

# **DRAFT CHILD CARE & PROTECTION BILL**

## **SUMMARY**



**Ministry of Gender Equality and Child Welfare  
GOVERNMENT OF THE REPUBLIC OF NAMIBIA**

**April 2009**

# ACKNOWLEDGEMENTS

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The **Legal Assistance Centre** produced this summary of the draft Child Care and Protection Bill on behalf of the **Ministry of Gender Equality and Child Welfare** with support from **UNICEF**.

The **boxes with blue text** contain background comments and information from the Legal Assistance Centre to facilitate discussion and debate on the draft Bill.

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# 1. BACKGROUND

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The draft Child Care and Protection Bill would replace the Children's Act 33 of 1960 which was inherited from South Africa and is very outdated, in addition to being a colonial law ill-suited to African situations.

Shortly after independence, it became clear that the Children's Act needed to be amended to be more appropriate for an independent Namibia. In 1994, the Ministry of Health & Social Services commissioned the Legal Assistance Centre and the Human Rights and Documentation Centre to prepare draft children's legislation. To make the law less unwieldy, the initial draft legislation was split into two pieces on the basis of its subject matter – a Children's Status Bill and a Child Care and Protection Bill. This early drafting process took place in consultation with persons who work with children in various capacities throughout Namibia, by means of a national workshop held in June 1994.

Responsibility for the draft legislation subsequently passed to the Ministry of Women Affairs and Child Welfare which came into existence in 1999. This Ministry solicited additional input from interested parties. Both pieces of draft children's legislation were discussed at a three-day workshop held at Heja Lodge near Windhoek in October 2001. The Children's Status Act was discussed in more detail at a smaller half-day workshop convened by the Ministry in Windhoek in April 2002. Both of these workshops were attended by various government officials as well as members of the legal profession and representatives of relevant NGOs.

The Ministry appointed a Task Force of persons with expertise in children's issues to refine the draft laws on the basis of the recommendations made at these workshops. This Task Force was chaired by the Permanent Secretary and included representatives from the Ministry of Health & Social Services, the Ministry of Justice, the Ministry of Home Affairs, the Office of the Attorney General and the Legal Assistance Centre. This Task Force met during 2002 and early 2003. The draft legislation was submitted to the technical legal drafters in the Ministry of Justice in 2003, along with minutes of the Task Force recommendations for policy revisions.

The Children's Status Bill was tabled in Parliament in 2003. After several rounds of committee hearings and amendments, it was passed in late 2006. However, changes in personnel at the Ministry of Gender Equality and Child Welfare (in respect of both the Minister and the Permanent Secretary) interrupted the progress of the longer Child Care and Protection Bill, which remained with the technical drafters at the Ministry of Justice until mid-2008. The current draft is based primarily on South Africa's 2005 Children's Act rather than on the previous Namibian drafts.

Because of the extended lapse of time since the last public consultations in 2001, and the many developments in the state of Namibian children during the intervening period, a new round of public and stakeholder consultation is being undertaken by the Ministry of Gender Equality and Child Welfare with technical assistance from the Legal Assistance Centre and support from UNICEF. The goal is to ensure that the new law will be appropriate for Namibia's children.

## 2. CONSTITUTIONAL & INTERNATIONAL FRAMEWORK

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### 2.1 Namibian Constitution

Namibian legislation on children must be consistent with the Constitutional protections for children.

#### **Article 10, Equality and Freedom from Discrimination**

- (1) All persons shall be equal before the law.
- (2) No persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.

#### **Article 14(3), Family**

The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

#### **Article 15, Children's Rights**

- (1) Children shall have the right from birth to a name, the right to acquire a nationality and, subject to legislation enacted in the best interests of children, as far as possible the right to know and be cared for by their parents.
- (2) Children are entitled to be protected from economic exploitation and shall not be employed in or required to perform work that is likely to be hazardous or to interfere with their education, or to be harmful to their health or physical, mental, spiritual, moral, or social development. For the purposes of this paragraph children shall be under the age of sixteen (16) years.
- (3) No children under the age of fourteen (14) years shall be employed to work in any factory or mine, save under conditions and circumstances regulated by Act of Parliament. Nothing in this paragraph shall be construed as derogating in any way from Paragraph (2).
- (4) Any arrangement or scheme employed on any farm or other undertaking, the object or effect of which is to compel the minor children of an employee to work for or in the interest of the employer of such employee, shall for the purposes of Article 9 be deemed to constitute an arrangement or scheme to compel the performance of forced labour.
- (5) No law authorising preventive detention shall permit children under the age of sixteen (16) years to be detained.

#### **Article 20(1)-(3), Education**

- (1) All persons shall have the right to education.
- (2) Primary education shall be compulsory and the State shall provide reasonable facilities to render effective this right for every resident within Namibia, by establishing and maintaining State schools at which primary education will be provided free of charge.
- (3) Children shall not be allowed to leave school until they have completed their primary education or have attained the age of sixteen (16) years, whichever is the sooner, save in so far as this may be authorised by Act of Parliament on grounds of health or other considerations pertaining to the public interest.

#### **Article 95, Promotion of the Welfare of the People**

- (a) The State shall actively promote and maintain the welfare of the people by adopting, inter alia, policies aimed at the following...

- (b) enactment of legislation to ensure that the health and strength of the workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter vocations unsuited to their age and strength...

In addition to these specific provisions, it is important to remember that children also enjoy all of the fundamental rights and freedoms (except in the few instances where there is a specific age limitation, such as on the right to vote and the right to stand for public office).

## 2.2 Existing international commitments on children

Namibia is a signatory to several international and regional conventions which guarantee certain children's rights:

1. **United Nations Convention on the Rights of the Child, 1990.** This is an internationally agreed framework of minimum standards for children's rights. It has been adopted by every country in the world apart from the United States and Somalia, making it the most widely ratified human rights treaty in history. The four core principles of the Convention are (1) non-discrimination; (2) commitment to the best interests of the child; (3) the right to life, survival and development; and (4) respect for the views of the child.

- 1.1 *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict.* This Protocol requires governments to "take all feasible measures to ensure that persons below the age of 18 do not take a direct part in hostilities and that they are not compulsorily recruited into their armed forces".

- 1.2 *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.* This Protocol obligates governments to protect the rights and interests of child victims of trafficking, child prostitution and child pornography, child labour and especially the worst forms of child labour. It promotes international cooperation in law enforcement around these issues and requires governments to make these actions criminal offences: (a) the sale of children for sexual exploitation, organ transfer, forced labour, adoption or any other purpose; (b) child prostitution; and (c) child pornography.

2. **African Charter on the Rights and Welfare of the Child, 1990.** This Charter was modelled on the UN Convention on the Rights of the Child, but with an emphasis on issues relating to African children.

3. **International Labour Organisation (ILO) Conventions:** There are several important ILO Conventions which are specifically applicable to children.

- 3.1 *ILO Convention 138 on the Minimum Age for Admission to Employment and Work, 1973.* This Convention sets minimum ages for various forms of work by children. It has been applied in Namibia by section 3 of the Labour Act 11 of 2007.

- 3.2 *ILO Convention 182 on the Prohibition and Immediate Elimination of the Worst Forms of Child Labour, 1999.* This Convention addresses (a) slavery and similar practices, including the sale and trafficking of children and the forced recruitment of child

soldiers; (b) the use of children for prostitution or pornography; (c) involving children in illicit activities, including the drug production and trafficking; and (d) work likely to harm the health, safety or morals of children. Namibia is addressing these issues through a programme headed by the Ministry of Labour and Social Welfare.

4. **Protocol to the Convention Against Transnational Organised Crime to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2000.** This Protocol is intended to harmonise national approaches to trafficking, in order to support efficient international cooperation in trafficking cases. It also provides for measures to protect and assist trafficking victims. Namibia's obligations under this Convention and Protocol are addressed by the Prevention of Organised Crime Act 29 of 2004, which has been passed by Parliament but is not yet in force.
5. **Convention on the Rights of Persons with Disabilities, 2006.** One of the key principles of this Convention is "respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities". The Optional Protocol to this Convention, which Namibia has also ratified, allows for individual complaints to the Committee on the Rights of Persons with Disabilities. Namibia's National Disability Council Act 26 of 2004 (not yet in force as of early 2009) creates a Council which has the duty to monitor the implementation of Namibia's National Policy on Disability and to review legislation affecting persons with disabilities. This policy, which was adopted by Cabinet in 1997, identifies children with disabilities as a key target group.

There are other international commitments with relevance for children, and in some cases for the girl-child in particular, in addition to those listed here.

## 2.3 Hague Child Protection Conventions

In addition to these key international commitments which Namibia has already ratified, the forthcoming children's legislation should be guided by certain Hague Conventions which Namibia might sign in future. These Conventions were drafted by the Hague Conference on Private International Law, a global inter-governmental organisation with nearly 70 members representing all continents which meets every four years. The Hague Conference develops agreements on personal, family or commercial issues involving more than one country. Several of the Hague Conventions are aimed at protecting children:

- (1) **Hague Convention on the Civil Aspects of International Child Abduction, 1980:** This treaty seeks to combat parental child abduction. If a child is removed from the home country by one parent in breach of the other parent's custody or access rights, the child must be returned and the dispute resolved in the original country.
- (2) **Hague Convention on the Protection of Children and Co-operation in Respect of Inter-country Adoption, 1993.** This Convention establishes safeguards to ensure that inter-country adoptions take place in the best interests of the child. It establishes a system of co-operation between authorities in the different countries, to help prevent abuses such as abduction, sale or trafficking in children.

- (3) **Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children, 1996.** This treaty provides a structure for effective international co-operation in matters such as custody, access and guardianship rights; foster care and institutional placements; and administration of a child's property. For example, the Convention could be relevant where there is a parental dispute over custody or contact in respect of a runaway teenager who has crossed international borders. The Convention is also intended to facilitate exchange of information and collaboration between child protection authorities in different countries.
  
- (4) **Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, 2007** (not yet in force internationally): This new Convention is designed to create systems for international cooperation in the enforcement of maintenance orders.

## 3. KEY DEFINITIONS

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Most of the definitions in the draft Bill are technical in nature. Definitions which are fundamental to various portions of the law are discussed in conjunction with those sections. However, one definition provides a fundamental starting point – the definition of a “child”.

### 3.1 “Child”

The Child Care and Protection Bill defines a child as being a person below the age of 18. This is consistent with the UN Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child.

The “age of majority” in Namibia would still be 21. 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.

Most countries in the world set the age of majority at 18. For example, South Africa recently lowered its age of majority from 21 to 18. The Convention on the Rights of the Child does not require countries to set the age of majority at 18 – the age of majority can be determined by each country “in light of the relevant social and cultural conditions”. But the Committee on the Rights of the Child encourages countries to be sure that their laws strike an appropriate balance between protecting children and respecting their evolving capacities.

### 3.2 “Parent” and “foster parent”

The draft Bill defines “parent” as a woman or a man in respect of whom parentage has been acknowledged or established, including an adoptive parent.

The draft Bill defines “foster parent” as a person who has foster care of a child by order of a children’s court.

### 3.3 “Family member”

The draft Bill defines “family member” in relation to a child to mean

- (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.

### **3.4 “Care-giver” & “primary caretaker”**

The draft Bill says that “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;
- (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 organisation where a child has been placed;
- (g) a child who cares for a child who is without appropriate family care in the community; and
- (h) the child at the head of a child-headed household”.

It defines “primary caretaker” 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”.

# 4. OBJECTIVES & GUIDING PRINCIPLES

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## 4.1 Objectives

Section 2 of the draft Bill lists the law's objectives. This list is modelled very closely on those contained in the South African Children's Act 38 of 2005, with some small changes of wording.

The Namibian law should ideally contain a set of objectives which is based on the Namibian situation. For example, the objectives make no mention of the special problems faced by children affected by HIV/AIDS or children with disabilities, and no reference to orphans and vulnerable children – even though these are overlapping groups of children which have been identified as needing special attention in Namibia.

As a point of comparison, the 1994 Namibian draft, and several later drafts, contained a more concrete set of purposes, with a greater emphasis on the prevention of family problems and the provision of support services:

- (a) *to protect and promote the well-being of all children;*
- (b) *to improve the quality of children's relationships with their families and communities;*
- (c) *to establish, promote and co-ordinate the use of services and facilities designed to advance the well-being of children, including services and facilities provided by the government, by non-governmental organisations and by the community;*
- (d) *to prevent, remedy or assist in solving problems which may place children in need of care or protection;*
- (e) *to actively involve families in resolving problems which may be detrimental to the well-being of the children in the family;*
- (f) *as a last resort, to intervene to protect children in need of care or protection, and to define the circumstances in which removal of a child from the home may be necessary;*
- (g) *through identification and provision of appropriate services, to restore children to their families as soon as a child's safety and well-being permit;*
- (h) *in cases where restoration to the family is not possible or appropriate, to place children in suitable adoptive homes in a timely manner;*
- (i) *to assure adequate care of children away from their homes, in cases where a child cannot be returned home or placed for adoption; and*
- (j) *to implement the UN Convention on the Rights of the Child, and to give effect to all other relevant international standards and guidelines regarding the prevention of child abuse and neglect and the protection of children.*

## 4.2 Best interests of the child

The draft Bill says that the best interests of the child must be “the paramount consideration” in respect of all children affected by proceedings under the Act. This follows the African Charter on the Rights and Welfare of the Child and the UN Convention on the Rights of the Child. Section 4(2) of the draft Bill includes a list of factors which should be considered in identifying a child's “best interests”. This list cannot really be summarised, but stakeholders should examine it to see if it contains all relevant issues.

## 4.3 Child participation

In the past, children were often treated as objects instead of people with their own rights and opinions. One effect of recognising children as full persons is giving them a right to participate in decisions which affect them. Both the UN Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child say that every child has a right to participate in any matter concerning the child. The draft Bill also gives children a right to express their views on matters which will affect them.

Infants will obviously not be able to express opinions. However, instead of providing a specific age at which the right to participate becomes relevant, the draft bases the right of participation on the child's "age, maturity and stage of development". This ensures that every child who is able to express meaningful views and opinions will have the opportunity to do so.

The draft also says that the views expressed by the child *must* be given "due consideration". This means that the child's view cannot be ignored, but the decision-maker can take into account factors such as the child's age, maturity and level of understanding when considering the child's input.

## 4.4 General principles

The draft provides some general principles to guide implementation of the law as well as all government actions and decisions affecting an individual child or children in general. All matters affecting children must follow the following six basic principles:

- (1) They must be consistent with the **fundamental rights and freedoms** set out in the Constitution, the **best interests** of the child, and the **rights and principles set out in this Act**.
- (2) They must respect the child's **dignity**.
- (3) They must treat the child **fairly** and **equitably**.
- (4) They must **protect the child from unfair discrimination** on any ground, including health status or disability of the child or a family member of the child.
- (5) They must recognise the child's need for development, and the child's need to engage in play and other recreational activities appropriate to the child's age.
- (6) If a child has a disability, they must respond to that child's special needs.

The draft also includes several additional principles:

- The child's family must be given the opportunity to express their views in any matter concerning the child – but only if this is in the best interests of the child.
- All matters concerning children must follow an approach that is "conducive to conciliation and problem-solving", as opposed to a "conflict approach".
- Delays must be avoided as far as possible
- Children of sufficient age and maturity must be informed of actions and decisions which could affect them. The children's parents must also be informed, as well as anyone else who has some parental rights and responsibilities (such as foster parents and guardians).

## 5. CHILD WELFARE ADVISORY COUNCIL

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The draft Child Care and Protection Bill provides for the establishment of a Child Welfare Advisory Council whose functions are –

- to advise the Minister on all services relating to child welfare
- to advise any government body which has a role in implementing the Child Care and Protection Act
- to recommend new laws or amendments to any existing laws relating to child welfare
- to prepare annual reports for the Minister on its activities and on the work of the Children’s Ombudsperson
- to design and propose programmes for prevention, protection or care which will advance the best interests of children
- to monitor the implementation of the Child Care and Protection Act and any other related laws
- to encourage and facilitate the involvement of non-governmental organisations and members of the community at large in matters relating to child welfare
- to carry out any other function assigned to it by the Minister.

The Council is to be funded by money appropriated by Parliament as well as by any grants, donations or bequests received with the approval of the Minister. In order to carry out its duties, the Council has a right of access to information held by organs of state, including courts, except where this information is confidential (such as information protected by attorney-client or doctor-patient confidentiality).

The Council is composed of 15 members appointed by the Minister:

- eight government stakeholders
- four private sector stakeholders
- three community stakeholders

At least eight members of the Council must be women. The seven members chosen from outside the government are chosen after the Minister invites nominations from stakeholders by means of public announcements in newspapers, radio and the *Government Gazette*, as well as through letters sent to relevant groups. If the Minister does not receive sufficient nominations, he or she will appoint the required number of persons who qualify at his or her discretion. The appointments and the members’ terms of office will be announced in the *Government Gazette*.

