



THE DRAFT CHILD CARE AND PROTECTION ACT

Issues for Public Debate

Booklet 2



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 This law is very outdated.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

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"? (Booklet 1, Fact Sheet 2)	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? (Booklet 1, Fact Sheet 3)	children's courts: measures to make court proceedings more comfortable for children and to ensure that children can participate in decisions that affect them (Booklet 1, Fact Sheet 4)
prevention and early intervention services: services to help families address problems that may harm children, before they become too serious (Booklet 1, Fact Sheet 5)	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 (Booklet 1, Fact Sheet 6)	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 (Booklet 1, Fact Sheet 8)
facilities for the care of children: facilities which must be registered under the new law (1) places of safety: places where children can stay temporarily in emergencies (2) children's homes: institutions which provide residential care for children (3) educational and vocational centres: more secure institutions suitable for children with behavioural problems or young offenders (4) shelters: places which provide services and overnight accommodation for street children and other children in need (5) places of care: places which provide short-term care, such as crèches and day-care centres (Booklet 1, Fact Sheet 7)	adoption: rules, procedures and safeguards for adoption of children by Namibians and citizens of other countries (Booklet 1, Fact Sheet 9)	child trafficking: measures to protect children who are moved from one place to another for the purpose of exploitation (Booklet 1, Fact Sheet 10)
Child Welfare Advisory Council: a group of experts appointed by government to monitor the implementation of the law and advise on child rights issues (Booklet 2, Fact Sheet 2)	Children's Ombudsman: a new government official who would investigate and act on complaints about abuses of children's rights (Booklet 2, Fact Sheet 3)	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 (Booklet 2, Fact Sheet 4)
corporal punishment: guidelines to help parents and other care-givers apply discipline without being abusive (Booklet 2, Fact Sheet 5)	Child Protection Register: a proposal to establish an official record of child abuse incidents and individuals who are not suitable to work with children (Booklet 2, Fact Sheet 6)	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? (Booklet 2, Fact Sheet 7)
other child protection measures: protective measures for children in particularly vulnerable situations (1) child-headed households: rules to support and protect households where there is no responsible adult to take care of the children (2) worst forms of child labour: offences aimed at preventing the sexual and economic exploitation of children (3) child safety at places of entertainment: safety measures at events likely to be attended by large numbers of children (4) crimes relating to child abuse and neglect (Booklet 2, Fact Sheet 8)		

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:

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CHILD WELFARE ADVISORY COUNCIL

What is the Child Welfare Advisory Council and what would it do?

A Child Welfare Advisory Council would be a government-appointed body with the task of promoting the rights and interests of children in society. It would be somewhat similar to Namibia's Labour Advisory Council which advises on issues relating to the Labour Act.

The draft Child Care and Protection Act gives the following key functions to the Child Welfare Advisory Council:

- to advise the Minister of Gender Equality and Child Welfare on child welfare services
- to advise any government body involved in implementing the Child Care and Protection Act
- to recommend new laws or amendments to existing laws on child welfare
- to design programmes for the protection or care of children
- to monitor the implementation of the Child Care and Protection Act and related laws
- to encourage the involvement of non-governmental organisations and members of the community at large in matters relating to child welfare.

Every government ministry that performs work related to child welfare would submit a report on its implementation of the Child Care and Protection Act to the Council each year. In turn, the Council would submit an annual report to the Minister of Gender and Child Welfare. This report would also be tabled in Parliament. Through this reporting system, the Child Welfare Advisory Council would monitor the national implementation of the Child Care and Protection Act and related laws.

Who would be on the Child Welfare Advisory Council?

The draft Child Care and Protection Act says that the Council would be composed of 15 members appointed by the Minister of Gender and Child Welfare:

- 8 government stakeholders
- 4 private sector stakeholders
- 3 community stakeholders.

The chairperson is chosen by members of the committee. At least eight members of the Council must be women. The basic terms of office are three years, with the option of re-appointment.

The public stakeholders would be chosen from a list of nominations submitted by interested parties to the Ministry of Gender and Child Welfare. This means that representatives from churches or traditional authorities may be chosen to sit on the council, but this is not guaranteed. Some countries make sure that certain interest groups are represented, by requiring that some Council members are drawn from churches, traditional authorities, social services and sometimes international agencies such as UNICEF.

What do other countries do?

Kenya, Zimbabwe and Sierra Leone are examples of African countries with councils on children's services. Zimbabwe's council has a budget and can fund activities and programmes relating to child welfare. Kenya's council is involved in planning, financing and co-ordinating child rights and welfare activities and can make regulations. The council in Sierra Leone has supporting structures in each village and chiefdom. Should Namibia's council draw on any of these examples?

QUESTIONS ABOUT THE PROPOSED CHILD WELFARE ADVISORY COUNCIL

Does Namibia need a Child Welfare Advisory Council?

- Are there any existing bodies which could carry out the proposed functions and duties of this Council? Or is it best to have a new body focusing only on children's rights?
- If Namibia establishes a Children's Ombudsman, will there be duplication between the roles of this official and the Child Welfare Advisory Council?

Should the Child Welfare Advisory Council have more specific functions? Should it have stronger powers?

- Should the Act specify the representation of particular stakeholders, such as traditional leaders, churches, social workers, NGOs or international agencies such as UNICEF?
- Should there be specific structures at the regional or local level to help implement and support the work of the Council, or are there existing structures which can play this role in Namibia?

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A CHILDREN'S OMBUDSMAN

What is an Ombudsman?

