with the minister responsible for justice, prescribing –
  - (i) the form of any application, authority, certificate, consent, notice, order, process, register, summons, subpoena, or any other form to be used in implementing this Act; and
  - (ii) the rules of procedure for proceedings in children’s courts;
- (t) with the concurrence of the minister responsible for finance prescribing the fees to be paid for an order of adoption or a certified copy of that order.

(6) Any regulation made under subsection (?) may prescribe a penalty for any contravention of or failure to comply with that regulation, not exceeding a fine of N\$2 000.

(7) Regulations made in terms of subsection (1), (2), (3) (4) and (5) may –

- (a) apply –
  - (i) generally throughout Namibia or in a category of areas;
  - (ii) generally to all persons or to a category of persons; or
  - (iii) generally to all child and youth care centres, partial care facilities, shelters or drop-in centres or to a category of such centres, facilities, shelters or drop-in centres; or
- (b) differentiate between different –
  - (i) areas or categories of areas;
  - (ii) persons or categories of persons; or
  - (iii) child and youth care centres, partial care facilities, shelters or drop-in centres or categories of such centres, facilities, shelters or drop-in centres.

(8) Regulations made in terms of subsection (?) may provide that any person who contravenes or fails to comply with a provision thereof is guilty of an offence and liable on conviction to a fine not exceeding N\$20 000 or to imprisonment for a period not exceeding five years or to both a fine and imprisonment.

## **Repeal of laws**

**180.** (1) The laws specified in Schedule 1 to this Act are repealed to the extent in the third column of that Schedule.



## **Transitional provision**

**181.** (1) Anything done in terms of a law repealed in terms of section 180 which can be done in terms of a provision of this Act, must be regarded as having been done in terms of that provision of this Act.

(2) Any regulation, appointment, order, leave of absence, agreement, notice or certificate made, granted, entered into, or issued and any other action taken under any provision of a law repealed by section 180 and which could be made, granted, entered into, issued or taken under any provision of this Act, must be deemed to have been made, granted, entered into or taken under the corresponding provision of this Act, and if this Act does not contain any such corresponding provision, must be proceeded with, disposed of and given effect to in so far as the Minister has not provided otherwise.

## **Short title and commencement**

**182.** This Act is called the Child Care and Protection Act, 2008 and commences 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 1

## LAWS REPEALED

COLUMN 1	COLUMN 2	COLUMN 3
No. and year of Law	Title of law	Extent of amendment
Act No. 33 of 1960	Children's Act, 1960	The whole
Act No. 69 of 1962	Commonwealth Relations Act, 1962	Sections 69 and 70
Act No. 50 of 1965	Children's Amendment Act, 1965	The whole
Act No. 62 of 1966	General Law Amendment Act, 1966	Sections 15 and 16
Act No. 102 of 1967	General Law Amendment Act, 1967	Section 16
Act No. 101 of 1969	General Law Amendment Act, 1969	Sections 18 and 19
Act No. 58 of 1970	Births, Marriages and Deaths Registration Amendment Act, 1970	Sections 50 and 51
Act No. 92 of 1970	General Law Further Amendment Act, 1970	Section 11
Act No. 74 of 1973	Children's Amendment Act, 1973	The whole
Act No. 43 of 1976	Children's Amendment Act, 1976	The whole
Act No. 15 of 1977	Children's Amendment Act, 1977	The whole
Act No. 7 of 1981	Children's Amendment Act (Rehoboth) 1981	The whole
Act No. 93 of 1962	General Law Further Amendment Act	Section 1

## SCHEDULE 2

# TEXT OF THE UN PROTOCOL TO PREVENT TRAFFICKING IN PERSONS

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Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, G.A. res. 55/25, annex II, 55 U.N. GAOR Supp. (No. 49) at 60, U.N. Doc. A/45/49 (Vol. I) (2001).

### **Preamble**

The States Parties to this Protocol,

Declaring that effective action to prevent and combat trafficking in persons, especially women and children, requires a comprehensive international approach in the countries of origin, transit and destination that includes measures to prevent such trafficking, to punish the traffickers and to protect the victims of such trafficking, including by protecting their internationally recognized human rights,

Taking into account the fact that, despite the existence of a variety of international instruments containing rules and practical measures to combat the exploitation of persons, especially women and children, there is no universal instrument that addresses all aspects of trafficking in persons, Concerned that, in the absence of such an instrument, persons who are vulnerable to trafficking will not be sufficiently protected,

Recalling General Assembly resolution 53/111 of 9 December 1998, in which the Assembly decided to establish an open-ended intergovernmental ad hoc committee for the purpose of elaborating a comprehensive international convention against transnational organized crime and of discussing the elaboration of, inter alia, an international instrument addressing trafficking in women and children,

Convinced that supplementing the United Nations Convention against Transnational Organized Crime with an international instrument for the prevention, suppression and punishment of trafficking in persons, especially women and children, will be useful in preventing and combating that crime,

Have agreed as follows:

# I

## GENERAL PROVISIONS (Articles 1-5)

### Article 1

#### **Relation with the United Nations Convention against Transnational Organized Crime**

(1) This Protocol supplements the United Nations Convention against Transnational Organized Crime. It shall be interpreted together with the Convention.

