



THE DRAFT CHILD CARE AND PROTECTION ACT

Issues for Public Debate

Booklet 1



Ministry of Gender Equality
and Child Welfare



LEGAL ASSISTANCE CENTRE

unicef 

unite for children



OVERVIEW OF THE PROPOSED CHILD CARE AND PROTECTION ACT

Namibia's main law on children is the Children's Act 33 of 1960, which was inherited from South Africa at independence. This law is very outdated. It is also a colonial law which is not well suited to African situations. The Ministry of Gender Equality and Child Welfare wants to replace the old law with a new Child Care and Protection Act. The new law should work better to protect and assist Namibian children.

Key topics in the new Child Care and Protection Act

<p>overall objectives and guiding principles: what principles should apply to children's rights? how do we know what decisions are in a child's "best interests"?</p> <p>(Booklet 1, Fact Sheet 2)</p>	<p>definition of "child": a child is defined as anyone below age 18, but at what age should a person become an adult in the eyes of the law: 18, 21 or some other age?</p> <p>(Booklet 1, Fact Sheet 3)</p>	<p>children's courts: measures to make court proceedings more comfortable for children and to ensure that children can participate in decisions that affect them</p> <p>(Booklet 1, Fact Sheet 4)</p>
<p>prevention and early intervention services: services to help families address problems that may harm children, before they become too serious</p> <p>(Booklet 1, Fact Sheet 5)</p>	<p>children in need of protection: procedures for removing children from their usual homes and placing them in alternative care when this is necessary for their safety and protection</p> <p>(Booklet 1, Fact Sheet 6)</p>	<p>foster care: procedures for putting children in the care of persons who act in the place of parents temporarily, or sometimes for longer periods of time</p> <p>(Booklet 1, Fact Sheet 8)</p>
<p>facilities for the care of children: facilities which must be registered under the new law</p> <p>(1) places of safety: places where children can stay temporarily in emergencies</p> <p>(2) children's homes: institutions which provide residential care for children</p> <p>(3) educational and vocational centres: more secure institutions suitable for children with behavioural problems or young offenders</p> <p>(4) shelters: places which provide services and overnight accommodation for street children and other children in need</p> <p>(5) places of care: places which provide short-term care, such as crèches and day-care centres</p> <p>(Booklet 1, Fact Sheet 7)</p>	<p>adoption: rules, procedures and safeguards for adoption of children by Namibians and citizens of other countries</p> <p>(Booklet 1, Fact Sheet 9)</p>	<p>child trafficking: measures to protect children who are moved from one place to another for the purpose of exploitation</p> <p>(Booklet 1, Fact Sheet 10)</p>
<p>Child Welfare Advisory Council: a group of experts appointed by government to monitor the implementation of the law and advise on child rights issues</p> <p>(Booklet 2, Fact Sheet 2)</p>	<p>Children's Ombudsman: a new government official who would investigate and act on complaints about abuses of children's rights</p> <p>(Booklet 2, Fact Sheet 3)</p>	<p>parenting plans: procedures to help parents and other care-givers make agreements about issues such as custody, access and maintenance, as a way of preventing future disputes</p> <p>(Booklet 2, Fact Sheet 4)</p>
<p>corporal punishment: guidelines to help parents and other care-givers apply discipline without being abusive</p> <p>(Booklet 2, Fact Sheet 5)</p>	<p>Child Protection Register: a proposal to establish an official record of child abuse incidents and individuals who are not suitable to work with children</p> <p>(Booklet 2, Fact Sheet 6)</p>	<p>consent to medical procedures: at what age may children get medical treatment without the permission of a parent? have access to contraceptives? have an HIV or pregnancy test?</p> <p>(Booklet 2, Fact Sheet 7)</p>
<p>other child protection measures: protective measures for children in particularly vulnerable situations</p> <p>(1) child-headed households: rules to support and protect households where there is no responsible adult to take care of the children</p> <p>(2) worst forms of child labour: offences aimed at preventing the sexual and economic exploitation of children</p> <p>(3) child safety at places of entertainment: safety measures at events likely to be attended by large numbers of children</p> <p>(4) crimes relating to child abuse and neglect</p> <p>(Booklet 2, Fact Sheet 8)</p>		

There may be some other issues which should be included in the draft before it is tabled in Parliament. (For details, see Booklet 2, Fact Sheets 9 and 10: *What is missing – Parts 1 and 2.*)

The international framework

A new law on children must support Namibia's international commitments on children's rights. Since independence, Namibia has signed several key international agreements aimed at protecting children's rights:

- United Nations Convention on the Rights of the Child, 1990:** This set of minimum standards for children's rights has been adopted by almost every country in the world. Its four core principles are (1) non-discrimination; (2) commitment to the best interests of the child; (3) the child's right to life, survival and development; and (4) respect for the views of the child.
- African Charter on the Rights and Welfare of the Child, 1990:** This Charter focuses on issues particularly relevant to African children and emphasises the role of the extended family.
- ILO Convention on the Prohibition and Immediate Elimination of the Worst Forms of Child Labour, 1999:** This Convention addresses (1) slavery and similar practices, including the sale and trafficking of children; (2) using children for prostitution or pornography; (3) involving children in unlawful activities; and (4) work that is likely to be harmful to children.
- Protocol to the Convention Against Transnational Organised Crime, to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2000:** "Trafficking in children" means involvement in moving children from one place to another for purposes such as sexual exploitation or forced labour. This Convention is aimed at preventing trafficking and assisting victims of trafficking.
- Convention on the Rights of Persons with Disabilities, 2006:** This Convention is aimed at ensuring that persons with disabilities can enjoy full human rights without discrimination. It calls for "respect for the evolving capacities of children with disabilities".

YOU CAN HELP IMPROVE THE PROPOSED CHILD CARE AND PROTECTION ACT

The Ministry of Gender Equality and Child Welfare wants to make sure that the planned Child Care and Protection Act will be appropriate to the issues faced by children in Namibia today. To do this, the Ministry needs your input.