A person is not qualified to be appointed to the Council if that person:

- is not a Namibian citizen or permanent resident
- is a member of Parliament or a regional or local authority council;
- is an unrehabilitated insolvent (bankrupt); or
- has been convicted, in Namibia or elsewhere, of an offence and sentenced to imprisonment without the option of a fine, unless 10 years has passed since the sentence was served.

A member of the Council holds office for 3 years and may be reappointed. Positions on the Council become vacant if members:

- are no longer qualified (on the points listed above)
- resign
- are absent from 3 consecutive meetings of the Council or
- are removed by the Minister for reasonable cause. Before removing a member, the Minister must give that member written notice of the problem and consider the member's side of the story.

If a member dies or vacates before the expiry of his or her term, another person will be appointed for the remainder of the term, following the guidelines for selecting members.

Members who are not government employees will be paid allowances for their services, with the amounts to be determined by the Minister. The allowances may be different for different members, depending on the office held or the duties performed.

The Council may establish committees which may include non-Council members.

The Council must meet at least once every 3 months. The time and place of the first meeting is decided by the Minister. At the first meeting, members elect a Chairperson and Deputy Chairperson from amongst the members. Subsequent meetings are convened by the Chairperson of the Council.

The Chairperson may at any time call a special meeting at the request of the Minister or a majority of the members.

The majority of members form a quorum, and decisions are made by vote of a majority of the members present. If the votes are split, the person presiding over the meeting gets an additional vote to break the tie. The Council determines the procedure to be followed at its own meetings. It may invite non-members to attend and participate, but they will have no vote.

The Council must ensure that minutes of its meetings are kept and that copies of the minutes are delivered to the Minister. Administrative work is done by staff members of the Ministry which will be made available to the Council. In addition, there is to be one staff member designated as secretary to the Council.

The Council may obtain the services of external advisors as it considers necessary. This must be done in consultation with the Permanent Secretary. The costs of such services will be paid for by the government budget.

Every government ministry with functions affecting child welfare must submit a report on its implementation of the Child Care and Protection Act to the Council each year. The Minister will identify which ministries fall into this category.

The Council must prepare an annual report containing information on

- the Council's activities
- the reports submitted to it by other ministries on the implementation of the Child Care and Protection Act
- the report submitted to it by the Children's Ombudsperson
- any other relevant matters necessary to the report, as the Minister directs.

The report will be submitted to the Minister who must table it in Parliament.

## 6. CHILDREN'S OMBUDSPERSON

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The draft Bill states that the Children's Ombudsperson will be appointed by the Minister. No qualifications, criteria or term of office are specified, although it appears that the Ombudsperson would be a member of the public service.

The Children's Ombudsperson is charged with two primary duties: (1) investigating complaints arising under the Child Care and Protection Act and (2) monitoring the implementation of the United Nations Convention on the Rights of the Child and other international instruments relating to child welfare which are binding on Namibia. The Minister can also assign additional duties and functions to the Children's Ombudsperson.

Complaints can be reported by an adult or a child. The Children's Ombudsman must attempt to resolve such complaints through the use of "negotiation, conciliation, mediation or other non-adversarial approaches".

The Children's Ombudsman has powers which he or she can exercise as part of the investigation of complaints, or in connection with the implementation of Namibia's international obligations or other functions assigned by the Minister. The Children's Ombudsman can

- make enquiries
- investigate
- make reports
- make recommendations on any matter relating to children or services covered by the Act.

The Children's Ombudsman also has the power to inspect a "place of safety, shelter, children's home, or an education or vocational centre in which a child is placed".

The Children's Ombudsman must submit reports to the Child Welfare Advisory Council on the outcome of any investigations made, including the conclusions and recommendations based on these investigations, and any suggested actions. The Children's Ombudsman must also report the results of any investigation to the child involved (if the child is sufficiently mature enough to understand the information), and to the parent or guardian of that child. Finally, the Children's Ombudsman **may** report the results of any investigation to the head of any place or premises which was the subject of an investigation.

The Children's Ombudsman also has the power "to represent the rights, interest, and viewpoints of a child" receiving services under the Act when a decision relating to the child is made – not as a legal representative, but rather as a conduit of information. In other words, the law does **not** envision the Ombudsperson acting in a legal capacity on behalf of children protected under the Act. This is different from the approach taken in some other countries, such as Norway, which do allow their Children's Ombudsmen to take on specific legal cases – often test cases aimed at interpreting the law or influencing agency practice.

The Children's Ombudsman must report to the Child Welfare Advisory Council on all relevant matters relating to the implementation of the UN Convention on the Rights of the Child. In

addition, the Children's Ombudsperson is expected to make an annual report to the Child Welfare Advisory Council on all his or her activities during the preceding year.

The Act imposes strict confidentiality requirements in order to protect children covered under the Act. Any report made under the Act by the Children's Ombudsperson, the Child Welfare Advisory Council, or any Ministry must not

- violate legal professional privilege (protected communications between attorneys and clients)
- disclose the identity of a child who is the subject of an investigation or proceeding
- disclose the identity any parent or guardian of the child
- disclose the identity of any person who makes a complaint.

The Act also includes criminal offences and penalties relating to the work of the Children's Ombudsperson. It is a crime to

- hinder or obstruct the Children's Ombudsperson's work
- refuse or fail to answer questions posed by the Children's Ombudsperson without lawful excuse
- intentionally give false or misleading information to the Children's Ombudsperson
- falsely claim to be the Children's Ombudsperson.

The penalty for these offences is a fine up to N\$20 000 or imprisonment for up to two years, or both.

## 7. PROBATION OFFICERS

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Probation officers are currently employed by the Ministry of Health and Social Services, Ministry of Gender Equality and Child Welfare, Prisons and Correctional Services of the Ministry of Safety and Security, parastatals, non-governmental organisations and social workers in private practice. There is no centralised database of probation officers, so it was not possible to obtain a count of all the probation officers employed by the different agencies.

All probation officers are currently being registered by the Ministry of Gender Equality and Child Welfare. In order to be registered as probation officers, they must be registered social workers and members of the Social Work and Psychology Council. Probation officers who work with children also work with adults – the child’s parents, guardians or care-givers.

The draft Bill authorises the Minister to designate “social workers who comply with prescribed requirements” as probation officers or to appoint “as many persons as he considers necessary as probation officers”. The draft does not specify the requirements of probation officers who are appointed specifically for this purpose, but rather leaves this to be set by regulation. Probation officers appointed or designated in this way will exercise the powers and duties imposed on them under the Child Care and Protection Act, or any other law.

The Minister may classify probation officers into different categories for different purposes if this is considered necessary, and issue different sets of regulations for different categories of probation officers.

As under the current law, probation officers will continue to be officers of every Children’s Court and Magistrate’s Court. To provide continuity, probation officers appointed under the Children’s Act of 1960 will be deemed to have been appointed under the Child Care and Protection Act. The proposed general powers and duties of probation officers pertain to both children and adults who are accused of crimes. They are:

- assessing persons accused of crimes and providing appropriate intervention services, including mediation and family group conferencing
- investigating the circumstances of the accused and providing a pre-trial report recommending whether or not prosecution should proceed
- investigating the circumstances of an accused, compiling a pre-sentencing report and recommending an appropriate sentence and appropriate assistance to the accused’s family
- assisting convicted criminals who are on probation in complying with the conditions of their probation in order to improve their social functioning
- supervising probation and reporting to the court on compliance with the probation conditions – including immediate reporting when a convicted criminal who is on probation violates the conditions of the probation

The proposed law also includes a special provision on the assessment of a child who has been arrested for a crime. Assessment here means evaluation of the arrested child, the child’s family circumstances, the nature and circumstances of the alleged crime, its impact on the victim, the attitude of arrested child about the crime and any other relevant factor. It thus describes the kind

of screening that social workers are already doing in practice in some parts of Namibia. The proposed law would require that any arrested child who has not been released must be assessed by a social workers who has been named as a probation officer as soon as reasonably possible.

The proposed law would also make it a crime to hinder or obstruct a probation officer in the performance of his or her duties. The penalty is a fine of up to N\$ 20 000, imprisonment for up to 5 years, or both.

## 8. PARENTING PLANS

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To understand parenting plans, it is necessary to consider the background of parental powers in Namibia.

**Where a child's parents are married**, they share parental authority (which includes custody). Since the abolition of the husband's automatic legal status as "head of household" by the Married Persons Equality Act, this means that decision-making on day-to-day matters should be exercised consultatively. Married parents also have equal guardianship of children of the marriage in terms of the Married Persons Equality Act. This means that either parent can make legal decisions on behalf of the child independently of the other parent. There are some exceptions to the rule of equal guardianship, with certain important decisions requiring the consent of *both* husband and wife in terms of the Married Person's Equality Act:

- consenting to the marriage of a child
- putting a child up for adoption
- removing a child from Namibia
- applying to add a child's name to either parent's passport
- selling land belonging to the child, or doing anything which affects the child's right to that land.

The High Court can give an order allowing one spouse to act on the listed matters without the other's consent if there is a good reason. Otherwise, husband and wife must both consent to these matters.

**If married parents divorce**, the divorce order will normally assign certain aspects of parental authority to each parent – for example, upon divorce, one parent might be named as the child's custodian while both parents might retain equal guardianship powers.

**If the parents of a child were never married to each other**, the Children's Status Act (which came into force in 2008) says that one of the parents must become the primary custodian. This means that one parent must take responsibility for the day-to-day care of the child – even if the parents are living together. The law does not say which parent must be the custodian; it is up to the parents to decide this between themselves. The person who is the custodian is automatically the legal guardian as well, although (unless a Children's Court orders otherwise) the consent of both mother and father is required to

- put the child up for adoption or
- remove the child from Namibia for a period longer than one year.

The non-custodian parent will have an automatic right of access to the child, unless the court limits this right to protect the child.

Unmarried parents can make an oral or written agreement between themselves on who will act as the primary custodian. The parents can make a written agreement and have it registered with any court (including a community court), but this is optional. If they cannot agree on who will be the primary custodian, then the Children's Court can decide the matter based on what will be in the best interests of the child.

**It is possible for someone other than the child's parent to apply to be named as the child's custodian or guardian.** The child's primary caretaker, or someone authorised by the Minister to act on behalf of the child (such as a social worker), can approach a Children's Court and ask to be named as the child's custodian or guardian, or ask that some other person be named as the child's guardian.

**If a child's parent or guardian dies,** any other parent who shared custody or guardianship powers over the child will become the child's custodian or guardian. If the deceased parent had sole custody and guardianship and failed to name a guardian in a will, then there is a simple administrative procedure whereby the Children's Court can name a guardian, who will normally be a close family member or the primary caretaker of the child. These rules appear to envisage a single guardian, but it is possible that a guardian named in this way might in fact share parental rights and responsibilities with others who look after the child on a daily basis or have rights of access to the child.

**When a child is placed in alternative care,** such as with foster parents or in a children's home, the current law transfers most parental powers to the person or institution where the child is placed. However, this transfer of parental power specifically excludes "power to deal with any property of a pupil or child or the power to consent to the marriage of a pupil or child or to the performance upon or the provision to a pupil or child of an operation or medical treatment which is attended with serious danger to life". The Minister has powers to authorise marriage or medical treatment under certain circumstances, such as in cases where the parents cannot be found or where their consent is being unreasonably withheld.

**The draft Bill refers to parenting plans between co-holders of "parental responsibilities and rights".** The term "parental responsibilities and rights" is not defined. It presumably refers to parental authority in the form of custody, guardianship and access. Who could currently be the co-holders of parental authority in the Namibian context?

- married parents
- divorced parents
- unmarried parents
- multiple persons named in a court order , which could include the child's primary caretaker or a social worker
- a child's parent(s) or guardian, and foster parents or the management of a children's home or other institutional placement (and for certain limited purposes, the Minister)
- a guardian named in a will or a court order and a surviving parent, primary caretaker or other relative.

According to the draft Bill, any time that more than one person has parental rights and responsibilities over a child, the co-holders *may* agree upon a parenting plan. If they are having difficulties in exercising their overlapping rights, then they *must* attempt to agree upon a parenting plan before they will be allowed to ask a court to resolve the matter.

A parenting plan can cover any aspect of parental authority, including the following issues (which are common areas of dispute):

- (a) where and with whom the child is to live;
- (b) maintenance;

- (c) contact between the child and any of the parties to the plan, or contact with any other person (such as extended family members or a spouse of either party);
- (d) the schooling and religious upbringing of the child.

The parenting plan must serve the best interests of the child. The parties to the parenting plan **must** get help from a lawyer, a social worker or a psychologist, or they **must** ask a social worker or other suitably qualified person to mediate if they are struggling to reach agreement.

The parenting plan **must** be in writing, and signed by all the parties to the agreement. It **may** be registered with a legal practitioner **or** made into a court order. It can be made into a court order only if it is in the format prescribed by regulations which will be issued under the Act, and if it is accompanied by either (a) a statement from a legal practitioner, social worker or psychologist certifying that they were consulted about the preparation of the plan, or (b) a statement from a social worker or other suitably qualified person certifying that the plan was finalised after they assisted with mediation.

If the parenting plan is registered with a legal practitioner, then the agreement can also be amended or terminated by that legal practitioner, without any specific formalities.

If the parenting plan was made into an order of court, it can be amended only by an order of a Children's Court or the High Court, on the application of –

- the co-holders of parental responsibilities and rights who are parties to the plan;
- the child covered by the plan (after getting the court's permission to make the application) or
- any other person acting in the child's interests (after getting the court's permission to make the application).

The court **must** ensure that the proposed changes are in the child's best interests.

The court **may** order any of the following things to guide its decision on the proposed changes, and charge the costs of the inputs to any of the parties to the case:

- it may obtain a report on the situation from a social worker or other suitably qualified person must be submitted to the court
- it may designate some other person to investigate any aspect of the matter
- it may ask for evidence from any person.

The court **may** also appoint a legal representative to represent the child at the court proceedings. Depending on the circumstances of the case, the costs of this legal representation could be charged to one or more of the parties, or paid by the state.

# 9. CHILDREN'S COURTS

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Children's Courts under the draft Child Care and Protection Bill would operate in much the same way as they do now under the Children's Act 33 of 1960, with a few new innovations.

This section does not present the provisions in the draft Bill in the order in which they appear, but rather in the order which they would arise in a court case. It might be useful to similarly re-order the Bill for greater ease of reference.

## 9.1 Children's Courts & Commissioners of Child Welfare

Every Magistrate's Court is a Children's Court and every Magistrate is a Commissioner of Child Welfare. It is also possible for the Magistrate's Commission to assign a Magistrate as a dedicated Commissioner of Child Welfare, as has been done in the past where the volume of cases made this practical. There is currently a dedicated Commissioner of Child Welfare at the Windhoek Magistrate's Court. Commissioners of Child Welfare have a duty to promote and protect the best interests of any child who comes before the court. A welcome new provision requires that the Minister of Justice must ensure that Commissioners receive appropriate training before assuming their duties under the Act. Like Magistrate's Courts, Children's Courts would have clerks to assist them.

## 9.2 Jurisdiction

Children's Courts can hear cases involving children who are "ordinarily resident" in their area of jurisdiction. If a single case involves more than one child, then the court can hear the case if any one of the children is ordinarily resident within the court's jurisdiction. In contrast, under the Children's Act 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".

## 9.3 Referrals

Any court dealing with any matter involving a child can refer the matter to a social worker for an investigation to see if a child is in need of care or protection. For example, a court dealing with maintenance or domestic violence might make such a referral. The court can also order that the child be temporarily moved to a "place of safety" while the investigation is underway. The child's safety and welfare are to be the highest priority.

## 9.4 Pre-hearing conferences

The draft Bill provides for pre-hearing meetings for the following purposes:

- to mediate between the parties;
- to settle disputes between the parties to the extent possible; and
- to define the issues to be heard by the court.

The court may order that these meetings be held in respect of any proceeding brought before a Children’s Court EXCEPT matters involving allegations of child abuse (including sexual abuse).

A pre-trial meeting **must** involve all of the parties to the case. The child in question **may** attend and participate in the meeting unless the Children’s Court decides otherwise. The court **may** give instructions about the procedure for this meeting, including who should attend and who should conduct it.

The court **may** give instructions about how to record facts which emerge and agreements which result from the meeting. The report on the meeting can be considered if the matter is subsequently considered by the court. (For example, it is possible that some of the issues which are in dispute may be resolved at such a meeting, while others may remain outstanding, to be decided by the court.)

## 9.5 Lay-forums

Another option available to the Children’s Court is to refer a matter brought before it to a “lay-forum hearing” for an attempt to settle the matter out of court. These are the options:

- (1) mediation by a social worker, a social service worker or other suitably qualified person
- (2) mediation by a traditional authority.

The draft excludes the use of lay forums in matters involving alleged abuse or sexual abuse of a child, but gives no other guidance on when lay forums are or are not appropriate.

