

Age of marriage and consent to marriage by a minor

Traditional cultural practices reflect values and beliefs held by members of the community for many years. Sometimes, long-standing practices go unquestioned by the members of the community, even if they are causing harm to individuals. In 2009, the Legal Assistance Centre asked children across Namibia what type of cultural practices might be considered harmful. They made the following suggestions:

- forced engagements and marriages;
- male circumcision;
- female genital mutilation;
- cutting on the cheeks or back with blades;
- sexual initiation; and
- dropping out of school to herd cattle.

Forced engagements and marriages take place when a person is forced to get married against his or her will. This might occur if a young girl has to marry an older man in her community that she does not love, or if a woman or girl whose husband has died is forced to marry the brother of the deceased husband. Namibia's Constitution says that marriage shall be entered into "only with the free and full consent of the intending spouses". This means that any person planning to get married must give consent to the engagement and the marriage. It is wrong to force someone to give consent against their will – this would not really be consent.

The Married Person's Equality Act amends the Marriage Act to set the age at which a child can be married in a civil marriage at 18. (The age was previously 18 for boys and 15 for girls.) A child who is below this minimum age needs to obtain permission from the government to marry. This is because the law recognises that in some cultures it is normal to get married at a younger age. However, the government wants to avoid the situation where a child is forced into marriage without understanding the implications of marriage. If a child under the age of 18 asks the government for permission to get married, it is likely that the government will ask a social worker to review the case to see whether the couple intending to get married are mature enough and are giving their consent without being put under pressure by family or community members.

Parental consent is also required before a child can marry. In terms of the Married Persons Equality Act, children under the

age of 21 can get married only if they have consent from their legal guardian(s). Usually, this will be the parents. If the parents are married, then the child needs the consent of both the mother and the father; if the parents are not married, the child needs parental consent from the parent who is the child's guardian.

So, looking at these laws together, a child under the age of 18 who wants to enter into a civil marriage needs to give his or her own consent, have parental consent and have permission for the marriage from the government.

The minimum age for marriage in the Marriage Act does not apply to customary marriages. A draft law on the recognition of customary marriages prepared by the Law Reform and Development Commission would set the minimum age for customary marriage at 18 also, but this proposed law has not yet been considered by Parliament. So at present, a child who wants to enter into a customary marriage before the age of 18 does not need permission from the government. However, there may be additional rules on consent under the applicable customary law which must be followed to make the marriage valid.

The provisions on parental consent to marriage in the Married Persons Equality Act appear to apply to both civil and customary marriages. So it appears that a person under 21 who wants to enter into a customary marriage must get parental permission, just as in the case of civil marriage. (The precise application of the Married Persons Equality Act to customary marriage is not entirely clear, and cannot be resolved for certain until Parliament clarifies the law, or until a court interprets what the law means in a court case. But the safest course of action in this situation would be to get the consent of both parents if the parents are married, since the Married Persons Equality Act may be interpreted as requiring this, and of the guardian parent if the parents are not married.)

Because the current laws are not completely clear about customary marriages, the government has included provisions on child marriages in the Child Care and Protection Bill. This bill is not yet a law. However, it will be reviewed by Cabinet in

2010, and the Ministry of Gender Equality and Child Welfare hope that the bill will go to Parliament and then become a law soon afterwards. The Child Care and Protection Bill defines what the term "marriage" means, stating that it applies to both civil and customary marriages. This means that when this law comes into force, a child must give his or her own consent and have permission from one or both parents to get married under civil or customary law.

The Child Care and Protection Bill gives clear protection to children who are forced to get married against their will. The bill states that no person may force a child to get married or engaged – the child must freely consent to the engagement/marriage. The punishment for forcing children to get married against their will is a fine of up to N\$50 000 and/or imprisonment for a period not exceeding ten years.

If a child is being forced to get married against his or her will, the child should tell a trusted adult. The adult should report the case to a social worker and/or the police.

The child can also go directly to a social worker or the police. The social worker or the police can protect the child and prevent the forced marriage from going ahead. Although it can be difficult to speak out against family and cultural practices, the law of Namibia says that a person should not be forced to get married against their will.

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RESEARCH SHOWS THAT SOME CHILDREN IN NAMIBIA ARE SUBJECTED TO HARMFUL TRADITIONAL PRACTICES.

THE GOVERNMENT THINKS THAT FORCING CHILDREN TO GET MARRIED AGAINST THEIR WILL IS A VERY SERIOUS OFFENCE.

CURRENT LAW

Civil marriage

Anyone who wants to marry must give own free consent.

Parental consent: anyone under 21 needs consent from one or both parents (both parents if the parents are married, the guardian parent if the parents are not married).

Anyone under 18 also needs consent from the government.

Customary marriage

Anyone who wants to marry must give own free consent.

Parental consent: anyone under 21 probably needs consent from one or both parents (both parents if the parents are married, the guardian parent if the parents are not married).

Any additional rules about consent under the customary law in question must also be followed.