The Ombudsman is an independent public official that investigates complaints against government agencies, officials and employees. An Ombudsman may also conduct research and make recommendations about how to protect constitutional rights. The Ombudsman must be impartial.

Does the Ombudsman work for the government?

The Ombudsman is appointed by government, but makes independent decisions (like a judge). Government, political parties and individuals are not allowed to interfere with the work of the Ombudsman.

What is a Children's Ombudsman?

A Children's Ombudsman protects and promotes the rights and interests of children in society. Many European countries have Children's Ombudsman offices. Mauritius is the only African country to have a Children's Ombudsman, although many other African countries have more generalised agencies which fulfil a similar role.

What would the Children's Ombudsman do?

The draft Child Care and Protection Act says that the Children's Ombudsman would have two main roles:

- (1) investigating complaints about anything related to the Child Care and Protection Act;
- (2) monitoring the implementation of the United Nations Convention on the Rights of the Child and other international agreements on child welfare which Namibia has signed.

The Children's Ombudsman could also be given other tasks. For example, the Children's Ombudsman could monitor the general implementation of the Child Care and Protection Act as well as investigate specific complaints. The Children's Ombudsman could also have more general and proactive involvement in the promotion of children's rights.

Some countries give their Children's Ombudsman the power to bring court cases on behalf of children. They use this power for influential "test" cases aimed at changing legislation, policy, or state practice.

Appointment

The draft Child Care and Protection Act says that the Children's Ombudsman will be appointed by the Minister of Gender Equality and Child Welfare. Currently the draft law does not specify any qualifications, criteria or term of office. Namibia's general Ombudsman holds office until retirement. The African Ombudsman Association recommends a four-year term of office, with a maximum of one re-appointment.

Structure

Namibia already has a general Ombudsman, so it is necessary to decide how the two officials could work together. Maybe they could make use of the same regional offices or even share staff and budgets to some extent. They should probably have similar powers to question people and carry out investigations.

DOES NAMIBIA NEED A CHILDREN'S OMBUDSMAN?

Arguments *for* having a Children's Ombudsman

- It is important to have a special official to monitor children's rights to ensure that children receive adequate protection.
- Since there is already a general Ombudsman in Namibia, the Children's Ombudsman could utilise existing structures and networks. This would reduce start-up costs.

Arguments *against* having a Children's Ombudsman

- There is no need for a special Children's Ombudsman as the general Ombudsman could fulfil this role.
- Many other countries do not have a special Children's Ombudsman.

Issues for discussion

- Would a Children's Ombudsman be useful in Namibia?
- What qualifications should a Children's Ombudsman have?
- What should the term of office be?
- Should the Children's Ombudsman have a narrow role (focused on investigating specific complaints) or a broad role (general monitoring, research and recommendations)?
- What should the duties of the Children's Ombudsman be?
- How could the Children's Ombudsman and Namibia's general Ombudsman work together?

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PARENTING PLANS

Protecting the best interests of a child

Sometimes more than one person has responsibility for a child, and in some cases this can lead to conflict. It may be that the child's parents cannot agree. It may be that the child is in the care of someone other than the parents, such as a grandmother or a close family friend or foster parents. To help protect the best interests of the child in such situations, the draft Child Care and Protection Act provides for **parenting plans**.

What is a parenting plan?

A parenting plan is an agreement that can cover any aspect of parental authority. It might be an agreement between parents, or it might involve extended family members or others who help care for a child. A parenting plan might include agreements on:

- ☉ where and with whom the child lives;
- ☉ payment of maintenance;
- ☉ maintaining contact with the child;
- ☉ schooling and religious upbringing of the child.

Parenting plans are optional and voluntary. They may not be needed in all situations.

Why are parenting plans needed?

Parenting plans are intended to help prevent disputes. Parenting plans can help families make decisions before problems occur, to reduce the potential for conflict and protect the best interests of the child.

One reason to make a parenting plan could be if the parent of the child is not taking care of the child on a daily basis. For example, it might be useful to have an agreement between the parents of a child and the grandmother who is taking care of the child while the parents are working in the city:

Peter and Mary have a daughter. The daughter is living with Mary's mother. Peter, Mary and Mary's mother make an agreement saying that Peter and Mary will both contribute to the child's maintenance. The agreement says that Mary's mother must consult Peter and Mary before she decides on a school for their daughter, and it says how often they will both visit.

Parenting plans could be used by parents who have divorced, so they can continue to co-operate in raising their children. They could also be used by unmarried parents to decide on each parent's role in the child's upbringing. The draft Child Care and Protection Bill does not currently provide sufficient information on who can make parenting plans.

How should a parenting plan be made?

The draft Child Care and Protection Act currently says that if the care-givers of a child want to make a parenting plan, they **must** get help from a lawyer, social worker or psychologist, and they **must** ask a social worker or another suitably qualified person to talk through the issues with them 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. The people who make the plan do not have to register it if they do not want to, but making it into a court order could help with enforcing it.

Making the agreement formal by writing it down will help if someone later wants to argue about what was agreed. But getting help from a lawyer, social worker or psychologist may be difficult for many people in Namibia.

Enforcement of parenting plans

The draft Child Care and Protection Act does not currently provide sufficient direction on how parenting plans would be enforced. The Children's Status Act 6 of 2006 already provides procedures for dealing with disputes between unmarried parents about custody, guardianship and access. These are designed to be simple and inexpensive procedures which do not require a lawyer. One option would be to have similar procedures in the Child Care and Protection Act. It would probably be easiest for both members of the public and children's court personnel if there is one basic procedure for addressing family disputes of a similar nature.