As in the case of pre-hearing meetings, the Children’s Court may give instructions about how to record facts which emerge and agreements which result from the lay-forum. The Children’s Court may consider the report on the meeting if the matter later comes back to the court.

Parties could of course choose to resort to mediation or a traditional leader on their own, without any obligation to report back to the court on the outcome. But where the court initiates the alternative approach, then the parties have an obligation to report back to the court on its outcome.

## 9.6 Family group conferences

The Namibian draft makes no provision for family group conferences. This is a procedure that is used in family matters in many other countries, including New Zealand, the United States, England and South Africa.

Building on Maori culture and tradition, New Zealand pioneered the concept of “family group conferences” which has become an international model. This concept is characterised by its broad notion of “family”. Here is a brief overview of the basic process:

A Family Group Conference is a structured decision making meeting made up of ‘family’ members. ‘Family’ is determined broadly, to include the child/ren, parents, extended family and even significant friends and neighbours to the family who may not actually be blood related. This group of people are given ‘private’ time to reach a plan to facilitate the safe care and protection of a child or children in

need. The professional is involved in information giving at the beginning of the process and in the assessment of the plan following a decision. All professionals are excluded from the private time, which is attended by family members only.

This process is applied to a range of areas involving children, including care and protection and child justice.

The principles that underpin the Family Group Conference process are:

- The child's interests are paramount.
- The child should have the resources made available for his/her voice to be heard.
- The child's views, feelings and solutions are as valid as the adults participating in the process.
- Children are generally best looked after within their families. Services should seek to promote this wherever possible.
- Working in partnership with families is beneficial for children.
- Families have the ability to make rational and sound decisions about their future and the future of the children involved.
- Given the right environment and the correct information, families instinctively know what is best for their children.

There are five defining features of the process:

- The Family Group Conference is the primary decision making forum for the child.
- The Family Group Conference is made up of as wide a network of family members as possible (including grandparents, siblings, uncles, aunts, parents, child, family friends who may know the child but are not blood relations).
- An independent coordinator facilitates the involvement of the child, family network and professionals in the Family Group Conference process.
- The family should always have private time at the Family Group Conference to produce their plans for the child or young person.
- The Family Group Conference plan should be implemented unless it places the child at risk of significant harm.

This could be one important avenue for involving a wider group of people in decisions affecting the child, including persons outside the biological family who are significant to the child.

## **9.7 Attendance at proceedings**

The Commissioner of Child Welfare can direct the clerk of the court to "request" in writing the attendance of certain persons at children's court proceedings:

- a party
- a family member of the child involved in the matter
- any other person who has some interest in the matter.

Anyone with physical control of a child who is involved in children's court proceedings must ensure that the child attends, unless the court or the clerk of the court has directed otherwise (such as in the case of a child who was too young to understand the proceedings, for example).

## 9.8 Witnesses

Witnesses can be summoned and required to bring documents, as is usual in Magistrate's Courts. To make sure that all relevant evidence is placed before the court, the clerk of the court is required to summon witnesses at the request of the presiding officer or any person likely to be affected by the outcome of the proceeding. For example, if one parent was trying to prove that the other parent had abused the child, that parent could request the clerk of the court to require the doctor who treated the child's injuries to come to court and give evidence. It is an offence to ignore a summons to appear in court, or to refuse to answer questions or produce requested documents.

## 9.9 Court procedure

Children's Courts will generally work in the same way as Magistrate's Courts (which is how they have operated in the past). However there are some special rules and procedures which apply to Children's Courts. Some of these special procedures are the same as in the past, while others are new innovations.

- (1) **Assessors:** The draft Bill makes provision for one or more "assessors" to assist in particular cases where this would be in the best interests of the child. The assessors would assist with determining the facts of the case, while the Commissioner of Child Welfare would decide questions of law on his or her own. Assessors who are not full-time state employees would be paid a fee for their services. This provision would allow Children's Courts to take advantage of specialised expertise, such as that of doctors, psychologists, and educators. It would also allow the court to make use of someone from the same language group or cultural group of the child, which can help make the child more comfortable and ensure more effective child participation.
- (2) **Comfortable environment:** The draft Bill makes provision for children's court proceedings to be held in an informal atmosphere which is likely to be less intimidating to children, whilst still preserving the "prestige" of the court. Proceedings can be held in a room other than the formal courtroom, and this room should (as far as possible) be –
  - informal
  - designed and furnished in a manner aimed at putting children at ease
  - not ordinarily used for the adjudication of criminal trials and
  - accessible to disabled persons and persons with special needs.
- (3) **Privacy:** Proceedings in a Children's Court will be closed to the public. Only certain persons will be allowed to be present:
  - the child involved
  - other parties to the matter
  - the legal representatives of any person involved
  - persons who have obtained permission from the presiding officer to be present
  - a social worker summoned to participate in the matter
  - any other person who has been instructed by the clerk of the court to attend the proceedings (such as a witness or a particular family member).

(4) **Explaining the proceedings:** The presiding officer must explain “the nature and significance of the proceedings” in simple language to children, parents and other persons with an interest in them. This is intended to help people participate in the proceedings as fully as possible.

(5) **Child participation:**

The draft Bill ties the right of child participation to the child’s age and maturity, rather than setting a specific age for this. It calls for the Commissioner presiding over any matter before a Children’s Court to allow any child with sufficient maturity to express a view or preference over the outcome of the proceeding, if the child wishes to do so.

If the child is unwilling to express a view, or if the court finds that the child is not able to participate, the reasons must be recorded. The Commissioner may intervene in the questioning of the child if appropriate under the circumstances, and questioning must take place through an intermediary (such as a social worker) if the court finds that this would be in the best interests of the child. The court has discretion to order that particular issues be dealt with in the absence of the child if this would be in the best interests of the child – but if this takes place, the reasons must be recorded. For example, a court might order that the presence of a child who was still an infant is unnecessary. A court might also want to excuse a child who is traumatised by abuse from having to be present at a proceeding involving the abuser.

The draft Bill provides for legal representation for a child only where the court determines that this would be in the child’s best interests. If so, then the matter is referred to the Director of Legal Aid. No special provision is made for the children’s representative to be specifically trained to work with children. (Although the draft Bill creates the office of Children’s Ombudsperson, the ability to represent a child as a legal representative is specifically excluded from this Office’s powers.)

(6) **Adjournments:** The court is required to take the best interests of the child into consideration when considering a request for an adjournment, and it may not postpone a matter for longer than 30 days. The court may excuse any person involved in the matter (such as the child) from appearing in court in person if there is only going to be a request for an adjournment.

(7) **Estimating age:** The Children’s Court is allowed to estimate the age of a person who appears to be a child. Regulations will provide guidelines for this purpose.

(8) **Investigations and assessments:** The draft Bill contains a section on “Reports requested by the court”. The court may order an investigation by a social worker or an assessment by a medical practitioner, psychologist or developmental or educational practitioner. Any such report must be given to the court and to all the parties involved in the matter at least five days before the hearing. The person who made the investigation may be asked to come to court in person to present the findings, or the court may decide that a written report is sufficient (although in this case, persons prejudiced by any of the findings must have a chance to question the person who made the report in court, or to give another side of the story). State funds can be used to pay the persons who make such reports if they are not state employees (in accordance with a tariff which will be set by regulation).

## **9.10 Orders and additional powers**

A Children's Court has general powers to –

- grant interdicts and supplementary relief
- extend, withdrawn, change or monitor any of its orders
- impose or change time deadlines in connection with any of its orders
- make orders concerning costs
- order that someone be removed from court (noting the reasons for this on the court record).

## **9.11 Monitoring**

The Children's Court has the power to monitor compliance with a court order it has issued, or the general circumstances of any child subject to a children's court order. One way to accomplish this is to incorporate monitoring provisions in the original court order by:

- (a) ordering any person involved in the matter to appear before the court on a future date, or
- (b) ordering that social worker reports be submitted to the court at specified dates or intervals.

In addition, any person can report concerns about non-compliance or concerns about a child's circumstances to the clerk of the court, who must then refer the matter to the Commissioner of Child Welfare for a decision on possible follow-up action. The court has the power to call or recall any person involved in the original matter before it at any time, for the purposes of questioning about compliance. If necessary, the court can refer the matter for possible criminal prosecution.

## **9.12 Judicial review of private agreements**

Where parties reach agreement between themselves on a matter which was placed before the court – through mediation or some other process – the clerk of court must give the agreement to the Children's Court for confirmation and acceptance. If the court finds that the agreement is in the best interests of the child, then it can confirm the agreement and make into an order of court – which makes it enforceable in court. The court may also reject the settlement, or refer it back to the parties with a direction that they reconsider specific issues. This process provides a safeguard in case mediation or lay-forums have failed to protect the best interests of the child.

## **9.13 Appeals**

Appeals from a decision of the Children's Court are made to the High Court, just as in any other judgement of a Magistrate's Court.

## **9.14 Confidentiality**

It will be illegal for anyone to publish any information which could reveal the identity of a child who was a party or a witness in any children's court proceedings. The proposed penalty is a stiff fine of up to N\$20 000 or imprisonment for up to five years. Only the Commissioner can

authorise exceptions to this rule, and only if this “in the interest of justice”. This would appear to mean that the consent of the child or the child’s parents will not justify publication of such information. The high financial penalty is appropriate to an offence for which the usual motive is financial gain through sensationalism.

The records of children’s court proceedings are confidential and may be disclosed only (a) where this is necessary for performing official duties under the Act (b) by a court order, provided that disclosure is compatible with the child’s best interests, and (c) for purposes of review or appeal.

# 10. PREVENTION & EARLY INTERVENTION SERVICES

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Prevention and early intervention services are services that are designed to protect and reduce the risk of violence or other harm within the family environment. For example, if there are family members who abuse alcohol or drugs, helping them with these problems would help protect the child. Identifying children who are at risk and targeting these families for early intervention could help prevent child abuse and neglect. The interventions could also help prevent the child from developing emotional or behavioural problems in the future.

In terms of the draft Bill, “prevention services” are services 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”. “Early intervention services” are services provided to families “where there are children identified as being vulnerable to or at risk of harm or removal into alternative care”.

Both categories of services have the following aims:

- (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;
- (c) establishing appropriate interpersonal relationships within the family;
- (d) promoting the well-being of children and the realisation of their full potential;
- (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;
- (g) diverting children away from the criminal justice system; and
- (h) avoiding the removal of a child from the family environment.

The Minister must ensure that prevention and early intervention services are provided to children and families, and the Minister may provide state funding to appropriate service providers for this purpose.

Where an investigation has concluded that a particular child is in need of protection, the social worker who conducted the investigation may arrange for prevention and early intervention services right away, but must at the same time arrange for a children’s court hearing (section 60(3)). The social worker may also recommend such services where the investigation has concluded that the child is **not** in need of protection (section 65((2)-(3)). Prevention and early intervention services are not otherwise integrated into the procedures provided for by the draft Bill.

# 11. CHILDREN IN NEED OF PROTECTION

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## 11.1 Definition

Under both the current and the proposed law, the suspicion that a child is in need of care or protection is the trigger for initiation of an investigation while a finding that a child is in fact in need of care or protection is the justification for removal of the child from the home environment and placement in alternative care.

All children need care and protection, of course, but this concept in law means that a child is in need of assistance which is not being provided in the home environment. “Care” is associated with nurturing, while “protection” is associated with safety issues. Various laws use one term or the other to encompass both aspects of a child’s well-being.

It is necessary to balance, (a) the child’s right to know and be cared for by his or her own family and the family’s corresponding right to maintain its relationship with the child against (b) the child’s need for protection from any significant risk of neglect or abuse.

The draft Bill defines “a child in need of protection” as a child who:

- is abandoned or orphaned and insufficient provision has been made for the care of the child
- is engaged in behaviour that is, or is likely to be, harmful and the parent or guardian or care-giver is unable or unwilling to control that behaviour
- lives or works on the streets or begs for a living
- lives in or is exposed to circumstances which may seriously harm the physical, mental or social welfare of the child
- is in a state of physical or mental neglect
- 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
- is being, or is likely to be maltreated or abused by a person having the care custody, control or charge of the child.

This is a fundamentally important definition which should be considered carefully. It must be kept in mind that the Children’s Court must find that a child meets one of these criteria in order to trigger most court orders and interventions – so the criteria must be specific and capable of proof.

## 11.2 Mandatory reporting

The theory behind reporting laws is that abused and neglected children are unable to ask for help. Child abuse and neglect usually take place privately, in a home, with no witnesses other than the parents and children. Reporting laws are designed to bring cases of possible wrongdoing to the attention of public authorities who are in a position to help.

**Mandatory reporting laws** are laws that require people in a specific group, or even the general public in some countries, to report if they suspect a child is being maltreated. Failure to report is a crime.

**Voluntary reporting laws** are laws that encourage people to make reports in good faith when they suspect that a child is being maltreated. But no criminal prosecution that will follow if a person fails to report a suspected problem.

The draft Bill applies mandatory reporting to all persons who have a “reasonable belief” that a child “is or may be in need of protection”. This part of the draft Bill confusingly contains a list of professionals who work with children, but actually applies the reporting requirement to all persons. The mandatory reporting requirement supersedes all requirements of professional confidentiality (including doctor-patient confidentiality) – the only exception is legal professional privilege which applies to certain communications between lawyers and their clients. Persons who make good faith reports are shielded from civil liability. The penalty for failing to make a report is a fine of up to N\$20 000 or imprisonment for up to 5 years, or both.

The report must be made to a social worker or a member of the police force, and there are clear follow-up procedures for investigation and actions to be taken in response to a report. If the report is made to a social worker, the social worker must

- (1) make an initial assessment and take steps to assure the safety and welfare of the child if necessary
- (2) convey the information to a senior official in the Ministry (the Director of Social Services)
- (3) investigate the truthfulness of the report and, if necessary, remove the child from the home or ask police to remove the alleged offender.

If the report is made to police, the member of the police force who receives the report must

- (1) make an initial assessment and take steps to assure the safety and welfare of the child if necessary
- (2) notify a social worker of the situation.

In either case the social worker must take steps to provide any necessary prevention or early intervention services, and apply for a child protection hearing.

One issue for debate is what would happen in practice in a case where one parent has a legal duty to report abuse by another parent? Suppose you have a case of parent A abusing a child and parent B not reporting. Constitutionally one cannot be forced to testify against one's spouse in court, although it is possible that the child protection proceeding could proceed without parent B's testimony. On the other hand, suppose that parent B (the non-abusive parent) is charged with failure to report and is found guilty – it will not help the child if parent B as the child's only protector goes to jail.

## 11.3 Investigations

The draft provides four ways to initiate an investigation into whether a child is a child in need of protection:

- (1) when a member of the public (who could be a professional working with children ) reports a case to a social worker or to the police (section 59);
- (2) when anyone (a member of the public, a government official, an NGO representative etc) gives evidence on oath “before a Commissioner” that a child appears to be a child in need of protection (section 61(2));
- (3) 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 (section 38(1));
- (4) when a social worker or a police officer has removed a child to a place of safety without a warrant because there is reason to believe that the child is in need of protection and also requires immediate protection (section 62).

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”.

### TRIGGERS FOR INVESTIGATION

One question which should be considered is whether these four avenues are sufficient triggers for a social worker investigation. There is a list of factors which determine whether or not a child is in need of protection, but there could be an additional list of factors which could warrant an *investigation*, without necessarily being tied to the *conclusion* that a child is a child in need of protection.

For example, the South African Children’s Act 2005 provides that any child who is a victim of child labour or any child who lives in a child-headed household must be automatically investigated as potential child in need of care or protection. The South African law also provides for automatic investigation of the circumstances of any child residing in the same place as a child who has been removed from that premises and into temporary safe custody.

Other possible triggers for investigation could be:

- any child named in a protection order issued under the Combating of Domestic Violence Act 4 of 2003
- any child named as a victim of any crime against the person in a police docket
- any child involved in a case referred for investigation by the Children’s Ombudsperson or the Child Welfare Advisory Council
- any child found to have been trafficked
- any child (or perhaps children below a certain age) found living on the streets.

Of course, an official in any of these situations could make a mandatory report to the police or a social worker or give information to a Children’s Court – but in the instances cited the situation may not actually raise a *suspicion* that the child *is* in need of protection, but rather a concern that the child *might* fit into that category. Broadening the basis for investigation might assist vulnerable children to get access to necessary preventative services even if the investigation did not reveal an immediate need for a Children’s Court enquiry. On the other hand, the triggers for investigation should not be so wide that they place an intolerable burden on social workers.

## 11.4 Emergency removal of children

It will usually take several weeks or even months for a social worker to complete an investigation into the situation of a child alleged to be in need of protection. And yet there could be situations where the child is in immediate danger. Therefore, the proposed draft (like the current law) allows for the temporary removal of a child to a “place of safety” pending the outcome of the process of investigation and the court hearing to determine a longer-term course of action.

A “place of safety” is defined as 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 – excluding a prison or police cell.

There are for two procedures for removing children to a place of safety in advance of children’s court enquiries: (1) removal with a warrant and (2) removal without a warrant.