(2) The provisions of the Convention shall apply, *mutatis mutandis*, to this Protocol unless otherwise provided herein.

(3) The offences established in accordance with Article 5 of this Protocol shall be regarded as offences established in accordance with the Convention.

### Article 2

#### **Statement of purpose**

The purposes of this Protocol are:

(a) To prevent and combat trafficking in persons, paying particular attention to women and children;

(b) to protect and assist the victims of such trafficking, with full respect for their human rights; and

(c) to promote cooperation among States Parties in order to meet those objectives.

### Article 3

#### **Use of terms**

For the purposes of this Protocol:

(a) 'Trafficking in persons' shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

(b) the consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;

(c) the recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered ‘trafficking in persons’ even if this does not involve any of the means set forth in subparagraph (a) of this article;

(d) ‘child’ shall mean any person under eighteen years of age.

## **Article 4**

### **Scope of application**

This Protocol shall apply, except as otherwise stated herein, to the prevention, investigation and prosecution of the offences established in accordance with Article 5 of this Protocol, where those offences are transnational in nature and involve an organized criminal group, as well as to the protection of victims of such offences.

## **Article 5**

### **Criminalization**

(1) Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in Article 3 of this Protocol, when committed intentionally.

(2) Each State Party shall also adopt such legislative and other measures as may be necessary to establish as criminal offences:

(a) Subject to the basic concepts of its legal system, attempting to commit an offence established in accordance with paragraph (1) of this article;

(b) participating as an accomplice in an offence established in accordance with paragraph (1) of this article; and

(c) organizing or directing other persons to commit an offence established in accordance with paragraph (1) of this article.

## **II**

# **PROTECTION OF VICTIMS OF TRAFFICKING IN PERSONS (Articles 6-8)**

## **Article 6**

### **Assistance to and protection of victims of trafficking in persons**

(1) In appropriate cases and to the extent possible under its domestic law, each State Party shall protect the privacy and identity of victims of trafficking in persons, including, inter alia, by making legal proceedings relating to such trafficking confidential.

(2) Each State Party shall ensure that its domestic legal or administrative system contains measures that provide to victims of trafficking in persons, in appropriate cases:

(a) Information on relevant court and administrative proceedings; and

(b) assistance to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings against offenders, in a manner not prejudicial to the rights of the defence.

(3) Each State Party shall consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons, including, in appropriate cases, in cooperation with non-governmental organizations, other relevant organizations and other elements of civil society, and, in particular, the provision of:

(a) Appropriate housing;

(b) counselling and information, in particular as regards their legal rights, in a language that the victims of trafficking in persons can understand;

(c) medical, psychological and material assistance; and

(d) employment, educational and training opportunities.

(4) Each State Party shall take into account, in applying the provisions of this article, the age, gender and special needs of victims of trafficking in persons, in particular the special needs of children, including appropriate housing, education and care.

(5) Each State Party shall endeavour to provide for the physical safety of victims of trafficking in persons while they are within its territory.

(6) Each State Party shall ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered.

## **Article 7**

### **Status of victims of trafficking in persons in receiving States**

(1) In addition to taking measures pursuant to Article 6 of this Protocol, each State Party shall consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases.

(2) In implementing the provision contained in paragraph (1) of this article, each State Party shall give appropriate consideration to humanitarian and compassionate factors.

## Article 8

### Repatriation of victims of trafficking in persons

(1) The State Party of which a victim of trafficking in persons is a national or in which the person had the right of permanent residence at the time of entry into the territory of the receiving State Party shall facilitate and accept, with due regard for the safety of that person, the return of that person without undue or unreasonable delay.

(2) When a State Party returns a victim of trafficking in persons to a State Party of which that person is a national or in which he or she had, at the time of entry into the territory of the receiving State Party, the right of permanent residence, such return shall be with due regard for the safety of that person and for the status of any legal proceedings related to the fact that the person is a victim of trafficking and shall preferably be voluntary.

(3) At the request of a receiving State Party, a requested State Party shall, without undue or unreasonable delay, verify whether a person who is a victim of trafficking in persons is its national or had the right of permanent residence in its territory at the time of entry into the territory of the receiving State Party.