We will be providing information about the proposed new law in newspapers, on radio, through community organisations and through workshops in different parts of the country.

We want you to tell us about the problems faced by children in your community. We want your opinions on the proposals for the new law. We want to know if you identify other issues that should be included in the law.

Send your comments to:

SMS: 0814241591
 Email: CCPA@lac.org.na
 Fax: 088613715
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OBJECTIVES AND GUIDING PRINCIPLES OF THE CHILD CARE AND PROTECTION ACT

The **objectives** of a law explain what the law is trying to achieve. The **guiding principles** are the values which the law will uphold.

What objectives should the Child Care and Protection Act try to achieve? What values should the Child Care and Protection Act uphold? To answer these questions, we have to ask: what are the main problems and issues that children in Namibia are facing? We have to consider all these questions if we want to make sure that the new law will really be helpful to Namibian children.

Objectives

The objectives of the proposed Child Care and Protection Act are:

- to uphold the children's rights in the Namibian Constitution
- to implement international agreements that are binding in Namibia
- to promote the protection of families
- to promote the best interests of children
- to strengthen and develop community structures which provide care and protection for children
- to protect children from discrimination, exploitation and other forms of harm
- to assist children in need of care and protection
- to generally promote the protection, development and welfare of children.

Are other objectives needed?

Guiding principles

The proposed Child Care and Protection Act says that all decisions affecting children must:

- be consistent with the Namibian Constitution, the best interests of the child, and the Child Care and Protection Act
- respect the child's dignity
- treat the child fairly
- protect the child from unfair discrimination, including discrimination based on the health status or disability of the child or a family member of the child
- recognise the child's need for development, play and recreation
- respond to the child's special needs, if that child has a disability.

There are also some additional principles:

- Family participation:** Decisions must be made only after the child's family has been given a chance to express their views (if this is in the best interests of the child).
- Avoid conflict:** Matters concerning children should use negotiation to reach agreement and avoid conflict where possible.
- Avoid delay:** Move as quickly as possible on decisions involving children, because delays have more impact on developing children than on adults.
- Good communication:** Children of sufficient age and maturity must be informed of all actions and decisions which could affect them. Parents also have a right to be informed.

Are other principles needed?

CHILD PARTICIPATION

Child participation is a key principle. Children with the necessary age, maturity and stage of development must be given a chance to express an opinion about decisions which affect them. Children's views should be given an appropriate degree of consideration, keeping in mind the child's age and maturity. This is important because children have thoughts and feelings – they should not be treated like objects to be argued over. The United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child both say that children should participate in decisions that affect them. Namibia has signed both of these agreements, so Namibian laws must also make sure that children are able to participate in decisions that affect them. In practical terms, how can children participate in decisions about their lives?

How can we decide what is in a particular child's "best interests"?

One of the law's objectives will be to promote the best interests of the child. This means the best interests of a particular child should guide any decision about that child. *For example, suppose the unmarried parents of a child cannot agree on whether the child should live with the father or the mother. The court should look at the best interests of the child to help decide the question. If the father works as a truck driver and travels most of the time, it would probably be in the best interests of the child to live with the mother.* This is a very simple example. In reality there are usually many factors to consider in deciding what is in the best interests of a child. The proposed law includes a long list of factors which decision-makers should consider. Here is a summary:

- the child's sex, age, background, maturity and level of development
- the child's cultural, ethnic and religious identity
- the impact of any disability or chronic illness
- the nature of the child's relationship with the parents, siblings and other relatives, and with any other people who are significant in the child's life
- the attitude and behaviour of the parents or other care-giver
- the capacity of the care-giver to provide for the child's physical, emotional, intellectual, spiritual, developmental and educational needs
- the importance of maintaining contact with family members – would a specific change make it easier or harder to maintain such contact?
- the need to protect the child from harm
- any history of family violence against the child or any other family member
- the need for a stable family environment (if possible).

Are other factors important in determining the best interests of a child?

MAKING THE PROPOSED LAW SUITABLE FOR NAMIBIA

- ☉ What problems and issues do children in Namibia face?
- ☉ What are good ways to involve children in decisions about their lives, while still teaching them to respect their elders?
- ☉ What objectives and guiding principles would be most appropriate for the Namibian Child Care and Protection Act?
- ☉ What factors will help identify a particular child's best interests?

YOU CAN HELP SHAPE THE NEW LAW.

- (1) **TICK** the boxes beside the points you **AGREE** with.
- (2) **DRAW A LINE** to cross out any point you strongly **DISAGREE** with.
- (3) **WRITE IN** any other points you want to add. Use extra paper if necessary.
- (4) **FAX OR POST** this sheet using the details below.

If you have shorter inputs, send your suggestions by email or sms.

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THE DEFINITION OF A “CHILD” WHEN SHOULD A CHILD BECOME AN ADULT?

THE DEFINITION OF A CHILD

The draft Child Care and Protection Act defines a child as being a person below the age of 18. The UN Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child also defines a “child” as a person below the age of 18.



child =
below age 18

THE AGE OF MAJORITY

There is a different rule about the “age of majority”, which is set at 21 in Namibia by a 1972 law called the Age of Majority Act.



minor =
below age 21

What is the age of majority?

The concepts of “minor” and “major” relate to the legal capacity of a person. In Namibia, a person who is below age 21 is a “minor” and a person who has reached age 21 is a “major”.

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

What is a minor able to do?

Minors gradually acquire certain specific rights as they mature. They are gradually treated more like adults even before they reach age 21.

A minor who is at least 16 years old can

- ⦿ make a will
- ⦿ open and operate a bank account
- ⦿ consent to sexual activity.

A minor who is at least 18 years old can:

- ⦿ work in any type of job
- ⦿ drive
- ⦿ buy alcohol
- ⦿ gamble
- ⦿ obtain a firearm licence
- ⦿ give independent consent to medical treatment
- ⦿ vote (although a person must be 21 years of age to stand for public office)
- ⦿ be tried for a crime as an adult and locked up in a prison with adults.