### Removal with a warrant

A Commissioner can issue a warrant authorising police or any social worker or any other person to search for, and remove a child and place that child in a temporary 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.

The Commissioner must make this decision based on the best interests of the child, taking into account all relevant facts and treating the safety and welfare of the child as the first priority.

The warrant must identify the child sufficiently clearly to enable it to be carried out properly. The warrant authorises any person who is directed to remove the child to enter any premises mentioned in the order, remove the child and carry out any other instruction from the court. Police may accompany the person authorise in the order to assist with these steps, and may use reasonable force. The police may even break a door or window if necessary to gain admission to the premises, after they have first explained the purpose of the visit and requested entry.

If a child has been removed, the person who carried out the removal must inform the child’s parent, guardian or the person who had care of the child at the time of the removal within 24 hours (or even sooner if possible). The matter must also be referred to a social worker for investigation within 24 hours. If the person who undertook the removal is a social worker, then the matter must be reported to the Director of Social Services.

Additional rules and procedures for removals may be included in regulations.

### Removal without a warrant

Police or a “designated social worker” (certain categories of social workers approved under the law) may remove a child and put the child in a place of safety without getting a warrant first if there is reason to believe (1) that the child is in need of protection and needs immediate

protection (2) that the delay involved in getting a warrant could jeopardise the child's safety and welfare and (3) that removing the child from the home environment is the best way to secure the child's safety and welfare.

If it is a social worker who removes the child without a warrant, that social worker must take similar steps in the case of a removal with a warrant: the social worker must inform the child's parent, guardian or the person who had care of the child at the time of the removal within 24 hours (or even sooner if possible), and report the removal to the Director of Social Services. The social worker must also inform the relevant Clerk of the Children's Court about the removal on the very next day that the court is open.

If it is a member of the Namibian police who removes the child without a warrant, the follow-up steps are similar. The police who removed the child must inform the child's parent, guardian or the person who had care of the child at the time of the removal within 24 hours (or even sooner if possible), and refer the matter to a social worker for investigation. As in the case of social workers, police must also inform the relevant Clerk of the Children's Court about the removal on the very next day that the court is open.

As in the case of removal with a warrant, the decision to remove the child must be based on the best interests of the child, taking into account all relevant facts and treating the safety and welfare of the child as the first priority. However, in this case, consideration must be given to the possible removal of the alleged offender from the home as an alternative method for protecting the child.

Misuse of the power to remove a child from the home without a warrant, by police or a social worker, will be grounds for disciplinary proceedings.

Additional rules and procedures for removals may be included in regulations.

### **General provisions on removals**

The draft Bill says that a decision to remove a child with or without a warrant is subject to automatic review by the High Court.

In the case of both removal with and without a warrant, if the child is not returned to the person who has a legal right of custody over the child within 48 hours of the removal, then the social worker dealing with the case must apply for a child protection hearing within 7 days of the removal.

## **11.5 Removal of alleged offender**

Police are empowered by section 63 to recommend that the better approach to protecting the child would be to remove an alleged offender from the place where the child is residing. (Social workers do not have this power, but could presumably work together with police.) This is similar to the approach taken in the Combating of Domestic Violence Act 4 of 203, where the court can issue a protection order directing the abuser to leave the common home instead of placing the burden of moving on the victim of the abuse.

In such a case, police are empowered to issue a written notice which contains the following provisions:

- (1) the name, surname, address, occupation and “status” of the offender;
- (2) a notice to the alleged offender to leave the place where the child in question resides and have not contact with the child until the children’s court hearing takes place;
- (3) a notice to the alleged offender to appear at a Children’s Court on a time and date specified in the notice to offer reasons as to why he or she should not be permanently prohibited from entering the place where the child resides; and
- (4) a notice to be signed by the alleged offender certifying that the document was received from the police and explained.

The police must file a second original of this notice with the Children’s Court. Misuse of the power to issue such a notice is grounds for disciplinary action.

When the alleged offender appears before the court, the court must make a summary enquiry into the circumstances behind the order to leave the home. After hearing the alleged offender’s side of the story, the court has the following options:

- (1) an order prohibiting the offender from entering the home, or from having contact with the child, or both, for a specified time period
- (2) an order allowing entry into the home or contact with the child, but only under certain conditions
- (3) an order requiring the alleged offender to pay maintenance for the family during the period of absence from the home covered by the order;
- (4) any other provision which the court considers appropriate.

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.

## 11.6 Application for child protection hearing

The draft Bill requires that a social worker carry out an investigation within 30 days and compile a report for the court.

The report must contain a finding as to whether or not the social worker believes the child to be in need of protection.

**If the conclusion is “no”**, the report must state the reasons for this finding. It must also include information on the measures recommended to assist the family, such as counselling, mediation, prevention measures, family reconstruction or rehabilitation, participation in behaviour modification or problem-solving programmes or referral to a particular professional or group. This report must be submitted to the court for review.

**If the conclusion is “yes”**, the finding must be confirmed by the children’s court. In this case, the social worker must apply for a hearing date, which must begin within 30 days of the application. This hearing must be concluded within 90 days of the date on which it starts.

## 11.7 Notice of hearing

The court must give 14 days' notice of the hearing to "the child's parent". This notice must include the following information:

- the nature of application;
- the date, time and place of the hearing;
- the basis for the application;
- the reasons for the removal of the child, if the child has been removed to a place of safety pending the hearing;
- the types of orders that the court could make at the conclusion of the hearing.

This notice is supposed to be served personally or by registered post.

The court may also, on oral or written request, name another person as a party to the proceedings if that person has a sufficient interest in the outcome of the hearing. This could be **an extended family member of the child, or any other person with a close connection to the child**. Before making a decision on such a request, the court may notify the child's parent or the social worker who did the investigation, and consider their views on the request before making a decision.

The Children's Court must also issue a summons directing that **the child who is the subject of the hearing** must be brought before the court, unless the court has reason to believe that the child should not be present because of

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

## 11.8 Additional reports

The court can request a further social worker investigation or an assessment of the child by a medical practitioner, psychologist, developmental or educational practitioner. This provision is generally worded so that it applies to any matter and not just to decisions on whether a child is in need of protection.

## 11.9 Court orders in a child protection hearing

Before making any finding, the court must consider the social worker's report. It must also base its decision on the best interests of the child – by considering the factors outlined in section 4 and the child's views as prescribed by section 5.

If the court finds that the child *is* in need of protection, it can make a broad range of orders:

**(a) Non-intervention**

- (1) The court can confirm that the person with custody of the child may retain custody of the child, without conditions. (This presumably refers to the child's legal custodian, who is not necessarily the person taking care of the child on a daily basis.)
- (2) The court can return the child to the person who was caring for the child before the child was placed in a place of safety, without conditions. (This person might be the child's primary caretaker rather than the legal custodian.)
- (3) If the child lives in a child-headed household, the court can order that the child remain in that household.

**(b) In-home placements**

(returning the child to the previous situation, but with conditions)

- (1) The court can order that the person who was caring for the child must make arrangements for the child to be placed in a crèche or day care centre when this caretaker does not have time to care for the child properly.
- (2) If the child lives in a child-headed household, the court can order that the child remain in that household under the care of the child heading the household, but can specify that the situation must be supervised by an adult designated by the court.
- (3) The court can make a "child protection order". This could include an order –
  - that a child remains in, be released from, or returned to the care of a person, subject to certain conditions
  - giving consent to medical treatment of, or to an operation to be performed on, a child
  - instructing the child's parent or care-giver to undergo professional counselling, or to participate in mediation, a family group conference, or some other appropriate problem-solving forum
  - instructing a child or another person to participate in a professional assessment (such as a psychological assessment)
  - instructing a person to undergo specified skills development, training, treatment or rehabilitation programme where this is necessary for the protection or well-being of a child
  - instructing a person who has failed to fulfil a statutory duty towards a child to appear before the court and give reasons for this
  - instructing a state agency to help the child get access to a public service to which the child is entitled (such as a state maintenance grant), or to send a representative to court to explain why this is not being done;
  - instructing that a person be removed from a child's home
  - limiting a person's access to the child, prohibiting a person from contacting the child altogether or allowing a person to contact a child only under specified conditions.
- (4) The court can make a supervision order, placing a child, or the parent or care-giver of the child, or both the child and the parent / care-giver, under the supervision of a social worker or other person designated by the court.

### **(c) Alternative-care placements**

- (1) If the child does not have a parent or care-giver, or if the child's parent or care-giver is unable or unsuitable to care for the child, the court can order that the child be placed in –
  - foster care with a suitable foster parent;
  - a place of safety, pending adoption
  - shared care where different care-givers or centres alternate in taking responsibility for the care of the child at different times or periods; or
  - a children's home or an educational and vocational centre that provides a programme suited to the child's needs.

Where the court orders one of these placements, there can be an additional order containing any of the following conditions:

- an order for supervision services by a social worker or other designated person
  - an order that the placement be accompanied by the provision of reunification services to the child and the relevant parent, care-giver or guardian by a social worker or other designated person
  - an order placing conditions on the persons providing the alternative-care placement, or requiring that they cooperate with the supervising social worker or other person.
- (2) The court can place the child in a specified facility for the care of children with disabilities or chronic illnesses.
  - (3) The court can order that the child be admitted as an inpatient or outpatient to an appropriate facility for treatment for addiction to a dependence-producing substance.
  - (4) Some of the possible provisions in child protection orders (listed above) might be coupled with alternative care placements. For example, it might be necessary to provide for non-contact provisions against an abuser to prevent that person from attempting to molest the child in the alternative placement.

### **(d) Supplemental**

- (1) The court can order that the child receive appropriate medical, psychological or other treatment or intervention, at state expense if necessary.
- (2) The court can interdict a person from maltreating, abusing, neglecting or degrading the child or from having any contact with the child, if the court finds that –
  - the child has been or is being maltreated, abused, neglected or degraded by that person;
  - the relationship between the child and that person is detrimental to the welfare or safety of the child; or
  - the child is exposed to a substantial risk of imminent harm.
- (3) The court can make a contribution order directing someone with legal liability to maintain the child to contribute towards the costs of maintaining a child in alternative care.

(e) **Other**

- (1) The court can make a “child protection order” instructing a hospital to retain a child suspected of being a victim of abuse or deliberate neglect, pending further inquiry.
- (2) The court may withdraw, suspend or amend any order it has made in a child protection hearing. An order for an alternative-care placement can be reconsidered by the court at any time, and confirmed, withdrawn or amended as appropriate.
- (3) The court may order that the child remain in the place of safety until it is possible to give effect to the primary order it has made.

If the court finds that the child **is not** in need of protection, it can still make a broad range of orders:

- (1) It can dismiss the application and order that the child be returned to the person in whose care the child was (although this order simply restores the *status quo* and does not affect legal custody of the child).
- (2) It can issue any of the orders which are possible when the child is found to be in need of protection, except for an order which places the child in alternative care.

## **11.10 Special provisions pertaining to orders for alternative care**

There are special investigation requirements which pertain to orders for alternative care. Before a court can make an order which would remove a child from the care of a parent or care-giver, the court must obtain and consider a social worker report which includes certain specific information

- (1) an assessment of the developmental, therapeutic and other needs of the child;
- (2) details of family preservation services that have been considered or attempted; and
- (3) a documented “permanency plan” which takes into account the child’s age and developmental needs, aimed at achieving stability in the child’s life.

This report must also contain any other details required by regulations issued under the Act.

The court is then required, before making the order, to consider the best way of securing stability in the child’s life, including whether such stability could be secured by one of the following options:

- (1) leaving the child in the care of the parent or care-giver under the supervision of a social worker (if this would not endanger the child’s health or safety)
- (2) 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 social worker;
- (3) placing the child in alternative care with or without terminating parental responsibilities and rights of the parent or care-giver;
- (4) making the child available for adoption; or
- (5) issuing instructions on how to evaluate progress in implementing the permanency plan at specified intervals.

If the court has chosen the option of a short-term alternative placement with the aim of family reunification, a social worker must additionally

- (1) investigate the causes why the child left (or had to be removed from) the family home;
- (2) address those causes and take precautionary action to prevent a recurrence of the same problems; and
- (3) provide counselling to both the child and the family before and after reunification.

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.

When a court issues an order for the removal of the child from the care of the parent or care-giver, the court may include in the court order instructions as to the implementation of the permanency plan for the child.

**Duration and extension of orders:** An order made by a court in a child protection hearing can remain in force for a maximum of two years, or for any shorter period which is specified. Such orders can be extended for up to two years at a time. If a court is considering extending an order, it must consider the views of the child, the parent (and any other person who has parental responsibilities and rights in respect of the child), and (where appropriate) the management of the centre where the child is placed or any alternative care-giver of that child. No court order made in a child protection context can be extended past the child's 18th birthday.

## 11.11 Monitoring of placements

As discussed above, the Children's Court has a general power to monitor compliance with any court order it has issued, or the general circumstances of any child subject to a children's court order. This can be done by incorporating monitoring provisions into the court order which require certain persons to appear before the court on a future date, or require social worker reports to be submitted to the court at specified dates or intervals. The court also has the power to call or re-call any person involved in the original matter before it at any time, for the purposes of questioning about compliance.

## 11.12 Terminating or suspending parental powers

The Minister can apply to a Children's Court or the High Court to make any of the following orders concerning parental rights and responsibilities held by a specific person –

- (a) suspending them for a specified time period
- (b) terminating them
- (c) transferring them to another person
- (c) restricting their exercise.

Such an application can be brought **without** the consent of the child's parent or care-giver **if**:

- (a) the child is below age 3 and has been in alternative care for more than 6 months
- (b) the child is between ages 3 and 7 and has been in alternative care for more than 1 year
- (c) the child is above age 7 and has been in alternative care for more than 2 years.

The court's decision should be based on the following factors, in addition to the child's best interests and the general principles and objectives of the law:

- the need for the child to be settled permanently, preferably in a family environment, taking the child's age and development into account
- the success or failure of attempts to reunite the child with the person whose parental rights and responsibilities are being challenged
- the relationship between the child and that person
- the degree of commitment that person has shown towards the child
- the probability that the child will be adopted or placed in another form of alternative care.

# 12. NATIONAL CHILD PROTECTION REGISTER

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The draft Bill proposes a National Child Protection Register which lists perpetrators of child abuse in an effort to ensure that they do not work with children in the future. It resembles the sex offender registers which are used in some countries. Some countries use a different form of “child protection register” or “child abuse register” which focuses on recording reports of suspected abuse to facilitate the monitoring of children at risk and the compilation of statistical data about child abuse. Some countries, such as South Africa, utilise both types of registers.

Namibia’s draft Bill would establish a National Child Protection Register that would be maintained by the Ministry of Gender Equality and Child Welfare. It would constitute a record of persons who are considered unsuitable to work with children.

## 12.1 Finding of unsuitability to work with children

A finding that a particular person is unsuitable to work with children could be made –

- by a children’s court
- by any court which hears civil or criminal proceedings, in respect a party or a witness in those proceedings
- by any forum which conducts disciplinary proceedings.

The court or forum could consider the question of a person’s suitability to work with children on its own, or at the request of any government agency, a prosecutor or any person “having a sufficient interest in the protection of children”.

A finding by a court that a person is unsuitable would **not** be dependent upon a conviction for any crime. However, convictions of certain crimes will automatically be understood to make the convicted person unsuitable to work with children. This would include a conviction of any of the following crimes in respect of a child victim: murder, attempted murder, rape (but not attempted rape), sexual abuse or assault with intent to do grievous bodily harm (but not “ordinary” assault). (This would also apply to a conviction for any of these crimes within five years before the new law comes into force. It would also apply to case where someone accused of any of these crimes was not tried or convicted for the crime because of mental illness or defect.)

A person who has been found unsuitable to work with children by a disciplinary forum may appeal the finding to a court. If the finding was initially made by a court, then there is a right of appeal to a higher court.

## 12.2 Contents of Register

For each person listed, the Register would contain the following information:

- full name, last known physical address and identification number
- fingerprints

- a photograph of the person (if available)
- a summary of the reasons why the person has been found unsuitable to work with children
- where the person in question was convicted of a criminal offence against a child, the particulars of the offence, the date of conviction, the sentence imposed and the case number
- any other information mandate for inclusion by regulations issued under the Child Care and Protection Act.

## **12.3 Consequences of being listed in Register**

A person whose name is listed in the Register is prohibited from managing, operating, working for or volunteering for an institution which provides welfare services to children, including a place of safety, shelter, children’s home, educational or vocational centre, school, club or association which provides services to children.

This prohibition is worded in such a way as to prevent anyone from working for children’s institutions in any capacity, regardless of whether they would come into direct contact with children – including, for example, kitchen staff and gardeners. The broad wording would also probably apply to private sports clubs, wilderness or environmental programmes, certain health services and many other associations which provide “services” to children.

Institutions which provide welfare services are prohibited from allowing a person named in the Register to work for them or have any access to the children they care for. This essentially places a duty on such institutions to check the Register before accepting staff or volunteers, and would presumably justify dismissal of any person whose name was found to be in the Register after he or she was employed.