SHOULD NAMIBIA INTRODUCE A SYSTEM FOR MAKING PARENTING PLANS?

Some arguments *for* parenting plans:

- ☉ A parenting plan will help define roles and responsibilities where more than one person is involved in caring for a child – especially where the people involved are not all living in one household.
- ☉ A parenting plan will help prevent disputes, which can be upsetting to children and may even lead to violence.
- ☉ A parenting plan provides a summary of issues related to parental roles and responsibilities. This is useful as the issues involved in parenting are covered in many separate laws.

Some arguments *against* parenting plans:

- ☉ The draft Act currently requires everyone to seek professional assistance in making a parenting plan, even if they have no serious disagreements. Many people in Namibia do not have the means to do this.
- ☉ Many families may not feel confident about writing down a parenting plan.
- ☉ Parenting plans will be difficult to enforce. This means there may be little point to completing one in the first place.

Issues for discussion:

- ☉ Would parenting plans be useful?
- ☉ Who shares parenting duties in Namibia?
- ☉ Who should be able to take part in making a parenting plan?
- ☉ Who can help people make parenting plans?
- ☉ Should parenting plans be formally registered? With whom?
- ☉ How could registered parenting plans be enforced?

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CORPORAL PUNISHMENT

What is corporal punishment?

Corporal punishment is when a person in authority uses physical force with the intention of causing pain for disciplinary purposes. Corporal punishment of children usually includes things like smacking, slapping, spanking or beating with the hand or with some implement (like a stick or a belt). It can also involve other things, like kicking, shaking, pinching or burning.

Discipline is meant to teach a person the difference between right and wrong, not to cause injury. There is no need to inflict pain to discipline a child. There are many other forms of discipline which are much more effective.

The use of corporal punishment is not permitted in Namibian schools, although some instances of it are still reported. The Namibian Supreme Court ruled that corporal punishment in schools is a violation of children's constitutional right to human dignity.

Corporal punishment is used in many homes. There have been cases in Namibia where excessive physical force has been used against children in the home. There are cases where children have been seriously injured or burned. Some children have even been beaten to death.

Rights that are affected by corporal punishment

- ☉ right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment
- ☉ right to be protected from violence and abuse
- ☉ right to development, including the right to the highest attainable standard of physical and mental health
- ☉ right to dignity and bodily integrity.

The proposed Child Care and Protection Act

The law on corporal punishment in the home is being revised because:

- ☉ Children in Namibia have been seriously injured and killed by “punishment”.
- ☉ The Namibian Constitution says that “no persons shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.” This includes children.
- ☉ Namibia has signed international conventions which require that the use of corporal punishment be addressed.

The draft Child Care and Protection Act says that any person who has control of a child, including the child's parents, must respect a child's right to physical integrity. Respecting physical integrity means preventing bodily injury. This means that the punishment of a child should not include corporal punishment.

The new law would also outlaw the use of physical force to punish a child at any facility which cares for children (including children's homes, crèches and day care centres).

Why is corporal punishment a problem?

Corporal punishment can turn into serious physical abuse.	Children who are exposed to violence are more likely to be violent as adults.
Corporal punishment teaches children that violence is an acceptable way of dealing with issues.	Corporal punishment does not teach children the reason why their behaviour was wrong.
Corporal punishment teaches children that it is okay to use violence against someone you love.	Corporal punishment can affect self-esteem by making the victim feel scared, sad, ashamed or worthless.
Corporal punishment makes children more aggressive towards other children.	Corporal punishment can destroy the relationship between a child and the child's parents or caregiver.

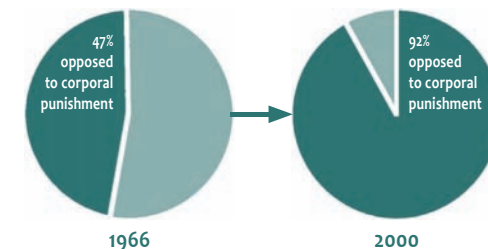
Child discipline is very important – without it, society would have many problems. The question is **what kind** of child discipline is most effective.

The aim of these provisions is to encourage people who care for children to use other forms of discipline. The law is not intended to authorise prosecution of parents for minor issues.

What do other countries do?

At least 25 countries have banned all forms of corporal punishment, including corporal punishment in the home. Sweden was the first country to outlaw all corporal punishment and other humiliating treatment of children. The new law helped produce a dramatic change in public opinion.

Legal restrictions on corporal punishment of children imposed in Sweden beginning in 1979 gradually helped change public attitudes, so that more people became opposed to corporal punishment.



Alternatives to corporal punishment

There are many other ways that children can be punished. Here are four examples:

- (1) **Explain the problem.**
- (2) **Make children take responsibility for their actions:** For example, if the child breaks something, he or she must fix it.
- (3) **“Time out”:** Sometimes children become overexcited and this can lead to bad behaviour. It can be effective to take the child out of the room – to calm down, sit quietly and think about what he or she has done wrong.
- (4) **Take away privileges:** The punishment could be not watching television, not being allowed to visit friends or not receiving pocket money.

ISSUES FOR DISCUSSION

- ☉ What should the new law say about how children should be punished?
- ☉ If minor physical punishment such as spanking is still allowed, how can children be protected from physical abuse? For example, some countries prohibit “the use of force” or “violence” against children, or any form of discipline which causes “physical or psychological harm”.
- ☉ What is the best way to raise public awareness of alternative forms of discipline which are more effective and better for children?