(4) In order to facilitate the return of a victim of trafficking in persons who is without proper documentation, the State Party of which that person is a national or in which he or she had the right of permanent residence at the time of entry into the territory of the receiving State Party shall agree to issue, at the request of the receiving State Party, such travel documents or other authorization as may be necessary to enable the person to travel to and re-enter its territory.

(5) This article shall be without prejudice to any right afforded to victims of trafficking in persons by any domestic law of the receiving State Party.

(6) This article shall be without prejudice to any applicable bilateral or multilateral agreement or arrangement that governs, in whole or in part, the return of victims of trafficking in persons.

## III PREVENTION, COOPERATION AND OTHER MEASURES (Articles 9-13)

## Article 9

### Prevention of trafficking in persons

(1) States Parties shall establish comprehensive policies, programmes and other measures:

(a) To prevent and combat trafficking in persons; and

(b) to protect victims of trafficking in persons, especially women and children, from revictimization.

(2) States Parties shall endeavour to undertake measures such as research, information and mass media campaigns and social and economic initiatives to prevent and combat trafficking in persons.

(3) Policies, programmes and other measures established in accordance with this article shall, as appropriate, include cooperation with non-governmental organizations, other relevant organizations and other elements of civil society.

(4) States Parties shall take or strengthen measures, including through bilateral or multilateral cooperation, to alleviate the factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity.

(5) States Parties shall adopt or strengthen legislative or other measures, such as educational, social or cultural measures, including through bilateral and multilateral cooperation, to discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking.

## **Article 10**

### **Information exchange and training**

(1) Law enforcement, immigration or other relevant authorities of States Parties shall, as appropriate, cooperate with one another by exchanging information, in accordance with their domestic law, to enable them to determine:

(a) Whether individuals crossing or attempting to cross an international border with travel documents belonging to other persons or without travel documents are perpetrators or victims of trafficking in persons;

(b) the types of travel document that individuals have used or attempted to use to cross an international border for the purpose of trafficking in persons; and

(c) the means and methods used by organized criminal groups for the purpose of trafficking in persons, including the recruitment and transportation of victims, routes and links between and among individuals and groups engaged in such trafficking, and possible measures for detecting them.

(2) States Parties shall provide or strengthen training for law enforcement, immigration and other relevant officials in the prevention of trafficking in persons. The training should focus on methods used in preventing such trafficking, prosecuting the traffickers and protecting the rights of the victims, including protecting the victims from the traffickers. The training should also take into account the need to consider human rights and child –and gender-sensitive issues and it should encourage cooperation with non-governmental organizations, other relevant organizations and other elements of civil society.

(3) A State Party that receives information shall comply with any request by the State Party that transmitted the information that places restrictions on its use.



## Article 11

### Border measures

(1) Without prejudice to international commitments in relation to the free movement of people, States Parties shall strengthen, to the extent possible, such border controls as may be necessary to prevent and detect trafficking in persons.

(2) Each State Party shall adopt legislative or other appropriate measures to prevent, to the extent possible, means of transport operated by commercial carriers from being used in the commission of offences established in accordance with Article 5 of this Protocol.

(3) Where appropriate, and without prejudice to applicable international conventions, such measures shall include establishing the obligation of commercial carriers, including any transportation company or the owner or operator of any means of transport, to ascertain that all passengers are in possession of the travel documents required for entry into the receiving State.

(4) Each State Party shall take the necessary measures, in accordance with its domestic law, to provide for sanctions in cases of violation of the obligation set forth in paragraph (3) of this article.

(5) Each State Party shall consider taking measures that permit, in accordance with its domestic law, the denial of entry or revocation of visas of persons implicated in the commission of offences established in accordance with this Protocol.

(6) Without prejudice to Article 27 of the Convention, States Parties shall consider strengthening cooperation among border control agencies by, inter alia, establishing and maintaining direct channels of communication.

## Article 12

### Security and control of documents

Each State Party shall take such measures as may be necessary, within available means:

(a) To ensure that travel or identity documents issued by it are of such quality that they cannot easily be misused and cannot readily be falsified or unlawfully altered, replicated or issued; and

(b) to ensure the integrity and security of travel or identity documents issued by or on behalf of the State Party and to prevent their unlawful creation, issuance and use.

## Article 13

### **Legitimacy and validity of documents**

At the request of another State Party, a State Party shall, in accordance with its domestic law, verify within a reasonable time the legitimacy and validity of travel or identity documents issued or purported to have been issued in its name and suspected of being used for trafficking in persons.

## IV

### **FINAL PROVISIONS (Articles 14-20)**

## Article 14

### **Saving clause**

(1) Nothing in this Protocol shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.

(2) The measures set forth in this Protocol shall be interpreted and applied in a way that is not discriminatory to persons on the ground that they are victims of trafficking in persons. The interpretation and application of those measures shall be consistent with internationally recognized principles of non-discrimination.