A person listed in the Register is also prohibited from becoming a foster parent, adoptive parent or “family care-giver”. The meaning of the term “family care-giver” in this context is not clear. “Care-giver” is defined as any person other than a parent or guardian who actually cares for a child. “Family care-giver” is not defined. What seems to be intended is to prohibit the person in question from caring for any children at all, other than his or her own.

A person working with children has a positive duty to disclose the fact that his or her name is in the Register. Failure to do so constitutes misconduct and is grounds for dismissal.

## **12.4 Access to Register and confidentiality**

The Minister has a duty to control access to the Register, and to ensure that the information in it is disclosed only to the people specified in the law: the Minister, certain designated staff members in the Minister and officials in the Ministry of Education (in order to check the Register with respect to school employees).

No one is allowed to disclose names in the Register, except as part of that person’s duties under the law – such as confirming whether or not the name of a prospective employee in a children’s institution is on the Register, or revealing the information when ordered to by a Children’s Court because this would be in a child’s best interests.

These provisions are aimed at protecting the right to privacy, while still allowing the information in the Register to be disclosed when necessary for the protection of children's safety.

The Minister is required to inform anyone found unsuitable to work with children when their name and details are entered into the Register. Furthermore, anyone has the right, after presenting some proof of his or her identity, to establish whether his or her name appears in the Register – and if so, the reasons for its entry. This allows for an opportunity to correct mistakes.

## **12.5 Removal of name from Register**

A person can request that his or her name be removed from the Register because (a) it was entered in error; or (b) at least five years have passed since the entry was made and the person has been rehabilitated. However, no one's name can be removed on these grounds if they have been convicted of more than one criminal offence against a child.

If there has been an error, the person may apply to the Minister, with an appeal to the High Court if the application is refused by the Minister. An application for removal on the ground of rehabilitation can be made to any court, including a children's court. Regulations issued under the law will set forth the criteria which the court must consider in such a case.

In 2002, the Task Force assembled by the Ministry to refine an earlier draft of this Bill was of the opinion that there is no need to establish a special register of convicted child abusers. They felt that places who employ people to work with children can ask job applicants to provide a police clearance certificate, which will serve the same purpose. They recommended that the law should place restrictions on the employment of convicted child offenders at places of safety, children's homes and educational and vocational training centres or schools, and that such persons should not be eligible to act as foster parents or to supervise child-headed households.

# 13. FOSTER CARE

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## 13.1 Foster care and kinship care

The term “foster care” is used to cover a variety of different kinds of care. In developed countries it usually refers to formal, temporary placements made by the state with families who are monitored and compensated to some degree. This kind of care is usually for a limited period, until the child can return home or move into a more permanent placement such as adoption.

However, in many developing countries, fostering more often takes the form of “kinship care”. Kinship care is the full-time care of a child by a relative or another member of the extended family (or even by a close family friend). It may be a means to provide care for a child or to give a child access to education. The child may be expected to do some kind of work for the foster family. Kinship care is the primary mechanism which allows children orphaned by HIV/AIDS in family care in their communities. Kinship care is often informal and unregulated by the State.

Kinship care is common in sub-Saharan Africa. Children may be sent to relatives to learn a trade or attend school, with the costs of the child’s schooling and maintenance being paid by the host family or the sending family, or being shared between the two. Children may be sent to a household with higher social standing, often moving from a rural to an urban area, in arrangements which are sometimes called “alliance fostering”. Such fostering is not seen as an emergency measure, but as a positive way to give children additional skills, experiences and opportunities. Children who live with extended family members act as “ambassadors” for their families and reinforce important networks of relationships. This results in the reallocation of resources within an extended kin group, which can maximise financial security. Social ties are strengthened through shared obligations and mutual assistance. In this kind of kinship care, the biological parents or parents retain rights over their children. The parents may visit the child, contribute to the child’s upkeep or direct the child to return home at some point.

Some draw a distinction between such positively-motivated kinship care and “crisis fostering”, when children are moved because of some negative event such as the death of a care-giver, or because a relative is barren.

In both instances, kinship care provides the benefit of flexibility. It essentially allows extended families to adjust household sizes, and to spread the cost of parenting over a wider network of kin. It can give mothers women greater scope to engage in income-generating activities, and possibly to remit some of this income to the person caring for the child.

It has been noted that these flexible arrangements take place in cultural contexts where it is not viewed as being normal or necessary for the biological parents to take primacy in looking after the child. For example, even if the mother is present in the household, others such as an older sibling, a grandmother or some other family member may play a large role in looking after the child from infancy; “care by a diversity of household members may be taken for granted”.

A recent study found that foster care in Namibia most often takes the form of kinship care, as opposed to the traditional notion of foster care by unrelated adults, and that it is often motivated by the desire to get access to the foster care grant. In early 2009, the Ministry of Gender Equality and Child Welfare paid foster care grants to almost 14 000 children.

#### **Advantages of kinship care**

- It allows family relationships to continue and preserves a sense of family identity.
- It maintains the child within the child's own family, culture and community.
- It avoids the anxieties which are likely to result from placements with unfamiliar adults.
- In many communities, it is a cultural norm for children to be cared for by a larger circle of relatives than just the biological mother or father, which can be an enriching experience.

#### **Disadvantages of kinship care**

- Children may be treated differently from the caretaker's own children. They may be exploited, abused or denied access to education and health services.
- It may delay reunification of a child with the child's parents because the family is comfortable with the situation, because of the there are financial incentives to the arrangement or because there is less intervention from social workers to motivate reunification.
- If arranged informally, there is no assessment or monitoring by social workers to ensure that the arrangement is in the child's best interests.
- Carers may be over-burdened with children to care for, especially in the context of the HIV/AIDS pandemic.

## **13.2 Definition of foster care**

The current draft provides for only one category of foster care. Foster care is defined as the situation when a child is placed in the care of a person other than a parent or guardian by an order of the children's court. Informal arrangements for care do not fall under this definition. The foster parent may be a family member, but this is not a legal requirement.

## **13.3 Approval of prospective foster parents**

Anyone who wishes to become an official foster parent must make an application to a social worker. The regulations issued under the Act will specify what information must be included in the application and how it will be assessed. A prospective foster parent must fulfil three basic requirements:

- (1) The applicant must be "a fit and proper person to be entrusted with the foster care of the child"
- (2) The applicant must be willing and able to undertake the responsibilities of providing foster care.
- (3) The applicant must have the capacity to provide an environment that is conducive to the child's growth and development.

If the applicant meets the criteria as assessed by the social worker, the Minister will approve the person as a prospective foster parent. The Minister can impose conditions on this approval (such as the specifying the number, age or sex of the foster children placed with this parent). Anyone who has been found unsuitable to work with children (because of a prior criminal offence against children, for example) may not be approved as a foster parent. All persons approved as prospective foster parents will be listed in a register.

## 13.4 Foster placement

Before any particular child is placed in foster care, the court must consider a social worker report which includes information on:

- (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.

A child may be placed in the foster care of a person from a different cultural, religious and linguistic background only if (a) there is an existing bond between that person and the child or (b) no suitable foster parent from a similar background is readily available.

## 13.5 Limit on number of foster children

No more than three children may be placed in foster care with a foster parent, unless (1) the children are siblings or otherwise related to each other or (2) the court finds for some other reason that a larger placement would be in the interests of all the children.

## 13.6 Extension of foster placements

A court order placing a child in alternative care normally remains in place for a maximum of two years, unless it is extended by the court for periods of not more than two years at a time. However, foster care may be treated differently by being extended for longer periods.

Once a child has been in foster care with **a person other than a family member** for more than two years, the court can issue an order extending the foster care placement until the child turns 18, without any further social worker supervision or reporting, as a means of providing stability in the child's life.

If the foster parent is **a person who is a family member**, then the initial placement may be for longer than two years, and any extensions may also be for periods longer than two years at a time. However, the longer periods apply only in the following situations:

- (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; or
- (d) it is in the best interest of the child.

In either case, a social worker must continue to visit the child who is in foster care at least once every two years to see if everything is fine.

## 13.7 Reunification of child with biological parent

At the time when a foster placement is made, if the Children's Court believes that reunification with the child's biological parents or parents is possible and would ultimately be in the best interests of the child, then it must make the placement order subject to conditions detailing social worker involvement to facilitate reunification. In such a case, if the child has not been reunited with the biological parents at least two months before the expiry of the initial placement order or any extension of that original order, then the social worker must submit a report explaining why reunification did not take place and recommending steps to provide stability for the child. The Children's Court may then order either that attempts by the social worker to facilitate reunification services should continue, or that they should come to an end (if there is no real prospect of success).

## 13.8 Responsibilities and rights of foster parents

The division of rights and responsibilities between the child's parents or guardian and the foster parents will be determined by the initial placement order made by the court, an amendment to this order made by the court, or a parenting plan agreed upon by the parties.

A foster parent automatically has the power to consent to medical treatment of a child who is not old enough or mature enough to give consent (but not to a surgical operation). A foster parent (or any other care-giver) may *not* take a child out of Namibia or permit the child to leave Namibia without permission from the Minister.

## 13.9 Termination of foster care

Foster care may be terminated by a Children's Court only if this is in the child's best interest. The court must consider the following factors:

- (a) the bond between the child and the child's biological parent, if that parent is seeking to reclaim the child
- (b) the bond between the child and the foster parent, and between the child and the foster parent's family
- (c) the various prospects for giving the child permanency by returning the child to the biological parent, allowing the child to remain permanently with the foster parent, placing the child in some other form of care or through adoption.

### PERMANENT FOSTER CARE

This draft Bill envisages permanent foster care, but provides for this only by means of extension of normal foster care placement orders which require some continued social worker monitoring (depending on whether the foster care is with family members or non-family members, with more intensive supervision rather oddly provided for foster parents who are family members).

The South African Law Reform Commission suggested that the law should provide for permanent foster placements which fall short of adoption but do not require ongoing review. This option

which could be very useful in practice – particularly in cases where the child’s parents have disappeared or died, or where family reunification will be clearly impossible or inappropriate. However, if introduced, it would be necessary to decide what forms of parental responsibility should be transferred to the permanent foster parents and what forms of parental responsibility should be retained by the parents (if they are still alive and involved with the child in any way).

It should be noted that the South African Law Reform Commission also recommended that foster care grants should be available only in respect of temporary foster placements, and not in the case of permanent placements. But if grants are cut off on the grounds of permanency, this might be an incentive for foster parents to decline to take children on a permanent basis. If Namibia provides for the possibility of permanent foster care, should grants be extended to the permanent foster parents?

The Task Force assembled by the Ministry to advise on an earlier draft of the Bill made the following recommendations on extended foster care:

- (1) This should be known in Namibia as ‘long-term care’. It should be available as an option in cases where (a) family reunification is not possible at the time of the final periodic review, and is not likely to become possible in the foreseeable future; and (b) adoption is not in the best interests of the child in the circumstances, either because an appropriate adoptive family cannot be located or because of some other reason. The views of the child at this stage must be taken into consideration, in light of the child’s maturity and understanding.
- (2) Any foster parent/family should be eligible for long term care. This option should not be limited to extended family members, although it would be extended family members in many instances.
- (3) Grants should continue as for foster care.
- (4) Legal custody and guardianship powers should go to the long-term care-giver, with the following exceptions: (a) consent to adoption and (b) consent to marriage. After much discussion, it was recommended that power to deal with the child’s property should go to the long-term care-giver, since there are many legal safeguards and mechanisms in place to protect against abuse (such as the State Guardian’s Fund, etc).
- (5) The biological parents should be allowed, and expected to, have reasonable contact with the child, unless there is a social worker recommendation that this would not be in the best interests of the child. Decisions on the details of such access would rest with the long-term care-giver as the child’s custodian.
- (6) There is no need for special monitoring of long-term care, but the grants administration should of course continue to do whatever verification is required for continued provision of the grant.
- (7) At this stage the social worker should not be expected to continue family reunification efforts. An order granting long-term care should be viewed as an end point of the children’s court process. However, the biological parent(s) or the child could at any stage request that family reunification services should be revived or continued (particularly in cases where there is a reason to believe that the underlying problem is being dealt with, such as progress in overcoming alcoholism).
- (8) Legal representation should be provided to the child in such a situation.

## **WHO SHOULD RECEIVE FOSTER CARE GRANTS**

The utilisation of various child care options in Namibia is shaped by the grant system. Maintenance grants available to biological parents are means-tested, while foster grants are not. There is no grant for adopted children, so it is financially more advantageous to be a permanent foster parent than to adopt a child.

One argument is that foster care grants should be lower in situations where children are being cared for by relatives since the extended family already has responsibility for its members. On the other hand, if it were financially more advantageous for non-relatives to care for children, might this discourage care by extended family members?

Which approach should be taken in Namibia? Should relatives who are acting as foster parents get: (a) no foster grant? (b) a lower foster grant than strangers who care for a child? (c) the same foster grant as any other foster parents?

Related questions arise with respect to informal foster care by extended family members – such as in a case where an orphan has been taken in by relatives without any court order or official intervention. Should relatives caring for children on a long-term, informal basis be able to apply to a Children's Court for recognition as foster parents in order to acquire necessary parental rights and responsibilities and to become eligible for foster care grants? Or should there be a separate grant with a simpler application procedure for such situations which does not place an unnecessary burden on social workers and courts?

# 14. FACILITIES WHICH CARE FOR CHILDREN & CONTRIBUTION ORDERS

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## 14.1 Introduction

The draft Child Care and Protection Bill provides for various forms of alternative care for children who have been abandoned or are not safe in their usual homes. They may also be utilised as alternatives to police cells and prisons for young offenders.

Foster care and adoption are particular forms of alternative care which are discussed in separate sections (foster care above and adoption below). This section of the draft Bill discusses other forms of alternative care: **places of safety**, **children's homes** and **educational and vocational centres**. In most cases, the proposed institutions are similar to those provided for under the Children's Act 1960.

In addition to forms of alternative care, the draft Bill also provides for the registration of "**places of care**" (which would include crèches, day care, and private pre-schools and kindergartens) and **shelters**.

Detailed standards for these various types of facilities would be contained in regulations instead of in the law itself, to allow for easier adjustment from time to time.

Facilities approved for the care of children under the current law can generally continue to operate under the new law as well.

## 14.2 Places of safety

A "place of safety" is a place where children can stay temporarily.

- Children who are removed from their usual homes on an emergency basis for their own protection usually stay in a place of safety until the conclusion of the children's court enquiry concerning their situations.
- Children who are being placed in alternative care may stay in a place of safety temporarily while waiting for the placement to be ready, or while an adoption is pending.
- Young offenders may stay in a place of safety while awaiting trial or sentence, or in terms of an order under the Criminal Procedure Act.

There can be different types of places of safety. For example, anyone who has been approved to be a foster parent can also provide a place of safety. Children's homes can be places of safety, and so can school hostels or any other state-owned buildings, such as hospitals. The government can also set up other places of safety as needed.

A child should always be put in a place of safety in the community or region where the child normally lives, and the place of safety should be a foster family rather than an institution if possible, if this is consistent with the child's best interests and the interests of community safety.

## 14.3 Children's homes

A children's home is a facility which provides residential care for children. Even though a children's home is an institution, such homes generally accommodate children in small groups to maintain a family-like atmosphere. Larger institutions usually use a cottage system, accommodating children in small family-like groups with a "housemother".

Children's homes are to be used as follows:

- ▶ They can serve as short-term places of safety, or as longer-term alternative care placements.
- ▶ Young offenders may stay in a children's home temporarily while awaiting trial or sentence, or in terms of an order under the Criminal Procedure Act.

The draft authorises the establishment of government-run children's homes, as well as the registration of privately-operated ones.

A 2008 report found that Namibia has 42 children's homes accommodating over 1000 children (figures for a few homes were not available). There is only one government managed home, in Windhoek – the Namibia Children's Home which can accommodate about 120 children. Twenty of the remaining homes are registered, and 21 are unregistered. Most were found to have facilities of a reasonable standard. Children are admitted to the 20 registered homes by way of social work assessment and court order. This practice is variable in respect of the unregistered homes. The most problematic issues concerning the homes were inadequate staffing and the qualifications of some managers.

## 14.4 Educational and vocational training centres

These are facilities for the care and training of children which are more secure and more suitable than other facilities for children who have specific needs and problems. They would replace the "reform schools" provided for in the current Children's Act, as that term has come to have a somewhat derogatory connotation. They would also replace the facilities known as "schools of industries". Some countries refer to them as "training schools" or "correctional institutions".

Educational and vocational training centres would be for –

- ▶ young offenders awaiting trial or sentence, or placed there in terms of an order under the Criminal Procedure Act
- ▶ children placed there by a children's court, as a form of alternative care
- ▶ children with "behavioural or emotional difficulties".

The draft authorises the establishment of government-run educational and vocational training centres, as well as the registration of privately-operated ones. The Minister may also approve the use of any existing government school for this purpose, in consultation with the Minister of Education.