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NATIONAL CHILD PROTECTION REGISTER

The draft Child Care and Protection Act proposes the initiation of a National Child Protection Register. This register would list all known perpetrators of child abuse. The aim of the list would be to ensure that offenders do not work with children in the future. The register would be maintained by the Ministry of Gender Equality and Child Welfare and would be similar to sex offender registers which are used in some countries.

A person whose name is on the list would be prohibited from working in an institution which provides welfare services to children. Working in these institutions in any capacity would be forbidden, regardless of whether or not the person in question would come into direct contact with children. Institutions would have a duty to check the register before accepting staff or volunteers. A person listed in the register would also be prohibited from becoming a foster parent, adoptive parent or “family care-giver”.

No one would be allowed to disclose names or other information in the register except as part of an official legal duty (such as to confirm whether a prospective employee is on the register).

The Register would contain the following information:

NATIONAL CHILD PROTECTION REGISTER

- ⑨ Full name, last known physical address and identification number
- ⑨ Fingerprints
- ⑨ A photograph of the person
- ⑨ A summary of the reasons why the person has been found unsuitable to work with children
- ⑨ If the person in question was convicted of a criminal offence against a child, the following details will be recorded:
 - (a) the details of the offence
 - (b) the date of conviction
 - (c) the sentence imposed and
 - (d) the case number
- ⑨ Any other relevant information

Finding a person to be unsuitable to work with children

A person may be found unsuitable to work with children by any court or any forum which conducts disciplinary hearings (such as an employer or an educational institution). It is not necessary for a person to be convicted of a crime before being placed on the list. However, anyone convicted of certain crimes against a child would be automatically placed on the list: murder/ attempted murder, rape, sexual abuse or assault with an intention to cause serious physical harm. A person who is found to be unsuitable to work with children would have a right to appeal this finding in court.

Removal of name from the register

A person's name may be removed from the register if at least five years have passed since the entry was made and the person has been rehabilitated. A person's name cannot be removed if he or she has been convicted of more than one criminal offence against a child.

What do other countries do?

In Sierra Leone, the Child Rights Act 2007 requires police “to maintain a register of child abusers and to take special measures to protect children from such persons”. The South African government keeps two different Child Protection Registers: a) a record of abused or neglected children which is used to monitor specific children who may be at risk of further harm, and to provide a general picture of child abuse in South Africa which can guide future interventions; and b) a register of persons deemed unsuitable to work with children similar to the one proposed for Namibia. Hong Kong uses a much simpler system; there is no special record of offenders, but people who wish to work with children must provide a police clearance certificate.

The debate

There is intense debate about the value of Child Protection Registers which focus on offenders. Here are some of the key points of debate:

- ⑨ Such registers can be expensive. Funds will be required to create and maintain the database, and to familiarise groups which work with children about their new responsibility to check the register. Some people say that the money used to create such registers would be better spent on providing services to children who are at risk. On the other hand, the costs of establishing and maintaining a Child Protection Register might be outweighed by its benefits if it is effective in preventing future child abuse.
- ⑨ Registers place the focus on a small number of known offenders, while many child abusers go unreported and unnoticed. Children may be more at risk from persons living in their communities than from persons who are employed to work with children.
- ⑨ A Child Protection Register might be found unconstitutional on the grounds that it violates the right to privacy or the right to be free from discrimination.
- ⑨ Some people say that registers of offenders are not as useful as registers of children who are at special risk of harm because of past abuse or other circumstances, which can be used to make sure that these children are monitored closely.
- ⑨ Child Protection Registers may have more value in countries that have different courts and police systems in different states or regions, such as the United States of America. Namibia has a single justice system and a single police force. Namibia is also composed primarily of small communities where it is quite likely that a person's conviction for a child-related offence would be known in the community. Instead of establishing a Child Protection Register, it might make more sense for Namibia to focus its resources on creating a good system of computerised police and court records and requiring police clearance certificates for persons who work with children.

ISSUES FOR DISCUSSION

- ⑨ Has child abuse been committed by people who work with children in Namibia?
- ⑨ Are there other ways to identify persons who should not work with children, such as by checking their criminal records before they are hired? Please tell us which method of background checking you think would be most effective, and why.
- ⑨ Is it unfair to place an individual's name on a National Child Protection Register if the abuse has not been proved in court?
- ⑨ Should children who have abused other children also be placed on the list, or only adult abusers?
- ⑨ Is the information required for each person who would be listed in the proposed Child Protection Register too much? too little? correct?
- ⑨ How could someone who wants to have their name removed from the Child Protection Register show that they have been rehabilitated?
- ⑨ The draft law states that an abuser's name should be on the register for at least five years before it can be removed. Is this too long? too short? correct?

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CONSENT TO MEDICAL TREATMENT CONTRACEPTIVES AND TESTING

(1) Consent to medical treatment

The current age of consent for medical treatment and surgical operations is 18. However, the proposed Child Care and Protection Act would allow children to give consent to medical treatment if they are at least 14 years old AND mature enough to understand the benefits, risks, and implications of the treatment. In situations where an operation is required, the draft says that a child may also give consent at the age of 14 if he or she is mature enough – but in this case the parent or guardian must also give consent.

What do other countries do?

The age of consent to medical treatment is different in different countries. In South Africa the age of consent for medical treatment is 12, although the child must be sufficiently mature and a parent or guardian must also agree to surgical operations.

In Kenya, the age of consent is 15. Children in New Zealand can consent to treatment at 16, or earlier if they demonstrate sufficient maturity. In Zimbabwe, Mozambique and Zambia, the age of consent is 18.