What is a minor unable to do?

- ⦿ Minors can engage in certain legal actions only with the consent or assistance of a parent or guardian.
- ⦿ A minor cannot enter into contracts without assistance from their responsible parent or guardian. Contracts entered into by minors without assistance are generally not legally enforceable. This is one of the key limitations faced by minors who are living and working on their own.
- ⦿ A minor cannot normally act alone to bring or defend a court case.
- ⦿ Minors cannot enter into a civil marriage without the consent of their responsible parent or guardian.
- ⦿ A minor cannot sell or mortgage land.
- ⦿ Minors cannot administer money or property which they have inherited.

An 18-year-old can vote, drive, drink, own a gun and be locked up in a police cell with adults, but would still need parental assistance to sign a cell phone contract.

What do other countries do?

Most countries in the world set the age of majority at 18. The Committee which monitors the Convention on the Rights of the Child encourages countries to harmonise the definition of “child” and the age of majority if they are not already the same. This helps to ensure that children do not lose any of their special legal protections before they get complete adult rights. In South Africa, new children’s legislation recently lowered the age of majority from 21 to 18.

WHAT ARE THE PROS AND CONS OF LOWERING THE AGE OF MAJORITY FROM 21 TO 18?

Some arguments *against* lowering the age of majority:

- ⦿ Lowering the age of majority would mean that 18-20 year-olds would lose certain legal protections. For example, contracts which they sign would become legally enforceable so that they would have no way to avoid their contractual responsibilities.
- ⦿ Many individual laws already give 18 year-olds permission to do many adult things, such as driving and voting.
- ⦿ Children over age 18, who might still be in school, would have to apply on their own for maintenance.
- ⦿ A lower age of majority might reduce parental control over learners who are majors but still being supported by their parents.

Some arguments *for* lowering the age of majority:

- ⦿ The change would mean that 18-20 year-olds would be able to enter into binding contracts, acquire property, take legal actions, and make other personal and business decisions without oversight from their parents or guardians. This would reflect the reality that many 18-21 year-old Namibians are already working, living independently from their parents, caring for their siblings or their own children, and handling other responsibilities of adulthood.
- ⦿ The change would make Namibian law more consistent on the age at which a child becomes an adult.
- ⦿ The change would bring Namibia in line with international law and the laws in most other nations.

A possible alternative: Children under the age of majority who are living and working independently can apply to the High Court to be declared majors at a younger age. This is called “emancipation”. A compromise approach would be to make the option of emancipation more accessible, such as providing for an emancipation procedure in magistrates’ courts.

WHAT DO YOU THINK?

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Be sure to say **WHY** you are in favour of making the age of majority 21 or 18.





CHILDREN'S COURTS

A Children's Court is a Magistrate's Court. In the future, dedicated Children's Courts may be set up. But at this stage, all Magistrates' Courts also function as Children's Courts. When the Magistrate's Court is functioning as a Children's Court, the Magistrate is called a Commissioner of Child Welfare. The Commissioner of Child Welfare has a specific duty to promote and protect the best interests of any child who comes before the court.

Children's Court = Magistrate's Court
Commissioner of Child Welfare = Magistrate

Resolving issues outside court

The proposed Child Care and Protection Act includes provisions to reduce the number of cases that must be decided in court. In cases which do not involve allegations of child abuse, the court can order the people involved to try to reach agreement between themselves on the problem, before it goes to court. They can be directed to attempt this at one of the following types of meetings:

- (1) **Pre-hearing conference:** a private meeting held with the goal of reaching agreement on some or all of the issues in dispute (usually more effective if facilitated by a neutral person trained in mediation)
- (2) **Lay-forum hearing:** referral to a social worker or a traditional leader who can help the family try to reach agreement.

Both alternatives will usually include all people involved in the case – including the child.

A third option not currently included in the proposed law is **family group meetings**. Family group meetings started in New Zealand as a way to incorporate traditional Maori customs into the law. They are now used in many countries, including South Africa and the United Kingdom. Family group meetings bring together a wide group of extended family members (and even close family friends) to discuss ways to resolve the problem. An independent facilitator will give the family relevant information. The family will have some time for private discussion. Then they will discuss their ideas with the facilitator, to decide how to take them forward.

Special provisions for hearings in Children's Courts

A Children's Court generally works in the same way as a Magistrate's Court. However, there will be some special rules and procedures for Children's Courts:

- (1) **Child participation:** Children have a right to participate in decisions affecting them. In a Children's Court, the Commissioner must allow the child to express a view or an opinion, if the child wishes. There is no specific age limit. To decide if the child is able to participate, the court will consider "the child's age, maturity and stage of development and any special needs that the child may have".
- (2) **Assessors:** Cases in the Children's Court can be decided by a panel if special expertise is needed. The Magistrate will decide legal questions, and the additional assessors will help with decisions on other issues. An assessor could be an expert such as a doctor or a psychologist. An assessor could also be someone from the same language or cultural group of the child, who could help the child feel more comfortable and make sure that there is clear communication with the child.
- (3) **Private hearings in comfortable environments:** Cases in the Children's Court are private. Only children and other parties to the case may attend, plus legal representatives or other people who are necessary to the case. The Children's Court is allowed to hold hearings in places other than the courtroom, such as in an office, so that children will not feel intimidated by big rooms and formal settings. The Commissioner must explain what is happening in simple language to the child, the parents and other persons with an interest in the case.

- (4) **Vulnerable witness arrangements:** The provisions in the proposed law will help make the court experience less traumatic for children. As an additional idea, Children's Courts could use the special arrangements shown below which are already available to children who give evidence in criminal cases (such as victims of child abuse):
 - allowing a child to give evidence from behind a one-way screen or by means of a live video recording from another room
 - allowing a support person to be with the child when the child gives evidence (such as allowing the child to sit on the lap of a family member)
 - requiring that questions be put to the child through an intermediary (a neutral person who has experience in talking to children, such as a social worker)
 - using statements the child has already made where possible, to avoid asking the child to talk about a traumatic experience repeatedly.