## 14.5 Places of care

The term "places of care" refers to any place where more than 6 children are cared for temporarily by private arrangement with the parents or care-givers. For example, this would cover crèches, day care and private pre-schools and kindergartens. It is defined as **not** applying

to ordinary schools, school hostels or hospitals or other medical institutions which are treating children. Facilities fall into this category if they meet the definition, regardless of whether the care provided is free or paid for. Places of care must be registered, although the sanction for failure to comply with this rule is not clear.

## 14.6 Shelters

A shelter is a facility which provides basic services, including overnight accommodation, to street children and other children who attend the facility voluntarily and are free to leave. Privately-run shelters must be registered. Shelters run by government or by NGOs are eligible to receive state funding only if they comply with the requirements of the Child Care and Protection Act.

### OTHER FACILITIES

There is no provision for registration of **temporary shelters for abused women**, who often have children accompanying them. These do not seem to fall under any law at present and so are not subject to any registration and monitoring requirements.

What about **homes for children with mental or physical disabilities or chronic illnesses** (other than schools, which are presumably regulated elsewhere)? Are these included under the general provision on “children’s homes”? Or should they be registered separately and subject to different requirements?

## 14.7 Minimum standards

All of the types of facilities named here must supply certain basic requirements for the children in their care:

- a safe area where the children can play
- adequate space and ventilation
- safe drinking water
- hygienic and adequate toilet facilities
- some adequate means for refuse disposal
- a hygienic area for the preparation of food for the children.

Other standards for the different categories of facilities will be set by regulations.

## 14.8 Management boards

Children’s homes and educational and vocational centres must have management boards with 3-9 members which fairly represent all the relevant stakeholders, including the community where the facility is situated. The board members must be appointed by the Ministry of Gender Equality and Child Welfare for state-run children’s homes, by the Minister of Education for state-run educational and vocational centres, and by the registration-holder for private institutions.

## **14.9 Annual registration process**

A person who wants to register a facility must apply to the Minister. The Minister must register the facility if there is reason to believe that it will be operated in the best interests of the children who will be accommodated there. However, the Minister may attach any conditions which are appropriate to promote the best interests of children. Once the registration is approved the facility will be given a certificate of registration which is valid for one year. The facility must apply for renewal of the registration at least three months before the certificate expires.

## **14.10 Cancellation of registration**

The Minister may cancel a facility's registration if it is no longer maintained as required by the law, if it has failed to follow any specific conditions of registration which were applied to it or for any other reasonable cause. The holder of the registration certificate must first be given notice of the reasons for the proposed cancellation, and an opportunity to give information on why the facility should not be closed. The notice must be provided at least three months before the registration is to be cancelled. If the registration of a children's home or an educational and vocational centre is cancelled, the affected children must be transferred to another facility.

## **14.11 Voluntary closure**

A registered facility which wants to close down must give written notice of the closure to the Minister, and hand in the certificate of registration.

## **14.12 Enforcement of registration requirements**

The Minister may give a written notice to an unregistered facility which falls under the law to either close down or apply for registration. In this case, the Minister may give an unregistered facility permission to continue operating while the application for registration is being processed. The Minister can also instruct a facility which has been registered to comply with the conditions of registration if necessary.

## **14.13 Inspections**

Inspections may be carried out by a social worker, a staff member of a local authority or any person authorised by the Minister for three purposes: (1) if there is a reasonable suspicion that the facility should be registered but is operating without registration (2) to see if the facility complies with all relevant health and safety requirements and (3) to see if the facility complies with all the requirements of the Child Care and Protection Act. The inspection can include observation or interviewing of any child on the premises, the questioning of any relevant people, the examination of relevant documents and the recording of information by photographs, videos or any other means. It is a crime for anyone to refuse to cooperate during an inspection. The person who carried out the inspection must make a report to the Minister.

## 14.14 Changes or discharge from placements in alternative care

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.

### (1) Transfers

The Minister has the power to issue a written notice transferring a child from one alternative care placement to another, or transferring a child from an alternative care placement to the child's parent, guardian or former care-giver.

Conditions can be attached to a transfer back to a parent, guardian or care-giver if necessary, to be supervised by a social worker. If the conditions attached to such a transfer are not met, the supervising social worker must bring the child before a Children's Court again to see if there is a need for a new order.

Before making a transfer, the Minister must receive a **social worker report on consultations with all the relevant parties**: the child, the child's parent or primary care-giver, the person or facility where the child had been placed and the person or facility where the child is to be transferred.

If a child is being transferred from a more secure facility to a **less secure** one (such as from an educational and vocational centre to a children's home or foster care), then the Minister must be satisfied that the transfer will not be prejudicial to other children. If the transfer will place the child in a **more secure** facility than before (such as from foster care to a children's home or an educational and vocational centre), then the transfer must be confirmed by a children's court.

A transfer can not have the effect of extending a placement in alternative care. There is a separate procedure for extension of a placement order (discussed above).

### (2) Removal of child from a placement

The Minister or a Commissioner of Child Welfare may issue a notice removing a child from any alternative care placement to another place (including a shelter, a place of safety, a private home or any other place specified in the notice), if this is in the child's best interests, while a formal enquiry about the best course of action for this child is pending.

If the Commissioner issues the notice, the clerk of the Children's Court must submit a report to the Minister on the reasons for the removal. If the Minister issues the notice, there is no requirement to record the reasons for the move.

In either case, the Minister must take one of the following steps within 6 months of the child's removal, after whatever enquiry the Minister considers necessary:

- (1) formally transfer the child
- (2) discharge the child from alternative care
- (3) order that the child be returned to the placement from which the child was removed.

### **(3) Provisional transfers**

The Minister has the power to issue a notice transferring any child from an alternative care placement to any form of care that is not more restrictive for a trial period of 6 months.

Such a provisional transfer may take place *only after the completion of procedures for (1) assessing the best interests of the child and (2) attempting to reunite the child with the child's family members, where this is applicable*. The required procedures will be set by regulation. The Minister must receive and consider a report on the assessment and the reunification procedures before making a decision on a provisional transfer.

The provisional transfer *must be supervised by a social worker* who will test the feasibility of reuniting the child with the family, integrating the child into another family or transferring the child to a less restrictive alternative care placement.

The Minister can revoke the provisional transfer at any time, and *must* revoke it if the child and the supervising social worker both request it.

The Minister can confirm the provisional placement or discharge the children permanently from alternative care at any time during the trial period, or at the end of the trial period.

### **(4) Discharge**

The Minister may issue a notice directing that the child be discharged from the alternate care placement. Like a provisional transfer, a discharge may be ordered *only after the completion of prescribed procedures for (1) assessing the best interests of the child and (2) attempting to reunite the child with the child's family members, where this is applicable*.

## **14.15 What happens when a child in alternative care reaches age 18?**

A child who is in an alternative care placement in the year that the child turns 18 is entitled to remain there until the end of that calendar year.

The child may request authorisation from the Minister to remain in the alternative care placement until the end of the calendar year in which the child turns 21, if (1) the alternative care-giver is willing and able to continue the placement and (2) the continued stay is necessary to allow the child to complete his or her education or training.

## **14.16 Death of a child in alternative care**

The death of a child in an alternative care placement must be reported immediately to the police and the supervising social worker.

## **14.17 Prohibition on leaving Namibia**

A child who is in alternative care may not leave Namibia without permission from the Minister, who may impose conditions to protect the child's best interests.

## **14.18 Leave of absence**

A child who is in alternative care may be granted a "leave of absence" from the placement, with or without conditions attached. If the placement is in an institution, the leave may be granted by the management; if the placement is with a person, the leave may be granted by that person. If a child is in a temporary placement pending the outcome of a court decision, then the leave of absence can be granted by the Minister. If the case is under social worker supervision, then that social worker must also approve the leave.

The management of a child care institution or the person with whom the child was placed can cancel a leave of absence at any time. Any leave of absence can also be cancelled by the supervising social worker. If the leave of absence is cancelled, the person who cancelled it must request the return of the child. The steps which are to be taken when a child is absent without authorisation are detailed in the following section.

Although the purpose of such leaves of absence is not stated, they could presumably be utilised to enable the child to remain in contact with family members.

## **14.19 Absence without authorisation**

Where a child absconds from a placement, or fails to return from a leave of absence, the child can be apprehended by police or a social worker without a warrant.

The child must be brought before a Commissioner within 5 days of being apprehended, for an enquiry into the reasons for the unauthorised absence. The child may either be returned to the placement or kept in a place of safety until the enquiry can take place. This precaution is necessary in case the child left because of abuse or some other problem which was endangering the child.

At the enquiry, the Commissioner must give the child an opportunity to explain the unauthorised absence, in private if necessary, since the child might be afraid to speak in front of parents, guardians or persons involved with the placement.

At the end of the enquiry, the Commissioner may order that the child be returned to the placement (with or without conditions) or may change the placement. The decision must be based on the child's best interests.

It is a crime to advise or assist a child to leave a placement without authorisation, or to prevent the child from returning to the placement in violation of an order from the Commissioner to this effect. The penalty is a fine of up to N\$20 000 or imprisonment for up to 5 years, or both.

## **14.20 Delegation of powers to local authorities**

The Minister can enter into agreements with local authority councils to assign some or all of the duties pertaining to registration and inspection of facilities to the local authority council or its staff, where the Minister is satisfied that the local authority has the necessary capacity.

## **14.21 Contribution orders**

A contribution order is a children's court order which requires a parent or some other person who is legally responsible for maintaining a child to contribute to the costs incurred by the state in assisting a child in need of protection or for holding such a child in alternative care. It is similar to a maintenance order. The proposed Child Care and Protection Bill provides a system for contribution orders that is similar to the one in the current Children's Act 33 of 1960, with only very minor adaptations. It is also based on the provisions on contribution orders in the South African Children's Act 38 of 2005.

The proposed Bill provides for contribution orders for contributions to three categories of costs:

- (a) the costs of maintaining a child in a place of safety, a children's home or an educational and vocational centre
- (b) the costs of treatment, rehabilitation, counselling or other interventions provided to a child who has been temporarily removed from the usual home by a court order
- (c) a "short-term emergency contribution" towards maintenance, treatment or other costs resulting from the special needs of "a child in urgent need".

The court can make a provisional contribution order against a person resident in any country with which Namibia has an agreement under the Reciprocal Enforcement of Maintenance Orders Act 3 of 1995. (At present, Namibia has an agreement only with South Africa in terms of this law.)

A Children's Court has jurisdiction to issue a contribution order (a) in the area where the respondent resides, works or runs a business or (b) in the area where the child in question resides.

The contribution order must state who the money is to be paid to, on what schedule and in what manner. For example, the order could specify monthly payments, or a single lump sum. It could require that the contribution be paid to the government, or directly to the institution where the child is in alternative care. In contrast, under the current law, payments under contribution orders can apparently be made only to officers of a children's court.

The contribution order can take effect from the date of the order, or from an earlier or later date. This means, for example, that the court could make a retroactive order from the date on which the child was placed in alternative care.

The contribution order will normally last only until the child is 18, but the court has discretion to make an order for an older child. The circumstances when this is permissible will be set forth in the regulations. Under the current law, contribution orders are applicable to children under the age of 21, with no possibility of extension beyond that age.

A contribution order has the same effect as a maintenance order, which would appear to mean that the same enforcement mechanisms are available (such as attachment of wages or execution against property). Failure to comply with a contribution order is a criminal offence. The draft Bill also includes a specific section on attachment of wages which allows for attachment of wages at any stage, even if there has not yet been a default in payment.

A person who is subject to a contribution order is required to give notice to the Children's Court of any change of residential address or place of work. The sanction for failure to comply is an unspecified fine or imprisonment for up to 10 years.

There is a right of appeal to the High Court against the decision of a Children's Court to grant or refuse to grant a contribution order.

# 15. ADOPTION

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## 15.1 Introduction

Namibia approves a relatively small number of adoptions each year, with an average of about 80 adoptions registered each year over the last 5 years. In comparison, as of February 2009, there were almost 14 000 children in foster care.

In 2004, the High Court of Namibia ruled in the *Detmold* case that it is unconstitutional to have a blanket rule preventing foreigners from adopting Namibian children, because such adoptions may sometimes provide the best family environment for a child. Government did not oppose this case, but recommended that procedures for intercountry adoption should be included in the forthcoming Child Care and Protection Act.

Intercountry adoption first became common after World War II when many countries were left with war orphans but lacked the resources to care for them within the country. Intercountry adoptions then became increasingly popular in the 1970s and 1980s, as a way to provide children to couples who could not conceive a child of their own. The increased demand for children to adopt led to problems such as child trafficking and baby markets. Concerns about these problems led to the 1993 Hague Convention on Intercountry Adoption, which provides procedures aimed at preventing abuses such as abduction, exploitation, sale or trafficking of children. It allows consideration of intercountry adoption only after exploring options for placing the child within the child's home country, and is designed to make sure that intercountry adoptions are child-centred rather than adult-centred.

The draft Bill begins by laying out a framework for domestic adoption, with an additional framework on intercountry adoption under the Hague Convention. Namibia has yet adopted the Hague Convention, but would probably do so as soon as the necessary legislation is in place.

## 15.2 Domestic adoption

### (a) Eligibility for adoption

Children in the following circumstances are eligible for adoption

- (1) a child who has no parent, and no guardian or care-giver who is willing to adopt the child
- (2) the whereabouts of the child's parent or guardian cannot be established
- (3) the child has been abandoned or
- (4) the child is in need of a permanent alternative placement.

Eligibility for adoption must be determined by a social worker.

### (b) Eligibility to adopt

Eligibility to adopt a child must also be determined by a designated social worker. A child may be adopted by a husband and wife jointly, a husband or wife whose spouse is the

parent of the child (ie a step-parent), the foster parent of the child, a widower, widow, divorced or unmarried person or the kinship care-giver of the child.

A prospective adoptive parent must be at least 18 years of age. This departs from the higher age limit and the rules on age difference between adoptive parent and child in the current law. Guidelines on this point could be set in regulations.

A prospective parent must be determined by social worker assessment to be fit and proper to fulfil parental responsibilities and rights, as well as being willing and able to exercise, undertake and maintain those parental responsibilities and rights. A person may not be disqualified from adopting on the basis of his or her financial status, but a person unsuitable to work with children is a not a fit and proper person to adopt a child.

### **(c) Adoption Register**

The Minister must keep a register of children who may be adopted and prospective parents who wish to adopt them. The registration of prospective adoptive parents is valid for 3 years and can be renewed. Registration can be cancelled if the person in question ceases to be eligible to adopt, has a child removed from his or her care as a child in need of protection or is convicted of an offence involving violence. A prospective adoptive parent can also request that his or her name be removed from the register.

Such a Register could be used (a) to attempt to match children with adoptive parents who share their religious and cultural backgrounds and (b) to establish whether any local adoptive parents are available before turning to intercountry adoption as an alternative.

### **(d) Adoption plans**

Before an adoption takes place, two or more parties to the adoption may enter into an adoption plan. Parties who wish to do this must be counselled by a social worker on the implications of such a plan. The plan may include arrangements relating to future information-sharing on matters such as the child's medical history, important events in the child's life and future contact between the child and the parties to the agreement. It may also include information about how the child can be assisted to develop a positive cultural identity and links to his or her heritage. The child must consent to the plan, if of sufficient age and maturity to understand its implications. The court, when granting the adoption, may confirm the adoption plan if it is based on the best interests of the child.

### **(e) Consent to adoption**

In terms of the current draft, consent must be given by both parents, whether or not they are married. However, there are several exceptions:

- (1) The consent of a parent or guardian is not required if that parent or guardian
  - (a) is mentally incompetent to give consent
  - (b) has abandoned the child
  - (c) after reasonable inquiry, cannot be found or identified
  - (d) has abused or deliberately neglected the child (or allowed the child to be abused or neglected)
  - (e) has consistently failed to fulfil his or her parental responsibilities towards the child during the last 12 months

- (f) has been divested by an order of court of the right to consent to the adoption of the child
  - (g) has failed to respond to a notice of the proposed adoption within 30 days of receiving it.
- (2) The consent of a parent or guardian to a child's adoption is not required if the child is an orphan and there is no guardian or care-giver willing and able to adopt the child. (The court may require death certificates or other documentation in such a case.)
- (3) The consent of a biological father of the child is not required in the following circumstances:
- (a) he is not married to the mother AND has not acknowledged paternity by
    - (i) providing a written acknowledgement of paternity either to the mother or the Clerk of the Children's Court before the child reaches the age of 6 months
    - (ii) voluntarily paying maintenance in respect of the child
    - (iii) paying damages in customary law or
    - (iv) being named as the father on the child's birth certificate.
  - (b) the child was conceived through incest or rape.

A parent who wishes for the child to be adopted by a particular person may state this in the consent.

If the parent of the child is a minor, the minor parent must be assisted by a parent or guardian. Consent must also be given by anyone who holds guardianship over the child.