Is 14 the right age to allow children to give medical consent? Sometimes it might depend on the situation. Consider the examples below:

- ☹ A 10 year-old boy is dying from cancer. He has one month left to live. Should he be allowed to decide on the treatment that he receives?
- ☹ A 17 year-old girl wants to have bigger breasts. Should she be allowed to decide to have cosmetic surgery?

There are several different options that could be written into the law:

1. Set a single age for all types of medical consent
2. Base the right to give medical consent on each individual child's capacity to understand.
3. Base the right to give medical consent on the child's age and capacity to understand.
4. Set different ages for different types of medical treatment.

(2) Access to contraceptives

The phrase “medical treatment” probably includes access to most contraceptives. This means that children under the age of 18 must currently get permission from a parent or guardian if they want a contraceptive. Access to male and female condoms may not be covered by this rule, but it does apply to contraceptive pills, injections, intrauterine devices (IUDs) and other forms of contraception. The new law would make 14 the age for access to contraceptives which qualify as “medical treatment”.

Should children be able to access contraceptives without the permission of their parents? At what age should they be able to do this? Some arguments for and against allowing children to have access to contraceptives are shown in the table below.

Young people SHOULD NOT have access to contraceptives

If children do not have access contraceptives, they will not have sex.

If parental consent is required, the parent can use the opportunity to educate the child about the risks associated with sex and help make sure that the child understands the medical risks associated with certain prescribed contraceptives.

Some contraceptives, such as the pill, can have health risks. Children will not understand these risks without parental guidance.

Children will not use contraceptives responsibly – they might forget to take the pill each day or put condoms on inside out.

Young people SHOULD have access to contraceptives

Many children will have sex regardless of whether or not they are able to access contraceptives.

If a child has to ask for parental permission, the child will not use contraception. This means the opportunity to discuss sex will never occur. Instead, the parent or care-giver should talk about safe sex at any suitable time. The child should also be able to get family planning information from the clinic.

The doctor prescribing the pill should explain the risks clearly and should not give the medication unless it is clear that the child understands the risks.

Children are having sex, so something needs to be done to protect them from pregnancy and sexually transmitted infections. They can be educated on contraceptive use through many different channels.

What do other countries do?

The age at which young people can access contraceptives is different in different countries. Ghana's policy is to provide contraceptives and reproductive health services to adolescents and to all couples engaging in sexual activity, regardless of age. In Zimbabwe, clinics are supposed to provide contraceptives to people over the age of 16. In South Africa children may have access to contraceptives from the age of 12; if they visit a clinic to request a prescription for contraceptives, they must also be given medical advice and a medical examination.

(3) Consent to medical testing

The draft Child Care and Protection Act proposes that children who are 14 years of age OR children who are mature enough to understand the implications may have an HIV test. This could mean that a mature 10 year-old would be allowed to consent to an HIV test. The draft law says that the test may only be given if the child receives proper counselling before and after the test.

What do other countries do?

In South Africa, a child over the age of 12 may consent to having an HIV test. In the United States of America, most states allow minors to consent to testing and treatment for all types of sexually transmitted infections. Some states specify that the minor must be a certain age (generally 12 or 14), although most do not set a specific age of consent.

Because Namibia's proposed law says a child can have a test at age 14 OR if the child is mature enough, this means that it is “easier” for a child to consent to having an HIV test than to consent to other medical procedures. Is this the correct approach?

The age of consent for an HIV test will not change the right of a parent or guardian to have a child tested for HIV. For example, even if a 9-year-old girl is not mature enough to make a decision to get tested by herself, her parents could give consent if a test is needed.

ISSUES FOR DISCUSSION

Age of consent for medical treatment

- ☹ Should the age of consent depend on (1) age (2) the maturity of each individual child (3) age plus maturity (4) type of treatment or (5) some other factor?
- ☹ If maturity must be assessed, who will decide? for example, will it be the doctor?
- ☹ If the law sets an age for consent to medical procedures, what should that age be?
- ☹ Should there be different rules for medical treatment and surgical operations?

Access to contraceptives

- ☹ At what age is a child old enough to make a decision about using contraceptives without the permission of a parent?
- ☹ Should there be different rules about access to condoms compared to access to other forms of contraceptives (such as the contraceptive pill)?

Consent to testing

- ☹ At what age should a child be able to consent to an HIV test without the permission of a parent?
- ☹ Should it be easier for a child to consent to having an HIV test compared to other medical interventions?
- ☹ Children may not want their parents to know about any medical issues which relate to sexual activity. Should there be similar provisions on pregnancy testing and testing for other sexually transmitted infections as for HIV testing?

WHAT DO YOU THINK?

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OTHER CHILD PROTECTION MEASURES

The draft Child Care and Protection Act includes provisions on the following issues:

1. child-headed households
2. worst forms of child labour
3. child safety at places of entertainment
4. crimes relating to abuse and neglect.

(1) Child-headed households

The proposed law identifies a child-headed household as a household where all three of the following 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.
3. A child has assumed the role of care-giver for some other child in the household.

When a child-headed household is identified, it must be placed under the supervision of an adult named by the Children's Court, or an adult named by a state agency or an NGO designated by the Minister. The child who heads the household may still make day-to-day decisions about the household and the children in it. Where adult intervention is required, the child who heads the household should be consulted. The other children in the household should also be consulted if they are mature enough to express a meaningful opinion. The designated state agency or NGO may collect and administer any grants to which the household is entitled. The draft law does not allow the individual adult who is supervising the household to administer the grant.