QUESTIONS ABOUT CHILDREN'S COURTS

Family mediation

- Should pre-court meetings be voluntary, or should the court be able to order parties to attempt mediation?
- Who should facilitate these meetings?
 - Do social workers have the time and the skills to conduct mediations in family disputes?
 - Would traditional leaders need special training to conduct mediations about children's issues?
 - Are there other people who could serve as mediators in Namibia?
- Should Namibian law include the option of family group meetings which involve extended family members?

Special provisions

- What people are best qualified to help the Magistrate make decisions about children's issues?
 - Should the Magistrate decide when to involve other experts, or should this be *required* in certain kinds of cases?
- What are the best ways to help children feel comfortable so that they will be able to participate effectively in a court hearing?

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PREVENTION AND EARLY INTERVENTION SERVICES

Prevention and early intervention services are services that are designed to reduce the risk of violence or other harm within the family environment.

“**Prevention services**” are services provided to **families with children** “in order to **strengthen and build their capacity to address problems** that may occur in the family environment”.

Prevention services can be targeted at the entire community. For example, a programme for parents on effective methods of child discipline could help prevent family conflicts. As another example, training sessions on how to care for children with disabilities could help ensure that such children get the care that they need.

“**Early intervention services**” are services provided to **specific families with children identified as being especially vulnerable** to or at risk of harm.

Identifying children who are at risk, and targeting those families for early intervention, could help prevent child abuse and neglect. For example, if there are families where some adult family members abuse alcohol or drugs, helping them with these problems would help protect the child. Early intervention services could also help prevent the child from developing emotional or behavioural problems in the future.

There are a number of aims and objectives that can be achieved through prevention and early intervention services:



There are many different types of prevention and early intervention services. These can include home visits by health workers or social workers, parenting skills programmes, preparation-for-school programmes, substance abuse programmes or interventions which combine different elements.

Some services are suitable for all families, whilst others are designed to target particular situations or problems. It will be important to have good planning, monitoring and evaluation of these services to ensure that they are effective.

ISSUES FOR DISCUSSION

- Ⓜ What problems affecting children in Namibia could be addressed by prevention and early intervention services?
- Ⓜ What preventative and early intervention services are already in place?
- Ⓜ What additional services are most important? Who could provide them (social workers, churches, NGOs, community volunteers)?
- Ⓜ How can children and families in need of such services be identified and targeted?
- Ⓜ Would there be any stigma attached to receiving help from early intervention services which do not target the entire community?
- Ⓜ Should courts be able to order families to take part in specific programmes and services as an alternative to removing a child from the family (in cases where there is no immediate danger to the child)?

WHAT DO YOU THINK?

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CHILDREN IN NEED OF PROTECTION

Definition

The draft Child Care and Protection Act defines “a child in need of protection” as a child who:

- ⦿ is abandoned or orphaned, where insufficient provision has been made for the care of the child
- ⦿ is in a state of physical or mental neglect
- ⦿ is engaged in behaviour likely to be harmful, where the parent, guardian or care-giver is unable or unwilling to control that behaviour
- ⦿ lives or works on the streets or begs for a living
- ⦿ is exposed to circumstances which may seriously harm the child’s physical, mental or social welfare
- ⦿ may be at risk of such harm if returned to the custody of the parent, guardian or care-giver
- ⦿ is likely to be maltreated or abused.

More than 400 children each year are found to be in need of protection and placed in alternative care in Windhoek alone.

Mandatory reporting

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 to report cases if they suspect that a child is being mistreated. **Voluntary reporting laws** are laws that *encourage* people to report cases if they suspect that a child is being mistreated.

The draft Child Care and Protection Act says that there should be mandatory reporting by all persons who have a “reasonable belief” that a child “may be in need of protection”. This requirement supersedes all rules about professional confidentiality except for confidential discussions between lawyers and their clients. 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.

ISSUES FOR DISCUSSION: What kinds of problems endanger children in their home environments?

Arguments FOR mandatory reporting	Arguments AGAINST mandatory reporting
Children need special protection because they are less able than adults to help themselves. Mandatory reporting will help protect children.	Parents and care-givers may be reluctant to seek help, especially medical attention, if they know that this will lead to a report of the abuse or neglect. Children themselves may be reluctant to seek help if they know the case must be reported.
Mandatory reporting will increase the number of cases of child abuse and neglect which are reported to authorities.	Mandatory reporting may lead to further abuse as a reaction to a report, or the withdrawal of the family from people who may otherwise have provided assistance.
Namibia has a commitment to protect children. All people should be involved in achieving this goal.	Compulsory reporting is virtually unenforceable. If a charge were laid, it would have to be proved beyond reasonable doubt. The accused person could argue that he or she did not actually suspect that abuse had occurred.
Mandatory reporting raises awareness of the need for everyone in society to work together to protect children.	Mandatory reporting may deny the children and families the opportunity of finding other ways to deal with the abuse. It may further endanger the child by disempowering the family.

What do other countries do?

South Africa’s Children’s Act 2005 says that there must be mandatory reporting by persons who work with children professionally, and voluntary reporting for everyone else. In the USA, all 50 states require mandatory reporting by a range of professionals. In contrast, Kenya and New Zealand allow for voluntary reporting by all people.