If the child is 14 years or older and of sufficient maturity and stage of development to understand the implications of giving consent, then he or she must give consent to the adoption; younger children must also give consent to their own adoption if they are of sufficient age, maturity and stage of development.

The Children's Court can overrule a lack of consent where it finds the adoption would be in the child's best interests and that consent is being unreasonably withheld, after taking into account the relationship between the person in question and the child over the last two years and their potential for a sound relationship in the immediate future.

Before consent for the adoption of the child is granted, the social worker facilitating the adoption of the child must counsel the parents of the child and, where applicable, the child.

Consent must be signed by the person consenting in the presence of a Commissioner of Child Welfare if that person is in Namibia; persons outside Namibia must follow procedures which will be detailed in regulations.

Consent can be withdrawn during a period of 60 days after the consent form was signed, thus providing a "60-day cooling-off period".

**(f) Making a decision on the adoption application**

The adoption application must be accompanied by a social worker report which states whether the adoption would be in the child's best interests, and contains medical information on the child which will be prescribed by regulations. It must also include a social worker's assessment of the prospective adoptive parents. If the parties to the adoption have made an adoption plan, that plan should also be included with the application.

Everyone whose consent is required in terms of the law must get 30 days' notice of the adoption application. If no reply is received within 30 days of delivery of the notice, then the persons in question will be regarded as having consented to the adoption.

When considering an application for the adoption of a child, the court must take into account all relevant factors. In particular, the court must ensure (a) that the adoption is in the best interests of the child; (b) that the child's given name(s), identity, language and cultural and religious ties must, as far as possible, be identified and preserved; (c) that any child able to form his or her own views on being adopted has been given an opportunity to express those views freely, and that the child's views have been given appropriate weight; (d) that all reasonable preferences stated by a parent in that parent's consent have been considered; and (e) that the social worker's report on the proposed adoption and any adoption plan has been considered.

**(g) Effect of adoption order**

Once an adoption order is confirmed, all prior parental rights or responsibilities are terminated. An adoption order confers full parental responsibilities and rights in respect of the adopted child on the adoptive parent; confers the surname of the adoptive parent on the adopted child (except when otherwise provided in the order); and ensures that the adoptive parent and the adoptive child are regarded as parent and child for all purposes.

The adoption order likewise ends all parental rights and responsibilities existing before the adoption order, and ends all claims to a right of access to the child by any family members of anyone who previously had parental rights and responsibilities. (However, as noted above, an adoption plan could include an agreement on future contact.)

There are only two exceptions to the basic rule that the child ceases to be a member of the previous family and becomes a member of the new family: (1) This 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. (2) It does not affect any rights to property the child acquired before the adoption.

**(h) Rescission of adoption order**

A High Court or Children's Court may rescind an adoption order on application by the adopted child, by the child's parent or guardian or by the adopted parent. An application for rescission must be lodged within two years of the adoption. Rescission may only be granted if it is in the best interests of the child, AND if the applicant is a parent whose consent was required for the adoption but consent was not in obtained OR the adoptive parents were not actually qualified to adopt.

Notice of the application for rescission must be served on the adoptive parents, anyone who consented or withheld consent to the adoption, the Competent Authority (if the adoption was an intercountry one) and "any other person whom the court finds has a sufficient interest in the matter".

When rescinding an adoption, the court must choose an appropriate placement for the child or order that the child be kept in a place of safety until an appropriate placement can be made.

**(i) Registering adoptions**

Adoptive parents must apply to the Minister of Home Affairs to record the adoption and any change of surname in the birth register. The Minister of Home Affairs must also record information pertaining to adoptions which will be prescribed by regulations in an adoption register, including details of each adopted child's biological parents and adoptive parents. The clerk of the court will be responsible for forwarding this information to the Minister.

**(j) Disclosure of information in adoption register**

In cases of closed adoptions, information pertaining to adoptions cannot be disclosed to the child or the adoptive parents until the child has reached the age of 18 years (except for medical information). Disclosure to the biological parents is also possible after the child reaches age 18, but only if the adoptive parents and child both give written consent. The Minister may require that the person requesting disclosure receive counselling before the disclosure takes place. An important exception to these general rules is the disclosure of any information which has been agreed to by the parties to the adoption plan, which essentially allows the parties to choose an "open" adoption if they wish. The possibility of disclosure of family information to all adult adoptees, regardless of whether the adoption was originally "open" or "closed", is in line with the international movement towards greater openness and information-sharing in respect of adoptions.

Disclosure is also possible for "official purposes" and for research (as long as all identifying information is kept confidential), and in terms of any court order whether the court has determined that disclosure is in the best interests of the child.

**(k) No consideration in respect of adoption**

A person may not give or receive, or agree to give or receive, any consideration in cash or in kind for the adoption of a child. It is also illegal to induce a person to give up a child for adoption. An exception is made for certain normal expenses and services:

- compensation for the reasonable health-related expenses of the biological mother, including the costs of counselling
- fees for the services of a legal representative, psychologist or other professional person provided in connection with an adoption
- payments made to any state agency or
- payments to any persons listed in future regulations on compensation.

**(l) Prohibition on advertising**

A person may not publish (or cause to be published) any form of advertisement dealing with the placement or adoption of a specific child. This does not apply to official notices in terms of this law or a court order. Other exceptions to the general rule against advertising can be made by regulation.

This rule is designed to prevent trafficking in children. It should be noted that it would also cover advertising via the Internet.

## 15.3 Intercountry adoptions

- (a) **Adoption in Namibia of child living in Namibia by person in a foreign country:** A person living outside Namibia who wishes to adopt a child living in Namibia must apply to the competent authority of the country concerned, which must prepare a report on the prospective adoptive parents and transmit it to the Minister. The Minister must similarly transmit a report on a child available for such adoption to the competent authority. If the authorities both agree to the adoption, it will be considered by the Children's Court along the same lines as any other adoption in Namibia, with the guiding standard being the best interests of the child. The Minister may withdraw consent to the adoption for a period of 140 days after consent was initially given, if this would be in the best interests of the child. If Ministerial consent is withdrawn, the child must be returned to the Namibia in the prescribed manner. This procedure will not apply to a child in Namibia who is to be placed for adoption outside Namibia with a family member or a step-parent; either of these circumstances would be handled as a domestic adoption.

### OTHER FACILITIES

It should be noted that the Hague Convention itself requires that intercountry adoption should be considered only after possibilities for placing the child in the child's country of residence have been considered. This is called the "principle of subsidiarity". In South Africa, it is implemented by a requirement that the child must have been listed on the Register of Adoptable Children and Prospective Parents for at least 60 days but no fit and proper parent within South Africa has been located during that period. Namibia will also need to provide for a clear method for applying this principle.

- (b) **Adoption in a foreign country of child living in foreign country by person in Namibia:** If a person who lives outside Namibia wants to adopt a child from inside Namibia, the procedure is essentially the same as that described above, but in reverse, with the adoption being confirmed according to the procedure in the foreign country in question. In each case, the adoption procedure is the one which applies in the country where the child resides.
- (c) **Recognition of intercountry adoptions:** Intercountry adoptions are recognised in Namibia if the adoption involves another convention country and the required adoption compliance certificate has been issued in line with the procedures of the Hague Convention. The Minister may issue a declaration recognising the intercountry adoption of a child from a non-Convention country if the adoption has the same effect as if it had been made in Namibia. The Minister may refuse to recognise any intercountry adoption if it is clearly contrary to public policy in Namibia, taking into account the best interests of the child in question.
- (d) **Disclosure of birth information:** All parties to the Hague Convention are required to preserve information about the adopted child's origin and medical history. Disclosure to a child of an intercountry adoption could take place after that child turns 18, in the same way as for domestic adoptions.
- (e) **Prohibition on bypassing procedures for intercountry adoption:** It is prohibited to try to circumvent the legal procedures for intercountry adoption in any way, such as in a case where prospective adoptive parents might try to get permission to remove a Namibian child from the country in order to avoid the normal procedures for intercountry adoption.

### **MATERNITY LEAVE FOR ADOPTIVE MOTHERS**

The Task Force recommended that the Labour Act should make provision for women who adopt children under the age of one year to be eligible for maternity leave after the date of adoption in the same way that they would be eligible for maternity leave after the birth of a biological child (8 weeks after the birth), to facilitate bonding and breastfeeding. It should be noted that social workers report that many adoptive mothers in Namibia, with the aid of medication, do in fact breastfeed adoptive babies.

# 16. CHILD TRAFFICKING

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“Child trafficking” means involvement in moving children from one place to another for purposes such as sexual exploitation or forced labour. It can involve moving children between different countries, or from place to place within one country. Trafficking is a growing problem in the world because of factors like poverty, conflict, natural disasters, crime and social violence – any of which can make children and their families desperate and vulnerable to trafficking.

Namibia is obligated by a number of international agreements to take action against trafficking, and particularly against trafficking of children:

- the UN Convention on the Rights of the Child and its Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography;
- the ILO Convention on the Elimination of the Worst Forms of Child Labour;
- the UN Convention against Transnational Organised Crime and its Protocol on Trafficking in Persons, especially Women and Children; and
- the African Charter on the Rights and Welfare of the Child.

The draft Bill defines “trafficking”, in relation to a child, as

the recruitment, sale, supply, transportation, transfer, harbouring or receipt of children, within or across the borders of the Republic –

- (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.

The definition “includes the adoption of a child facilitated or secured through illegal means”.

The draft Bill makes trafficking of children a crime, and provides for extra-territorial jurisdiction to address trafficking by citizens or permanent residents of Namibia outside Namibia’s borders. It also provides mechanisms to address trafficking by companies and organisations, by making them liable for involvement in trafficking by their employees and agents.

The draft Bill makes it illegal to facilitate trafficking in children by knowingly supplying premises for harbouring trafficked children, or by involvement in advertising or information relating to trafficking (including the supply of such information through the Internet).

The draft Bill also provides for assistance to child victims of trafficking, including steps to facilitate the return of Namibian children who are trafficked to other countries (such as the provision of any necessary travel documents), and the involvement of social workers to assist such children upon their return. The law also authorises the government to make arrangements to send an adult to escort a trafficked child back to the child’s home country if necessary.

Research suggests that some parents traffic *their own* children for prostitution or for child labour – often to work for extended family members. In such cases, the parent is usually paid, or else

benefits in some way from the arrangement. In fact, much of the limited trafficking which has come to light in Namibia to date would fall into this category. The parent could be charged with the criminal offence of trafficking. Furthermore, if a child's parent or guardian is suspected of involvement in the trafficking of the child, the Children's Court can suspend that person's parental responsibilities and place the child in question in a place of safety pending court proceedings. The child would then be dealt with as any other child alleged to be in need of protection. The suspension of parental rights is not automatic, as the parent may have been acting out of a desperate desire to remove their child from severe poverty, becoming easy prey to promises of higher wages and a better life for the child.

Requiring a children's court enquiry before deciding how to address the parent's rights over the child will allow the court to consider the motives and circumstances in each individual case.

A police officer, social worker, doctor, nurse or immigration official who comes in contact with a child who is a victim of trafficking must refer the case to a social worker for investigation to see if the child is "child in need of protection" (in accordance with the general procedures described above in the second on children in need of protection). The child can be placed in a place of safety while the investigation is underway.

If the child is from outside Namibia, the court can order that the child be assisted to apply for asylum in Namibia, or be treated as a child in need of protection and allowed to remain in Namibia for the duration of any court order concerning the child. It may be necessary to authorise the child to remain in Namibia while criminal proceedings against the trafficker are in process. The trafficked child may also be returned to his or her country of origin if the government is satisfied that this will not endanger the child's safety. An adult escort can be provided at state expense if necessary. The objective is to ensure that a vulnerable child is not placed in danger of being trafficked again, or mistreated in any way.

The law gives Namibia authority to act against any Namibian citizen or permanent resident, or against any company or "legal person" or partnership which is registered in Namibia, in respect of any act done outside Namibia, if the same act would have been a crime inside Namibia. In other words, anyone "based" in Namibian can be prosecuted for a trafficking crime committed outside Namibia, just as if the crime had been committed within the borders of Namibia. This "extra-territorial jurisdiction" is important because trafficking can involve the movement of people between countries.

# 17. CONSENT TO MEDICAL TREATMENT, TESTING & EMERGENCY OPERATIONS

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## 17.1 Age of consent to medical interventions

The current age of consent to medical treatment and operations is 18. The draft Bill would lower this age of consent to 14, but would also couple the age requirement with a maturity requirement – in order to consent, the child would have to be age 14 AND have sufficient maturity and mental capacity to understand the benefits, risks, social and other implications of the treatment. The same holds true for a child undergoing a surgical operation, but in this case, the child's parent or guardian must also give consent.

## 17.2 Age of consent for access to contraceptives

Access to contraceptives in Namibia is currently governed by the general medical treatment section of the Children's Act 1960. It does not explicitly mention contraceptives, however, and therefore the policy on providing youth with contraceptives has been confusing both to children and care providers.

Despite this confusion, the draft Bill still does not explicitly address the provision of contraceptives to youth. One can assume then, that access to at least some contraceptives (such as the pill or the injection) would fall under the definition of medical "treatment" – although other forms of contraception (such as condoms and diaphragms) might not. Where the section on medical treatment applies, this would mean that child can receive contraceptives without parental consent at 14 years of age, if the child is found to possess sufficient maturity to make this decision.

Namibia's National Policy for Reproductive Health contains a strong commitment to adolescent-friendly health services. The policy states generally that "Adolescents have the right to all information on sexual and reproductive health, and access to quality adolescent friendly services", and suggests that the ministry responsible for youth should "provide condoms to adolescents".

As a point of comparison, the South African Children's Act 38 of 2005 includes a special section on access to contraceptives. It provides as follows:

- No one may refuse to sell condoms to a child who is over age 12. If condoms are generally being given away free of charge, then no one may refuse to give them in the same way to a child who is over age 12 if the child requests them.
- Any other contraceptive may be provided on request to a child who is over age 12, without the consent of a parent or care-giver, if proper medical advice is given to the child and a medical examination of the child confirms that there is no health-related reason to deny the contraceptives requested.
- A child who obtains condoms, other contraceptives or advice about contraceptives is entitled to full confidentiality – subject to the legal provision which requires professionals who work with children to report suspected child abuse.

## 17.3 Age of consent for HIV-testing

Currently, the Namibian Guidelines for Voluntary Counselling and Testing allow consent to HIV-testing in Namibia at 16 years. There is an exception, however, for children who are pregnant or married – in these cases the child may get tested at any age without parental consent.

The draft Bill contains a specific section on HIV-testing which gives children the right to consent to HIV tests on their own if they are at least 14 years old OR “of sufficient maturity to understand the benefits, risks and social implications of such a test”. The rules for HIV-testing differ here from the age of consent for other medical procedures, where a child must be 14 years old AND of sufficient maturity to consent. Thus, it is possible that children under age 14 may be allowed to consent to HIV-testing, while there is no possibility for an under-14 year old to consent independently to other medical procedures.

If the child is under age 14 and lacking in sufficient maturity to consent to the test, the parent or care-giver can consent to the test for the child. The Minister can also consent to the testing of the child under the same circumstances. If a child in these circumstances does not have a parent or care-giver, the superintendent or person in charge of a hospital can consent for the child. Lastly, a Children’s Court can give consent for the test if the child, or the child’s parent or care-giver, is incapable of giving consent or unreasonably withholds consent. The Children’s Court can also authorise the test if the Minister unreasonably withholds consent.

However, there are additional requirements for HIV-testing. The test can take place only if one of the following three conditions is met: (1) the test is in the best interest of the child and some valid consent has been given from amongst the multiple possibilities provided; (2) the test is necessary in order to establish whether a health worker, in which case no consent from anyone is required or (3) any other person may have contracted HIV from the child, and a court has authorised the test.

Finally, no matter what route has been taken to authorise the test, there are requirements for pre- and post-test counselling. A child may be tested for HIV only after there has been “proper counselling, by an appropriately trained person” for:

- the child, if the child is of sufficient maturity to understand the benefits, risks and social implications of the test (ie the same test as for consent)
- the child’s parent or care-giver, if that person has knowledge of the test.

Post-test counselling must be provided in the same way.

The results of an HIV test on a child are confidential, with the following exceptions:

- disclosure by a person acting within the scope of that person’s powers and duties in terms of the Child Care and Protection Act or any other law;
- when necessary for the purpose of carrying out the provisions of this Act;
- for the purpose of a legal proceeding
- to obey a court order.

Permission to disclose the test results can be given by the following persons:

- by the child, if the child is age 12 or older OR of sufficient maturity to understand the benefits, risks and social implications of disclosure (ie the same standard as for consent to the test, but with a lower age)

- the parent or care-giver, if the child is not capable of consenting to disclosure under these criteria
- the superintendent or person in charge of a hospital, if the child is not capable of consenting to disclosure under these criteria and the child has no parent or care-giver
- a children’s court, if disclosure would be in the child’s best interests but consent for disclosure is being unreasonably withheld OR the child, parent or care-giver is incapable of giving consent.