ISSUES FOR DISCUSSION

- ⦿ What criteria should be used to identify child-headed households?
- ⦿ What kind of special support does a child-headed household need?
- ⦿ Who should collect and administer grants for child-headed households?
- ⦿ What role should a supervising adult have?
 - ⦿ Should the adult be able to control the spending of a grant provided to the children?
 - ⦿ Should the children be able to make complaints about this adult if necessary? If so, to whom?

(2) Worst forms of child labour

Article 15 of the Namibian Constitution protects children against exploitative labour practices. Namibia has also signed the International Labour Organisation (ILO) Convention on the Prohibition and Immediate Elimination of the Worst Forms of Child Labour. In this Convention, the worst forms of child labour are defined as:

- ⦿ child trafficking and slavery
- ⦿ commercial sexual exploitation of children
- ⦿ children being used by adults to commit crime
- ⦿ work which is likely to harm the health, safety or morals of children.

The Labour Act 11 of 2007 gives effect to the Constitution and the ILO Convention. It is illegal to employ a child under the age of 14, and there are restrictions about the type of employment children allowed for children between the ages of 14 and 18.

The proposed Child Care and Protection Act would complement the Labour Act by providing additional provisions on the worse forms of child labour. These are worded in very general terms, without much definition or detail:

- ⦿ It would be a crime to offer or use a child for commercial sexual exploitation.
- ⦿ It would be a crime to offer or use a child for criminal activities, including drug production and trafficking.
- ⦿ It would be a crime to force a child to perform labour for any person, whether or not it is for reward.
- ⦿ It would be a crime to encourage or force a child to do work likely to harm the child's health, safety or morals or work that might interfere with the child's well-being, education, health or development.

ISSUES FOR DISCUSSION

- ⦿ What types of "work" or "labour" are children being forced to do in Namibia?
- ⦿ Should the law include specific offences relating to the use of children in pornography? child prostitution? any other specific forms of child sexual exploitation?
- ⦿ What types of public entertainment or profitable activities should parents be able to consent to for children (such as acting, modelling, advertisements, beauty pageants or other performances)?
 - ⦿ Should children be able to consent independently to such activities, and if so at what age?
 - ⦿ If such activities are allowed, should there be any legal requirement for the earnings to be held in trust for the children concerned (perhaps if the earnings exceed a certain amount), or used for their benefit?
- ⦿ What should happen in a case where a child is begging voluntarily (as opposed to being forced to beg)? What should happen if a child is accompanying a parent who is begging?
- ⦿ What should happen to a child engaged in informal work, such street trading?
- ⦿ Should there be specific rules about work performed by the child within the child's own family or household, if that work might be harmful to the child in any way?

(3) Child safety at places of entertainment

In certain circumstances, places of entertainment must take steps to ensure that children are entertained in a safe environment.

In situations where:

- ⦿ access to the venue involves stairs, escalators or lifts;
- ⦿ the majority of the people attending the entertainment will be children;
- AND
- ⦿ the total number of people in attendance (adults plus children) is expected to be more than 50.

The owner/entertainment provider must:

- ⦿ determine the maximum number of people who can be safely accommodated on the premises;
- ⦿ station a sufficient number of adult attendants to ensure that this maximum number is not exceeded; AND
- ⦿ control the movement of people while they are entering and leaving and take other reasonable safety precautions.

ISSUES FOR DISCUSSION

- ⦿ What events should be covered by rules designed to protect child audiences?
- ⦿ What steps should the host of the event be required to take to protect children?

(4) Crimes relating to abuse and neglect

The draft Child Care and Protection Act repeats the current law on abuse and neglect. It is a crime for a parent, guardian, care-giver or any person who voluntarily takes care of a child to abandon the child, abuse the child or deliberately neglect the child. It is also 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 the person has the means to provide these things.

ISSUES FOR DISCUSSION

- ⦿ Are there any other crimes against children which should be included in the new law?
- ⦿ Are there any other protective provisions which should be included in the new law?

**TELL US YOUR OPINION ON
CHILD PROTECTION MEASURES**



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WHAT ELSE SHOULD BE INCLUDED IN THE ACT?

Part 1

(1) Rights and responsibilities

Right and responsibilities go together. Some countries have decided to include children's responsibilities in their laws along with children's rights. For example, the Children's Act in Kenya includes a section on the responsibilities children have. The African Charter on the Rights and Welfare of the Child also includes sections on the responsibilities children should have. What should Namibia do?

Kenya's Children's Act 2001

This law says that a child has a responsibility to:

- ⑨ respect his parents, superiors and elders at all times and assist them in case of need;
- ⑨ serve his national community by placing his physical and intellectual abilities at its service;
- ⑨ preserve and strengthen social and national solidarity; and
- ⑨ preserve and strengthen the positive cultural values of his community in his relations with other members of that community.

ISSUES FOR DISCUSSION: Should the Child Care and Protection Act include a section on children's responsibilities? If so, what responsibilities should it include? How would this be enforced?

Some harmful traditional practices include:

- ⑨ female genital mutilation
- ⑨ some forms of ceremonial male circumcision
- ⑨ sexual initiation
- ⑨ child marriage and betrothal.

In Ghana, the Children's Act of 1998 states that *"No person shall subject a child to... any cultural practice which dehumanises or is injurious to the physical and mental well-being of a child"*. It also says that *"No person shall force a child to be betrothed, to be the subject of a dowry transaction or to be married."* Uganda makes it a crime to subject a child to harmful social and cultural practices in the Children Statute of 1996: *"it shall be unlawful to subject a child to social or customary practices that are harmful to the child's health"*. What should Namibia do?