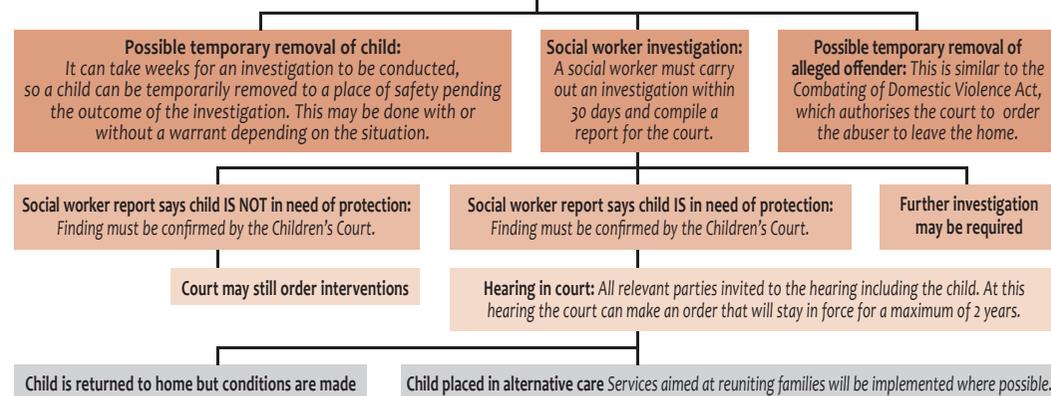
ISSUES FOR DISCUSSION

- ⦿ Should reporting of children in need of protection be mandatory or voluntary?
- ⦿ Should there be different rules about reporting for different people, such as mandatory reporting for professionals who work with children and voluntary reporting for the general public?
- ⦿ Is there a danger that ill or injured children will not get the medical care that they need if doctors and nurses are required to violate doctor-patient confidentiality and make reports?
- ⦿ If mandatory reporting is required, this would mean that a parent must report abuse committed by the other parent. Failure to report the abuse could be punished. Would it be fair to punish this parent? What if this parent was also being abused by the other parent?
- ⦿ Is a criminal charge the best punishment for a failure to report, or is there a better sanction that can be applied?

Helping a child who is in need of protection

Under the proposed law, if a social worker investigation raises cause for concern, a Children’s Court will hold a hearing to decide if a child is in need of protection. A child who is in danger can be placed in a temporary place of safety until the court hearing is completed. Children who are mature enough will have a chance to express their opinions at the hearing. If the court finds that the child is at risk of harm, it can make an order saying how to protect the child. The child might be sent back to the usual home with an order for social work supervision or family counselling. Or the child might be removed from the usual home and placed in alternative care, such as with a foster family or in a children’s home. The court might also order a particular person to stop abusing the child or having contact with the child. There are many options. The order will depend on the situation.

REPORT OF CHILD IN NEED OF PROTECTION MADE TO A SOCIAL WORKER OR TO THE POLICE



ISSUES FOR DISCUSSION

- ⦿ What can be done to avoid having to remove children from their homes while still keeping them safe?
- ⦿ If a child is removed from his or her home, where should the child be placed?
- ⦿ If a child has to be removed from the usual home, what can be done to resolve the underlying problems so that the family can be reunited?
- ⦿ Should there be mandatory monitoring by social workers as a follow-up to all court cases about children in need of protection?

WHAT DO YOU THINK?

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FACILITIES WHICH CARE FOR CHILDREN

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

Other child care facilities, such as crèches and day care centres, care for children while their parents are at work. Shelters are child care facilities where children decide to come on their own.

This fact sheet discusses the rules relating to places of safety, children’s homes, educational and vocational centres, places of care and shelters. (Foster care and adoption are also forms of alternative care for children, but the rules for these kinds of care are discussed in separate articles.)

ALTERNATIVE CARE FACILITIES	
Places of safety	A place of safety is a place where children can stay temporarily. This could be at a children’s home, school hostel or hospital. Anyone who has been approved to be a foster parent can also provide a place of safety. 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 in the best interests of the child).
Children’s homes	A children’s home is a facility which provides residential care for children. The draft law allows for both private and government-run children’s homes.
Educational and vocational training centres	Educational and vocational training centres are facilities specially developed to help children who have specific needs and problems, such as young offenders or children with behavioural problems or emotional difficulties. The draft law allows for private and government-run centres.
OTHER CHILD CARE FACILITIES	
Places of care	A place of care is any place where more than 6 children are cared for on a temporary basis. This includes crèches, day care, private pre-schools and kindergartens but not ordinary schools, school hostels or medical institutions which treat children.
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.

Minimum standards

All facilities for the care of children must provide the following basic requirements:

- ☉ 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.

These are the basic standards. Regulations issued under the Child Care and Protection Act will give more details about the standards for different kinds of facilities for children.

Annual registration

People running facilities for the care of children will be required to register their facility with the Ministry of Gender and Child Welfare. This registration must be renewed each year. The Ministry has the power to cancel a facility’s registration if it fails to comply with the law or to follow any specific conditions attached to its registration, or for any other reasonable cause.

Inspections

Periodic inspections may be carried out by a social worker, a staff member of a local authority or any person authorised by the Ministry. It is a crime for anyone to refuse to co-operate during an inspection.

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 change or discharge a child from a placement as follows:

- (1) **transfer:** The Minister may issue a written notice to transfer a child from one alternative care placement to another, or to transfer a child from an alternative care placement to the child’s parent, guardian or former care-giver. Before a transfer may occur, a social worker must give a report on consultations held with all the relevant parties. When a child is moved to a more secure facility the transfer will also require the approval of the Children’s Court.

For example, a child may be transferred from foster care to a children’s home if it becomes clear that the child needs specialist care that cannot be provided by the foster parents. A Children’s Court would have to approve this transfer.

- (2) **provisional transfer:** The Minister also has the power to issue a notice temporarily transferring a child from one care placement to another care placement that is not more restrictive for a trial period of 6 months. A provisional transfer must be supervised by a social worker.

For example, the Minister could authorise the provisional transfer of a child to a different children’s home. This might be because the child was experiencing problems at the first home and may settle in better at a different home.

- (3) **removal:** The Minister or a Commissioner of Child Welfare may issue a notice removing a child from an alternative care placement temporarily (for a maximum of 6 months) while awaiting the conclusion of an enquiry on the next step for that child.

For example, suppose it came to light that a child in a children’s home was being sexually abused by another child. The child victim might be moved to a foster home to get more individualised care, and the child abuser might be moved to an educational and vocational centre to be held under stricter conditions.

- (4) **discharge:** The Minister or a Commissioner of Child Welfare may issue a notice removing a child from any alternative care placement if this is in the child’s best interests.