The provisions on HIV-testing need to be read in context with the section on general principles, which states that all actions and decisions in matter concerning a child must “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”.

There is one additional provision on HIV-testing. The draft bill provides that “if HIV-testing of a child is done for foster care or adoption purposes” then the state may in some circumstances pay the costs of this test – but it is not clear from the draft Bill when prospective foster or adoptive parents would have a right to request HIV-testing.

## 17.4 Consent to medical treatment by care-givers

In terms of the draft Bill, a care-giver other than a parent can consent to medical treatment of the child, but only if the medical treatment is unlikely to significantly change or have an adverse effect on the child’s health or well-being. Care-giver is broadly defined to include a person caring for a child in a place of safety, a foster parent, the head of a children’s home, “a person who cares for a child with the implied or express consent of a parent or guardian of the child”, a community member who cares for a child who is without appropriate family care, or even a child at the head of a child-headed household. It might be better for care-givers who are looking after children – especially on a temporary, a short-term basis – to be required to make a reasonable attempt to contact parents if the delay would not be dangerous to the child. A care-giver has no authority to consent to a surgical operation for the child.

The South African Law Commission recommended that a care-giver should be able to consent to an operation on a child if that child has been abandoned or if his or her parents are deceased. The South African Law Reform Commission also proposed that a parent or guardian should be entitled to transfer their parental powers regarding consent (to medical treatment and operations) to a third party, provided the person to whom such power is transferred is the child’s care-giver and they have done this in the form of a statement before a Commissioner of Oaths. The provision which was ultimately adopted in the 2005 Children’s Act in South Africa was less formal. Any care-giver who takes care of a child has a duty to safeguard the child’s health and well-being and automatically acquires the ability to exercise any parental rights and responsibilities “reasonably necessary” to fulfil this duty, 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”. (Surgery is not mentioned).

## 17.5 Procedures in cases of lack of consent to medical interventions

### (1) Non-emergency situations

The Minister can consent to any medical treatment or surgical operation which requires parental consent where the parent or guardian

- (a) unreasonably refuses consent
- (b) cannot readily be traced
- (c) is “incapable of giving consent or of assisting the child in giving consent” or
- (d) is deceased.

Where the child is competent to consent to his or her own medical treatment or operation but unreasonably refuses to give consent, the Minister may also authorise the medical intervention.

As an alternative, the draft Bill also provides that the High Court or a Children’s Court may consent to medical treatment 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. This provision clearly authorises the courts to overrule a refusal of consent by the parent. However, it does *not* appear to authorise the courts to overrule a child’s refusal of consent, since the provision refers to the consent of “another person” to treatment or an operation on the child. Nevertheless, the High Court would probably still have this jurisdiction in its role as “upper guardian” of all children.

The draft Bill explicitly states that a parent, guardian or care-giver of a child may not withhold consent to medical treatment or an operation “by reason only of religious or other beliefs”, unless they can show that there is a “medically-accepted alternative” for the child. This provision should provide guidance for deciding when a parent’s refusal of consent is “unreasonable”. It should be noted that “other beliefs” could also cover a parent’s preference for relying on traditional medicine.

### (2) Emergency situations

The draft Bill uses an approach similar to that in the current Children’s Act on emergency procedures, with only a few small changes. 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 delayed for the purpose of obtaining consent.

## 17.6 Medical interventions in cases of neglect

When a Children’s Court finds that a child is “a child in need of protection”, the court can make an order that the child receive appropriate medical or psychological treatment or attendance, “if needs be at state expense”. The court can also make an order “giving consent to medical treatment of, or to an operation to be performed on, a child”.

## 17.7 Costs of medical interventions

Under the current law, whenever medical interventions are authorised without the consent of a parent or guardian, anyone who is legally liable to maintain the child is still responsible for the costs of the medical intervention in question. The draft Bill is silent on who must pay for the costs in a situation where there was no parental consent to medical treatment or operations.

## 17.8 Procedures in cases of abuse or sexual assault

At present, there appears to be confusion amongst medical practitioners on how to proceed in sexual abuse cases involving minors, and on the administration of post-exposure prophylaxis (PEP) to minors in rape cases. The draft Bill is silent on consent for medical examination or treatment in cases of abuse or rape. Such cases would therefore fall under the general medical treatment sections, as they do now. This means that a child would be able to consent to these procedures when 14 years or older and sufficiently mature to understand the consequences of the procedures. Otherwise, the normal procedures for dealing with lack of consent from the parent or guardian would apply.

The problem with not having a special policy dedicated to minor victims of sexual assault, rather than grouping this situation together with those on general medical treatment, is that victims of sexual assault face unique problems. For example, one of the problems South Africa faced without a clear policy on consent in such cases was that some district surgeons refused to treat victims of sexual abuse unless the case had been reported to the police. Additionally, parents often refused to consent to the medical examinations in order to protect their children from the secondary trauma of undergoing a medical examination immediately after sexual abuse. In some instances of abuse, one of the parents is the perpetrator and it is unlikely that such a parent will readily consent to a medical examination. Because of these problems, the South African Law Reform Commission urged that the “circumstances under which parental authority can be waived needs to be clearly defined in law and the process needs to be simple and swift”.

# 18. CORPORAL PUNISHMENT

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It has been pointed out that there is no more obvious sign of the low status which children still enjoy in most of the world than the readiness of adults to defend smacking, slapping, and beating them.

In Namibia, the use of corporal punishment by parents is unquestioned and occurs daily in many families. For example, a 1995 study in the Hardap and Karas regions found that parents who beat their children believe that “corporal punishment is one of the tools available to parents for socialising children into honest, well-behaved, self-disciplined, obedient and reflective individuals” and that it helps children to become “persons who fear and respect authority”, which is “important for the maintenance of regulated and ordered social relationships”. A 2007 study which surveyed 840 households in Caprivi, Kunene, Ohangwena, and Otjozondjupa Regions found that over half of the children aged 2 to 14 in these households had been physically struck, with one-third of the children having been struck with a belt or another object.

Participants who took part in focus group discussions held for this study felt that young people are more rebellious than in the past, and felt that the removal of corporal punishment from the school setting may have contributed to making children less disciplined. Adults also felt that children were learning in school that physical punishment was illegal, which made parents afraid to physically discipline their children. Older respondents in particular felt that the result was increased misbehaviour among the youth. Some argued that this left young girls at risk of violence, because they were ill-disciplined and removed from the social control of their families.

Corporal punishment is often the only discipline technique used by Namibian parents. In fact, many cannot think of any other way to discipline their children.

As of early 2009, at least 25 countries have banned all forms of corporal punishment, including corporal punishment in the home, and this move is gaining momentum.

Many international agreements to which Namibia is party to guarantee respect for human dignity and prohibit the use of degrading treatment or punishment. The clearest statement on corporal punishment of children is contained in the Convention on the Rights of the Child, which requires governments to take steps “to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation including sexual abuse, while in the care of parent(s), legal guardian(s), or any other person who has the care of the child.”

The Committee on the Rights of the Child has noted that eliminating corporal punishment of children is a key strategy for reducing and preventing all forms of violence in societies. The Committee has also noted that parents need examples of positive, non-violence forms of discipline.

Article 8 of the Constitution of Namibia relates to corporal punishment. It states:

**Article 8 Respect for Human Dignity**

- (1) The dignity of all persons shall be inviolable
- (2) (a) In any judicial proceedings or in other proceedings before any organ of the State, and during the enforcement of a penalty, respect for human dignity shall be guaranteed.
- (b) No persons shall be subject to torture or to cruel, inhuman or degrading treatment or punishment

Shortly after Independence, the Namibian Supreme Court found that Article 8(1) prohibits the corporal punishment of children in schools. This case did not address question of corporal punishment in the family, which might similarly be found unconstitutional.

At the moment, “reasonable chastisement” of a child is a defence to the crime of assault for parents – meaning that if a child laid a criminal charge of assault against a parent, the parent could defeat the charge by arguing that the physical punishment fell into the category of “reasonable chastisement”.

The draft Child Care and Protection Bill would require any person who has control of a child, including the child’s parents, to respect the child’s right to physical integrity. (This would include foster parents primary caretakers and other care-givers.)

It is absolutely forbidden for anyone to administer corporal punishment to a child at any place of safety, place of care (which covers, crèches, day care centres etc) shelter, children’s home or educational and vocational centre.

The provision also states that any law which allows corporal punishment of a child by a court (including a traditional court) is no longer valid. This rule covers statutes, common law and customary law.

The Minister responsible for education is charged to take all reasonable steps to ensure that education and awareness-raising programmes about the law on corporal punishment of children and on appropriate child discipline at home and at school are implemented across the country.

It should be noted that this provision stops short of repealing the defence of “reasonable chastisement” which can be raised as a defence to a charge of assault of a child by the parent. It also stops short of explicitly prohibiting corporal punishment and other cruel or degrading forms of punishment by parents or others who are in control of a child.

# 19. OTHER CHILD PROTECTION MEASURES

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## 19.1 Child-headed households

The draft Bill includes a section allowing the Minister to recognise a household as a “child-headed household” if the following three circumstances are present: (1) the parent or care-giver of the household is terminally ill or has died; (2) there is no adult family member available to care for the children in the household; and (3) a child has assumed the role of care-giver in respect of some other child in the household.

Every child-headed household must be placed under the supervision of an adult named by the children’s court, or named by a state agency or NGO designated by the Minister. The designated state agency or NGO may collect and administer any grants to which the household is entitled.

The adult selected to supervise the child-headed household, or the state agency or NGO involved, may not take any decisions about the household without consulting (a) the child who heads the household and (b) the other children if they are of sufficient age, maturity and development for this. The child who heads the household may take all day-to-day decisions about the household and the children in it as if that child were an adult care-giver.

A child-headed household may not be excluded from any aid, relief or programme aimed at poor households just because it is headed by a child.

## 19.2 Worst forms of child labour

The Namibian Constitution contains several provisions on child labour. Namibia is a party to the ILO Convention on the Prohibition and Immediate Elimination of the Worst Forms of Child Labour. This Convention addresses four categories of “worst forms of child labour”:

- (1) child trafficking and slavery;
- (2) commercial sexual exploitation of children (including the use of children for prostitution or pornography);
- (3) children being used by adults to commit crime (including the production and trafficking of drugs)
- (4) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.

The fourth category includes, at a minimum:

- (a) work which exposes children to physical, psychological or sexual abuse
- (b) work underground, under water, at dangerous heights or in confined spaces
- (c) work with dangerous machinery, equipment and tools, or which involves the manual handling or transport of heavy loads

- (d) work in an unhealthy environment which may, for example, expose children to hazardous substances, agents or processes, or to temperatures, noise levels, or vibrations damaging to their health
- (e) work under particularly difficult conditions, such as work for long hours or during the night or work where the child is unreasonably confined to the premises of the employer.

The Labour Act 11 of 2007 gives effect to the Constitution and the ILO Convention, and in some cases goes further. The Labour Act's rules on child labour and forced labour can summarised as follows:

- (1) It is illegal to employ a child under the age of 14 in any work.
- (2) It is illegal to employ a child between the ages of 14 and 16 in
  - work that is likely to be hazardous or to interfere with their education, or to be harmful to their health or physical, mental, spiritual, moral or social development
  - work between the hours of 20h00 and 07h00
  - work on any premises where –
    - (i) work is done underground or in a mine;
    - (ii) construction or demolition takes place;
    - (iii) goods are manufactured;
    - (iv) electricity is generated, transformed or distributed;
    - (v) machinery is installed or dismantled; or
    - (vi) any work-related activities take place that may place the child's health, safety, or physical, mental, spiritual, moral or social development at risk
 UNLESS the Minister has authorised work in such premises for this age group by regulation
  - work which has been prohibited by the Minister for this age group by regulation
- (3) It is illegal to employ a child between the ages of 16 and 18 in the following types of work, UNLESS the Minister has made an exception by regulation
  - work between the hours of 20h00 and 07h00
  - work on any premises where –
    - (i) work is done underground or in a mine;
    - (ii) construction or demolition takes place;
    - (iii) goods are manufactured;
    - (iv) electricity is generated, transformed or distributed;
    - (v) machinery is installed or dismantled; or
    - (vi) any work-related activities take place that may place the child's health, safety, or physical, mental, spiritual, moral or social development at risk.
- (4) It is a crime to directly or indirectly cause, permit or require any individual to perform forced labour. This includes work performed under any kind of threat, work expected from a child because the child's parent is an employee (from children staying with parents who are farmworkers or domestic workers, for example) or work required of someone by a traditional leader.

The proposed provisions on child labour in the draft Bill complement the Labour Act 2007 in some ways, but are in other ways are contradictory to the Labour Act or provide insufficient information.

**(a) commercial sexual exploitation**

The draft Bill makes it a crime to “use, procure, offer or employ” a child for purposes of commercial sexual exploitation. No further details are provided, and there is no definition of “commercial sexual exploitation”.

**(b) children being used by adults to commit crime**

The draft Bill makes it a crime to “use, procure, offer or employ a child for illicit activities, including drug production and trafficking”.

**(c) forced labour**

The draft Bill makes it a crime to force a child to perform labour for any person, whether or not it is for reward. However, this prohibition does not prevent the following forms of labour by a child, so long as they do not put at risk the child’s “well-being, education, physical or mental health or spiritual, moral or social development”:

- appearance in an advertisement
- engagement in sport
- appearance in an artistic or cultural event.

It is also permissible for a child to engage in work “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”. It is not clear precisely what this exception is aimed at – possibly participation in school cooperatives.

At present, section 23 of the Children’s Act 1960 requires anyone who wishes to involve children under the age of 14 in a “public entertainment” (which is not defined) to obtain a licence from a Commissioner of Child Welfare. This licence can set conditions for the entertainment in question. The proposed law eliminates this licence.

**(d) prohibited labour**

The draft Bill makes it a crime to “encourage, induce or force” (but not to allow) a child to perform work which falls into either of 2 broad categories:

- (1) labour which is likely to harm the child’s health, safety or morals
- (2) labour that places at risk the child’s “well-being, education, physical or mental health or spiritual, moral or social development”.

This would seem to supplement the Labour Act 2007 by covering labour within the home or family, as opposed to formal employment (such as herding cattle, minding younger children, or doing various forms of domestic work – where these tasks violated the principles cited, such as by being required during school hours). This prohibition could also be applied to begging, or to children working on the streets in capacities which may not always be formal employment (selling various goods, watching parked cars, etc).

## **(e) enforcement**

The draft Bill states that the Minister must take “all reasonable steps” to enforce the prohibition on the worst forms of child labour, including steps for the confiscation of assets acquired through the use of child labour in terms of the procedures provided in the Prevention of Organised Crime Act 20 of 2004 (which is not yet in force).

## **19.3 Child safety at places of entertainment**

The draft Bill provides rules for persons providing entertainment to children IF ALL THREE of the following conditions apply:

- (1) access to the premises or enclosure where the entertainment is being held is by means of stairs, escalators, lifts or other mechanical means
- (2) the majority of the people attending the entertainment will be children and
- (3) the total number of people in attendance (adults plus children) is expected to be more than 50.

In this case, the person providing the entertainment (or the owner of the premises) must do the following things:

- (1) determine the maximum number of people who can be safely accommodated on the premises
- (2) station a sufficient number of adult attendants to ensure that this maximum number is not exceeded
- (3) control the movement of people while they are entering and leaving and
- (4) take all reasonable precautions for the safety of everyone in attendance.

Alcohol and tobacco products must not be sold to children at the entertainment.

Anyone authorised by a local authority or regional council is empowered to enter premises to check and see if the legal requirements for public entertainments are being followed.

## **19.4 Crimes relating to abuse and neglect**

The draft Bill follows the existing law on several offences relating to children:

- It is a crime for a parent, guardian, care-giver or any person who voluntarily takes care of a child to abandon a child, abuse a child or deliberately neglect a child.
- It is a crime for anyone who is legally liable for a child’s maintenance to fail to provide the child with adequate food, clothing, lodging and medical assistance – if person has the means to provide these things.

## **19.5 Unlawful detention or removal**

### **(1) Unlawful removal or detention within Namibia**

The draft Bill follows South Africa’s example by including a provision on unlawful removal or detention of a child, which would seem to be useful for preventing children from being trafficked or abducted, before the harm is completed. This provision makes it a crime to remove

a child from the care of anyone who is lawfully caring for the child (ie the child's custodian or someone delegated by that custodian to care for the child). It is also a crime to detain a child in order to keep the child apart from someone who lawfully entitled to care for the child).

## **(2) Unlawful removal of children from Namibia**

There is another provision in the draft Bill which supports the provisions on trafficking, as well as assisting to prevent the abduction of children; the draft Bill makes it a crime to take or send a child out of Namibia if this is (1) in violation of a court order prohibiting the removal of the child from the country or (2) without the consent of the persons with relevant parental rights and responsibilities, or consent from a court.