## Article 15

### **Settlement of disputes**

(1) State Parties shall endeavour to settle disputes concerning the interpretation or application of this Protocol through negotiation.

(2) Any dispute between two or more States Parties concerning the interpretation or application of this Protocol that cannot be settled through negotiation within a reasonable time shall, at the request of one of those States Parties, be submitted to arbitration. If, six months after the date of the request for arbitration, those States Parties are unable to agree on the organization of the arbitration, any one of those States Parties may refer the dispute to the International Court of Justice by request in accordance with the Statute of the Court.

(3) Each State Party may, at the time of signature, ratification, acceptance or approval of or accession to this Protocol, declare that it does not consider itself bound by paragraph (2) of this article. The other States Parties shall not be bound by paragraph (2) of this article with respect to any State Party that has made such a reservation.

(4) Any State Party that has made a reservation in accordance with paragraph (3) of this article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

## **Article 16**

### **Signature, ratification, acceptance, approval and accession**

(1) This Protocol shall be open to all States for signature from 12 to 15 December 2000 in Palermo, Italy, and thereafter at United Nations Headquarters in New York until 12 December 2002.

(2) This Protocol shall also be open for signature by regional economic integration organizations provided that at least one member State of such organization has signed this Protocol in accordance with paragraph (1) of this article.

(3) This Protocol is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations. A regional economic integration organization may deposit its instrument of ratification, acceptance or approval if at least one of its member States has done likewise. In that instrument of ratification, acceptance or approval, such organization shall declare the extent of its competence with respect to the matters governed by this Protocol. Such organization shall also inform the depositary of any relevant modification in the extent of its competence.

(4) This Protocol is open for accession by any State or any regional economic integration organization of which at least one member State is a Party to this Protocol. Instruments of accession shall be deposited with the Secretary-General of the United Nations. At the time of its accession, a regional economic integration organization shall declare the extent of its competence with respect to matters governed by this Protocol. Such organization shall also inform the depositary of any relevant modification in the extent of its competence.

## **Article 17**

### **Entry into force**

(1) This Protocol shall enter into force on the ninetieth day after the date of deposit of the fortieth instrument of ratification, acceptance, approval or accession, except that it shall not enter into force before the entry into force of the Convention. For the purpose of this paragraph, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by member States of such organization.

(2) For each State or regional economic integration organization ratifying, accepting, approving or acceding to this Protocol after the deposit of the fortieth instrument of such action, this Protocol shall enter into force on the thirtieth day after the date of deposit by such State or organization of the relevant instrument or on the date this Protocol enters into force pursuant to paragraph (1) of this article, whichever is the later.

## Article 18

### Amendment

(1) After the expiry of five years from the entry into force of this Protocol, a State Party to the Protocol may propose an amendment and file it with the Secretary-General of the United Nations, who shall thereupon communicate the proposed amendment to the States Parties and to the Conference of the Parties to the Convention for the purpose of considering and deciding on the proposal. The States Parties to this Protocol meeting at the Conference of the Parties shall make every effort to achieve consensus on each amendment. If all efforts at consensus have been exhausted and no agreement has been reached, the amendment shall, as a last resort, require for its adoption a two-thirds majority vote of the States Parties to this Protocol present and voting at the meeting of the Conference of the Parties.

(2) Regional economic integration organizations, in matters within their competence, shall exercise their right to vote under this article with a number of votes equal to the number of their member States that are Parties to this Protocol. Such organizations shall not exercise their right to vote if their member States exercise theirs and vice versa.

(3) An amendment adopted in accordance with paragraph (1) of this article is subject to ratification, acceptance or approval by States Parties.

(4) An amendment adopted in accordance with paragraph (1) of this article shall enter into force in respect of a State Party ninety days after the date of the deposit with the Secretary-General of the United Nations of an instrument of ratification, acceptance or approval of such amendment.

(5) When an amendment enters into force, it shall be binding on those States Parties which have expressed their consent to be bound by it. Other States Parties shall still be bound by the provisions of this Protocol and any earlier amendments that they have ratified, accepted or approved.

## Article 19

### Denunciation

(1) A State Party may denounce this Protocol by written notification to the Secretary-General of the United Nations. Such denunciation shall become effective one year after the date of receipt of the notification by the Secretary-General.

(2) A regional economic integration organization shall cease to be a Party to this Protocol when all of its member States have denounced it.

## Article 20

### Depositary and languages

(1) The Secretary-General of the United Nations is designated depositary of this Protocol.

(2) The original of this Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF, the undersigned plenipotentiaries, being duly authorized thereto by their respective Governments, have signed this Protocol.

#### **GENERAL**

The text of the UN Protocol on Trafficking is appended to the Bill. If Namibia intends to sign the Hague Conventions on Intercountry Adoption or International Abduction, it might also be useful to append the texts of these conventions.