A discharge will normally be issued when the problems that cause the child’s placement in alternative care have been sufficiently resolved to make it safe for the child to return home. Another example would be a discharge from foster care after the child has been formally adopted by the foster family.

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

When a child who is in alternative care reaches 18 years of age, he or she is allowed to remain at the facility until the end of that calendar year. A child may also request authorisation from the Minister to remain at the facility until the end of the calendar year in which he or she turns 21, if the alternative care-giver is willing to continue the placement and if the continued stay is necessary to allow the child to complete education or training.

ISSUES FOR DISCUSSION

- ☉ Are there any problems with the current operation or management of child care facilities in Namibia?
- ☉ What kind of monitoring and inspections should take place?
 - ☉ What government officials should inspect child care facilities?
 - ☉ Should some types of facilities for the care of children receive more monitoring than others?
 - ☉ How often should a social worker monitor the situation of an individual child who has been placed in alternative care?
- ☉ Does the list of minimum standards cover all the basic requirements that every child care facility should provide? Is anything missing from the list?
- ☉ Is it practical for child care facilities to renew their registration once a year?
- ☉ If a child is discharged from an alternative care placement to return home, is there a need for some ongoing monitoring or supervision to make sure that the child remains safe?
- ☉ Should the law provide for any specific measures to help children with the transition to independent living when they leave alternative care facilities at age 18 or 21?
- ☉ Should shelters which provide temporary accommodation for abused women be registered under this law (since such shelters sometimes allow children to accompany their mothers)?

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FOSTER CARE

There are approximately 14 000 Namibian children in foster care. Most of these children are being cared for by extended family members, often for long time periods. When a child is cared for by a relative or a close family friend, this is sometimes called kinship care. Kinship care is very important in Namibia and has strong cultural value. The United Nations Convention on the Rights of the Child also says that care by extended family members is the next best option if parental care is not possible.

The current law is based on a different vision of foster care. It is based on the idea that foster care is when people who are strangers to a child take care of the child for a short temporary period, until the child can either return home or be placed for adoption.

Proposed law

Like the current law, the proposed law has only one category of foster care, regardless of whether it is short-term or long-term, and regardless of whether it involves extended family members or others.

In terms of the proposed law, prospective foster parents must apply through a social worker to the Ministry of Gender Equality and Child Welfare. The social worker must examine their circumstances and make a report. Children can be placed in foster care only after they have been found by the court to be in need of protection, on the basis of another social worker report.

In most cases, a foster parent may foster only three children, unless the children are siblings or there is another good reason to allow care of more children. Children must normally be placed with foster parents of the same culture, religion and language as the child. Foster parents must be monitored at least every two years by social workers, even if the foster placement has been made permanent. This means that a relative who is caring for a child as a “foster parent” would be monitored by a social worker even if the child had been living with the family for many years.

The division of rights and responsibilities between the child’s parents or guardian and the foster parent will be determined by the initial placement order, or by an agreement made between the foster parents and the biological parents. This proposal is a change from the current law, which gives foster parents automatic powers to make all day-to-day decisions concerning the child.

Under the proposed law, a foster parent has the power to give permission for medical treatment if the child is not old enough to consent. But a foster parent cannot authorise a surgical operation or allow a foster child to leave Namibia without permission from a biological parent, the Minister or a Children’s Court.

ISSUES FOR DISCUSSION

☉ **Should there be separate definitions and provisions for short-term foster care, long-term foster care and kinship care?**

- ☉ should there be a simpler process to approve kinship care?
- ☉ should there be less monitoring of kinship foster care by social workers?
- ☉ should there be less monitoring of permanent foster care placements than of temporary ones?

Different application and monitoring processes for different categories of foster parents might help reduce the burden on social workers.

☉ **What should the law say about decision-making by foster parents?**

- ☉ what decisions should foster parents be able to make about a child?
- ☉ what decisions should only the biological parents/court be able to make?
- ☉ should a permanent foster parent have different rights and responsibilities from a temporary foster parent?

☉ **What should be the maximum number of children fostered by one person or couple?**

Foster care grants

The rules and regulations for grants for children in Namibia are complicated:

- ☉ A biological parent can get a state maintenance grant if the other parent is dead, in prison or receiving an old age pension or disability grant and the income of the parent making the application is less than N\$1000/month. This grant is N\$200/month for the first child and N\$100/month for each additional child up to a total of six children.
- ☉ A foster parent can get a grant of N\$200/month for the first foster child and N\$100/month for each additional foster child. There is no means test.
- ☉ People who adopt children are not eligible for any grants.

The examples below illustrate some of the difficulties which can arise within this system:

Sarah has been living with her aunt Ruth for 10 years. Ruth has a good job and has plenty of money for luxuries. After 8 years, Ruth registers as a foster parent and receives a foster care grant for Sarah.

Simon works as a security guard. He and his wife have 3 children. They struggle to buy food and clothes for their family. Simon often goes hungry so that he can provide food for his children. There are no grants which apply to this family's situation.

Samuel is an orphan. He lives with his grandparents. His grandparents are registered as foster parents and receive a grant to care for Samuel. They want to adopt Samuel but cannot afford to look after him without the foster care grant.

While some people will become foster parents out of a sincere desire to help children, it is possible that some people might seek to become foster parents for a child just because of the foster care grant.

ISSUES FOR DISCUSSION

- ☉ Do foster grants affect people’s decisions about whether or not to foster a child?
- ☉ Should foster grants be means-tested or should they be available to all foster parents?
- ☉ If the foster care grant was abolished or provided only to very poor households, would fewer people be willing to act as foster parents?
- ☉ Should relatives who are acting as foster parents
 - ☉ receive the same foster care grant as any other foster parents?
 - ☉ receive a lower foster care grant than strangers who care for a child?
 - ☉ receive no foster care grant?
- ☉ Foster parents can receive grants while adoptive parents cannot. Does this discourage foster parents from adopting children?
- ☉ Should there be a limit on the time period that foster parents can receive grants or should foster care grants continue until the child turns 18 (or 21)?
- ☉ Instead of foster care grants, should there be a general child maintenance grant for anyone who is caring for a child on a long-term basis? If this approach were adopted, should the grant be available only to households with incomes below a certain amount, or to all children in certain age groups?