ISSUES FOR DISCUSSION

- ⑨ What harmful cultural practices affect children in Namibia?
- ⑨ What should the new law say about harmful cultural practices?
- ⑨ Should the minimum age of 18 which applies to civil marriage be extended to all types of marriages? Why or why not?

(3) Baby-dumping and infanticide

Baby-dumping and infanticide are significant problems in Namibia, although we have no national statistics. While the killing of a baby is a crime, it can be difficult to judge these cases because of the complex physical, mental and emotional factors involved – such as a special form of depression that some new mothers experience. Some countries make infanticide a separate crime to murder. For example, in Zimbabwe a woman who kills her own child within six months of the child's birth *"at a time when the balance of her mind is disturbed as a result of giving birth to the child"* is guilty of infanticide rather than murder and is liable to imprisonment for a period not exceeding five years. This sentence is designed to provide a response to the crime while at the same time acknowledging that there may have been exceptional circumstances involved. Botswana and Lesotho also have separate offences of infanticide. What should Namibia do?

To adequately address the issue of baby-dumping and infanticide, additional measures are needed. Some countries, such as the United States, have enacted "safe haven" laws. The purpose of these laws is to encourage parents – usually mothers – to leave unwanted babies in a safe place (such as a hospital or police station) where the baby will receive proper care and protection until an adoptive home can be found. The objective is to prevent infants from being abandoned in circumstances which are likely to harm them, or cause their deaths. Safe haven laws generally allow the parent to remain anonymous.

Whilst safe havens laws are important if they can prevent even a small number of infants from being left to die, there can be some problems. What should Namibia do?

ISSUES FOR DISCUSSION

- ⑨ Should infanticide be a different criminal offence to murder?
- ⑨ Should Namibia introduce safe haven provisions into the new law? If so, what measures should be put into place to protect the rights of fathers and extended family members?

(4) Children and alcohol

Underage drinking is another significant problem in Namibia. For example, a Ministry of Health study found that amongst 13-16 year-olds, 11% of girls and 18% of boys use alcohol regularly. The same study found that over 28% of youths aged 13-30 drink alcohol weekly, and almost 7% drink alcohol daily. To address this issue, the draft Child Care and Protection Act could include amendments to the Liquor Act 6 of 1998 to make the current provisions clearer and to expand them to cover areas which are currently neglected:

1. Prohibit children under the age of 18 from being in certain types of drinking establishments except when accompanied by a parent or guardian.
2. Require alcohol sellers to confirm the age of the buyer by checking identification and strengthen penalties for presentation of false identification by the buyer.
3. Make alcohol suppliers and sellers legally obliged to check the age of the buyer through an identification check and strengthen penalties for presentation of false identification.
4. Clarify situations where alcohol can be supplied to persons under age 18 (for example as a religious sacrament, or in moderate amounts for older children drinking under parental supervision).
5. Prohibit manufacture of homebrew by children under age 18.
6. Define certain types of coerced, induced or permitted alcohol consumption by children as a form of child abuse by the adults who are involved.
7. Put in place more restrictive rules for persons under age 21 who drink and drive.

What should Namibia do?

ISSUES FOR DISCUSSION

- ⑨ Should the new law strengthen the provisions on underage drinking?
- ⑨ If an adult coerces, induces or permits a person under age 18 to consume alcohol, should this be considered child abuse?
- ⑨ Should there be a more restrictive provision on drinking and driving for young drinkers, such as those under age 21?

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Limitations of safe haven laws

- ⑨ The law could deprive biological fathers of their legal right to care for their children, as the infant may be left without their knowledge.
- ⑨ The children who are left at safe havens may never know their family histories. Extended family members are also prevented from having the chance to care for the child in question.
- ⑨ Mothers who intend to leave their infants at a safe haven may conceal their pregnancies and give birth in unsafe circumstances instead of seeking appropriate pre-and post-natal care.

Advantages of safe haven laws

- ⑨ Combined with public awareness campaigns, they can help to reduce the number of infanticides and backstreet abortions.
- ⑨ Once a baby has been dropped, many safe havens advertise for fathers who might suspect a baby is theirs to come forward. This gives fathers a chance to care for their children.

(5) International abduction

One form of international abduction can happen when the parents of a child part company, and one parent takes the child out of the home country without the permission of the other. The Hague Convention on the Civil Aspects of International Child Abduction is an international agreement that facilitates the rapid return of abducted children under age 16 to their home country in these circumstances. The court in the child's home country can then decide disputes between the parents on custody and access. Namibia has not yet signed this agreement but may sign it soon. Signing this Convention would promote international cooperation to assist in cases of international abduction by parents. Namibia has already signed the United Nations Convention on the Rights of the Child, which says that member states should "take measures to combat the illicit transfer and non-return of children abroad".

ISSUES FOR DISCUSSION

- ⑨ Are Namibian children being removed from the country by one parent, in violation of the other parent's rights? If so, how are these cases being dealt with at present?
- ⑨ Should Namibia adopt the Hague Convention on the Civil Aspects of International Child Abduction and make provision in the new law for implementing it?



WHAT ELSE SHOULD BE INCLUDED IN THE ACT?

Part 2

(6) Grants

There are 4 main types of grants available for the care and protection of children in Namibia:

1. **child maintenance grants**
2. **foster care grants**
3. **allowances paid to children's homes and places of safety**
4. **grants for children with disabilities.**

The Children's Act of 1960 makes provision for these grants. This old law will probably be repealed once the draft Child Care and Protection Act is put into place. But the draft law does not include new provisions for grants.