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ADOPTION

Article 14 of the Namibian Constitution says:

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

Adoption is a valuable way of affording children the benefits of family life which might not otherwise be available to them. However, only a small number of Namibian children (about 80) are adopted each year. In comparison, as of February 2009, there were almost 14 000 children in foster care. Are the rules and regulations associated with adopting a child in Namibia too difficult or are there other reasons why adoption is not common in Namibia?

Who should be able to adopt a child?

The draft Child Care and Protection Act proposes that the following people should be able to adopt a child:

- ☉ a husband and wife who are unrelated to the child
- ☉ a step parent (a person married to one of the child's parents)
- ☉ the foster parent/s of the child
- ☉ a widow or widower
- ☉ a divorced or unmarried person
- ☉ a person related to the child.

In Angola, a single person or a couple may adopt a child. The couple does not have to be married to become joint adoptive parents. In contrast, only married couples in Chile may adopt a child. In Kenya, a single parent may adopt a child of the same sex. What should Namibia do?

How old should an adoptive parent be?

The draft Child Care and Protection Act says that an adoptive parent should be over the age of 18. It does not say whether there should be a specific age gap between the adoptive parent and the child. The current law in Namibia (the Children's Act of 1960) says that an adoptive parent must be 25 years old unless the adoptive parent is a relative or step-parent of the child. The Children's Act also requires there to be 25-year age gap between the adoptive parent and the child in some cases, such as where unmarried persons adopt children of the same sex.

Kenya and Ghana require that adoptive parents be at least 25 years old and at least 21 years older than the child if they are unrelated to the child. Burundi requires a 15-year age gap for non-relatives. Russia requires no age gap for adoption by married couples, but a single person who adopts a child must be more than 16 years older than the child. Some countries also apply maximum ages for adoptive parents – for example, the maximum age is 65 in Kenya and 60 in Greece. What should Namibia do?

What about cultural and religious values?

The draft Child Care and Protection Act proposes that a child in any of the following circumstances may be adopted:

- ☉ the child has no parent, guardian or caregiver who is willing to adopt the child OR
- ☉ the whereabouts of the child's parent or guardian cannot be established OR
- ☉ the child has been abandoned OR
- ☉ the child is in need of a permanent alternative placement.

The draft law says that the child's identity, language and cultural and religious ties must be preserved as far as possible in an adoption. While this standard is important, it should not be forgotten that the most important criteria should always be the child's best interests.

For example, suppose that a child has formed a very strong bond since birth with close family friends who are from a different cultural and language group. If this child's parents are killed in a car accident and there are no close extended family members, it might be in the child's best interests to be adopted by the close family friends despite their cultural differences.

Who should consent to a child being adopted?

The draft Child Care and Protection Act says that consent to an adoption must normally be given by both parents, regardless of whether the parents are married. But consent of a single father is required only where he has already acknowledged that paternity (such as by paying maintenance or being named as the father on the child's birth certificate). Consent is also **not** required from a parent who –

- ☉ is mentally incompetent to give consent
- ☉ has abandoned the child
- ☉ cannot be found or identified after reasonable efforts
- ☉ has abused or neglected the child
- ☉ has allowed the child to be abused or neglected
- ☉ has consistently failed to fulfill parental responsibilities towards the child during the last year
- ☉ has failed to respond to a notice of the proposed adoption within 30 days of receiving it.

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. Before making this decision, the court must take into account the relationship between the parent and the child over the last two years and their potential for a good future relationship.

Deciding to put a child up for adoption is a difficult decision. Therefore there is a 60-day "cooling-off period" after consent has been given. The child would normally live with the adoptive parents during this time, but could be returned to the birth parents if consent to the adoption is withdrawn.

Arguments **against** a 60-day cooling-off period:

- ☉ the uncertainty during this period is traumatic for both adoptive and birth parents
- ☉ the waiting period can hamper bonding between the adoptive parents and the child
- ☉ the same objective could be served by counselling the birth parents, to ensure that they have considered their decision thoroughly

Arguments **for** a 60-day cooling-off period:

- ☉ the circumstances of the birth parents might change and cause them to want to withdraw their consent
- ☉ social workers can observe the placement to see if proper bonding has taken place before the adoption is final
- ☉ a lifetime decision like adoption should be carefully considered, after adequate counselling

One compromise might be a shorter waiting period, such as 30 days.

Does the child have a role in the decision?

If the child is 14 years or older, and of sufficient maturity and stage of development to understand what is happening, 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.

How should intercountry adoptions be managed?

Intercountry adoption 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 to adopt children has led to problems such as child trafficking and baby markets. With the HIV/AIDS epidemic affecting many countries, intercountry adoption is seen by some people as a way of providing for the best interests of orphans in situations where extended family links have broken down or the extended family is already overstretched.

Concerns about these problems led to the Hague Convention on Intercountry Adoption, an international agreement first signed in 1993. It provides procedures for intercountry adoption aimed at preventing abuses like abduction, exploitation, sale or trafficking of children. The agreement requires that countries can consider intercountry adoption only after exploring options for placing the child within the child's home country. It is designed to make sure that intercountry adoptions are child-centred rather than adult-centred.

Many countries have signed this agreement. Namibia has not yet signed the agreement but may do so in the future. The High Court of Namibia ruled in 2004 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. The Hague

Convention would provide a framework for intercountry adoption which would protect the best interests of Namibian children.

Some countries require that foreigners who want to adopt must establish some link to the child's home country. For example, some countries require foreigners to reside in the child's home country for certain time periods before the adoption can be finalised: 1 month in Madagascar, 3 months in Kenya, 12 months in Zambia and 3 years in Uganda (although the court makes exceptions to this rule where it is in the child's best interests). What should Namibia do?