Child maintenance grants: A child maintenance grant is available to people who meet the conditions shown in the table on the right. There are a number of problems with these conditions, also shown in the table.

Foster care grants: The foster care grant (N\$200/month for the first child and N\$100 for each of the others) is available to a foster parent who has been approved by a court to care for a child who has been found in need of protection. All foster children are eligible to receive grants. A means test is not applied. One problem here is that adoptive parents cannot receive this grant. This creates a financial incentive to avoid adoption, even when it is the child's best interests to be adopted. Another problem is that foster parents can receive the grant in situations where biological parents cannot. This might encourage fostering arrangements where they are not really necessary.

Allowances paid to children's homes and places of safety: This is a small amount paid to these facilities to offset the costs of caring for each child. Parents are expected to contribute towards these payments if they can afford it.

Grants for children with disabilities: The children's disability grant (N\$200/month) is available for a child with a disability who has a medical certificate and a report from a social worker. No means test is applied. It may be important to allow for supplements to this grant for costs such as wheelchairs, transport to health clinics or special training (such as training in sign language or how to read Braille).

CRITERIA	PROBLEMS
The applicant must be the biological parent of the child.	Care-givers of orphans and vulnerable children cannot access this grant directly. Children whose mothers and fathers are both deceased cannot get the grant.
The applicant must be a Namibian citizen or permanent resident.	Some people in Namibia, particularly at the borders, have lived in Namibia for many years but are not Namibian citizens or permanent residents. These people cannot access the grants.
The applicant must have an income of less than N\$1000/month.	This requirement does not consider how many people must be looked after on this income. A better test would be to link income to the number of dependants.
The applicant must prove that the other parent is dead, imprisoned for more than 6 months or receiving a state grant such as old age pension or disability grant.	There are many cases where the mother or father is untraceable (no death certificate, unknown parentage or no known whereabouts). Also, in some cases both parents are present and doing the best they can to support their children, but they may still be suffering extreme poverty.
The grant is available for up to 6 children per applicant. N\$200 is given for the first child and N\$100 for each of the others. The grant is available up to the age of 21 if the child remains in education.	It is not uncommon for there to be more than 6 children in a family. Children in large families are likely to be in need. The current limitation may even contribute to the separation of siblings as the seventh child onward may be sent away because of the lack of financial support.

Possible new provisions on grants

- ⑤ *Waiver of school fees:* It has been suggested that all children who are receiving state grants should be automatically exempted from school fees.
- ⑤ *Emergency maintenance grants:* It has also been suggested that Children's Courts could be provided with a budget for short-term emergency maintenance needs such as food aid. This would be a temporary measure, giving the recipients time to apply for an ordinary state grant through the usual channels.

ISSUES FOR DISCUSSION

- ⑤ What criteria should be applied for state grants for children?
- ⑤ Who should get grants to care for children? Should there be one kind of child care grant, or different kinds of grants depending on who is caring for a child?
- ⑤ Does Namibia need any new kinds of grants, such as a basic income grant for all children?

(7) Other provisions on children with disabilities

The proposed law contains no definition of "disability". However it prohibits unfair discrimination on the basis of disability of a child or a family member of the child. It says that Children's Courts are accessible to disabled children and children with special needs. It also says that the effect of a disability should be taken into account in determining a child's best interests. When a Children's Court finds that a child with a disability or a chronic illness is in need of protection, the court may order that the child be placed in a facility which is equipped for this problem, if this would be in the child's best interests.

What other provisions are needed on children with disabilities? Here are some suggestions: (a) Provide programmes to develop the capacity of parents and care-givers to care for children with disabilities and chronic illnesses. (b) Include special provisions for registering facilities for children with disabilities or chronic illnesses. (c) Treat a disabled child who is being unlawfully confined or ill treated as a child in need of protection, and provide appropriate care and assistance.

Ghana and Sierra Leone both have laws saying that no one is allowed to treat a disabled child in an undignified manner and that disabled children have the right to the treatment, care and education they need to develop their maximum potential. Kenya has a similar law. South African law requires that children with disabilities or chronic illnesses must be treated with dignity, encouraged to be self-reliant and enabled to participate actively in community life – including social, cultural, religious and educational activities.

ISSUES FOR DISCUSSION

- ⑤ What problems do children with disabilities experience in Namibia?
- ⑤ Does the proposed law need any additional provisions on children with disabilities?

(8) Refugee and immigrant children

The draft Child Care and Protection Act currently does not contain any special provisions on refugee or immigrant children. Refugee children are already partially dealt with by the Namibia Refugees (Recognition and Control) Act 2 of 1999. The United Nations Convention on the Rights of the Child states that countries should take appropriate measures to assist refugee children. To achieve this, the following suggestions should be considered for the new law:

- ⑤ Refugee children who are not accompanied by an adult should be able to apply for asylum on their own. Children who are with family members should also be able to act alone if necessary. Children acting on their own should have a right to legal representation at state expense, and their applications should receive top priority.
- ⑤ An unaccompanied refugee or immigrant child should be automatically treated as a child in need of protection. Any other refugee or immigrant child could also be treated as a child in need of protection if appropriate, in the same way as Namibian children.
- ⑤ Harboursing or assisting children who are illegally present in Namibia should not be a criminal offence. Otherwise, people may be afraid to come to their aid.

ISSUES FOR DISCUSSION

- ⑤ What problems do refugee and immigrant children experience in Namibia?
- ⑤ What legal protections do refugee or immigrant children need?

WHAT DO YOU THINK?



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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**



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