ISSUES FOR DISCUSSION

- ☉ Why are so few children adopted in Namibia? Is there a need for some other option of permanent care, which does not require the end of all legal ties between the child and the child's birth parents?
- ☉ Should single people be allowed to adopt children of the same sex?
- ☉ Should unmarried couples be able to adopt a child together? What about others who might want to adopt a child together, such as a brother and sister?
- ☉ Should there be a fixed minimum or a maximum age for an adoptive parent, or a fixed age gap between the adoptive parent and the adopted child? or should this be decided on a case-by-case basis?
- ☉ Should the consent of both biological parents be required if they are not married? What rules should be applied to ensure that a parent who is not actively involved in a child's life does not block an adoption unreasonably?
- ☉ Should there be a cooling-off period during which the birth parent can withdraw consent to the adoption? If so, how long should this period be?
- ☉ How can a Namibian child's cultural connections best be preserved in cases where an intercountry adoption is determined to be the best option for the child?

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CHILD TRAFFICKING

“Child trafficking” is moving a child from one place to another for the purpose of exploitation, such as sex work or forced labour. This movement can be within a single country or between different countries. Factors such as poverty, crime and violence can contribute to child trafficking. Where such problems are present, the parents or the child might think that the move will be the only option the child has for a “better” life – such as access to better education or a chance to earn some income.

A few cases of child trafficking have been reported in Namibia, although not through organised networks. It is common for family members to be involved in the movement of children. For example, it appears that children have been brought into Namibia from Angola and Zambia to herd livestock or do domestic work. It also appears that some children are being moved within the country to care for livestock, do road construction, make charcoal or sell food. Some children may even be forced into commercial sex work.

The proposed Child Care and Protection Act

The United Nations Convention on the Rights of the Child and a number of other international agreements say that child trafficking should be prevented. In line with these agreements, the proposed Child Care and Protection Act makes trafficking of children a crime.

The draft Child Care and Protection Act 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 Namibia –

(i) by any means, including the use of threat, force or other forms of coercion, abduction, fraud, deception, abuse of power or the giving or receiving of payments or benefits to achieve the consent of a person having control of a child; or

(ii) due to a position of vulnerability,

for the purpose of exploitation.

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

This provision will include trafficking for purposes such as:

- ⦿ prostitution or other forms of sexual exploitation
- ⦿ forced labour or services, prohibited child labour or other economic exploitation
- ⦿ slavery or practices similar to slavery, including debt bondage or forced marriage
- ⦿ servitude
- ⦿ the removal of any body parts.

It is a crime for individuals or companies to assist in any way with child trafficking, such as by providing accommodation for children who are being trafficked or supplying information to potential traffickers.

The proposed law also provides for assistance to children who are victims of trafficking, including steps to return children who have been moved across borders to their home countries, safely and with the least possible trauma.

To help prevent child trafficking, the proposed law makes it a crime to remove a child from the care of anyone who is lawfully caring for the child (such as the parent or caregiver). It is also a crime to detain a child in order to keep the child away from a parent or another lawful care-giver. Another preventative measure is that it is illegal to take a child out of Namibia without consent from both the child’s parents, or permission from a Magistrate’s Court (if the parents are not available or are unreasonably withholding consent).

Special reporting requirements

Namibia’s current law (the Children’s Act 33 of 1960) has special reporting requirements for children under the age of 7 who are living apart from their parents or extended family members for longer than 30 days. The person caring for the child must inform a Commissioner of Child Welfare (a Magistrate). The proposed Child Care and Protection Act has no such requirement. One issue to consider is whether a similar reporting requirement should be included in the new law, to help prevent child trafficking, illegal adoption practices or other dangers to children.

ISSUES FOR DISCUSSION

- ⦿ What should be done to assist children who are victims of trafficking?
- ⦿ What should happen when a parent or another family member trafficks a child for their own profit or benefit?
 - ⦿ Should family members be treated more leniently if they really believed that their actions would give the child better opportunities?
 - ⦿ What if they were motivated by desperate poverty?
- ⦿ Should there be a special reporting requirement for children who are not living with immediate or extended family members?
 - ⦿ Would such a requirement serve a useful purpose?
 - ⦿ How could it be enforced?
 - ⦿ If such a provision were included in the law, what age groups of children should be covered?
- ⦿ Does the law need to say anything else about child trafficking?
- ⦿ Child trafficking in Namibia is fortunately not yet a widespread problem. What other steps can Namibia take to prevent future child trafficking?

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YOU CAN HELP IMPROVE THE PROPOSED CHILD CARE AND PROTECTION ACT

The Ministry of Gender Equality and Child Welfare wants to make sure that the planned Child Care and Protection Act will be appropriate to the issues faced by children in Namibia today. To do this, the Ministry needs your input.

We will be providing information about the proposed new law in newspapers, on radio, through community organisations and through workshops in different parts of the country.

We want you to tell us about the problems faced by children in your community. We want your opinions on the proposals for the new law. We want to know if you identify other issues that should be included in the law.

A second booklet on the Child Care and Protection Bill is also available.

BOOKLET 1:

1. Overview of the proposed Child Care and Protection Act
2. Overall objectives and guiding principles
3. Definition of "child"
4. Children's courts
5. Prevention and early detection services
6. Children in need of protection
7. Facilities for the care of children
8. Foster care
9. Adoption
10. Child trafficking

BOOKLET 2:

1. Overview of the proposed Child Care and Protection Act
2. Child Welfare Advisory Council
3. Children's Ombudsman
4. Parenting plans
5. Corporal punishment
6. Child Protection Register
7. Consent to medical procedures
8. Other child protection measures
9. What is missing (Part 1)
10. What is missing (Part 2)

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For more information on the draft Child Care and Protection Act, contact:

Ministry of Gender Equality and Child Welfare (061-2833111) or

Legal Assistance Centre (061-223356).

Fact sheets and booklets developed by the **Ministry of Gender Equality and Child Welfare**, facilitated by the **Legal Assistance Centre** and supported by **UNICEF**

