BILL

To give effect to certain rights of children as contained in the Constitution of the Republic of Namibia; to set out principles relating to the best interests of children; to provide for the establishment of a National Advisory Council on Children; to provide for the appointment of a Children’s Advocate and the designation of social workers and probation officers; to make provision for children’s courts; to provide for residential child care facilities, places of care and shelters; to provide for proof of parentage and parental rights and responsibilities in respect of children born outside marriages; to provide for custody and guardianship of children upon the death of the person having custody or guardianship; to provide for kinship care of children; to provide for parenting plans and their formalisation; to provide for prevention and early intervention services in relation to children; to provide for measures relating to children in need of protective services; to provide for foster care; to provide for the issuing of contribution orders; to provide for the domestic and inter-country adoption of children; to combat the trafficking of children; to create additional measures for the protection of children; to provide for grants payable in respect of certain children; to set the age of majority at 18 years; to make provision for the application of certain Conventions in Namibian law; to repeal certain laws, including the Children’s Status Act, 2006; to amend the Combating of Immoral Practices Act, 1980, the Liquor Act, 1998, and the Combating of Domestic Violence Act, 2003; to give effect to the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child; to create new offences relating to children; and to provide for incidental matters.

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BE IT ENACTED by the Parliament of the Republic of Namibia, as follows:
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CHAPTER 1
DEFINITIONS, OBJECTIVES OF ACT AND APPLICATION

This chapter includes key definitions and a section on the basic objectives of the new law which can be used to guide its interpretation. The definitions are best considered when the terms in question arise in the other chapters of the Bill, rather than in isolation.

The key definition is the definition of a child as a person under the age of 18 years, which follows the UN Convention on the Rights of the Child, the African Charter on the Rights and Welfare of the Child and international practice in almost every country in the world. Further discussion on the recommendation to set the age of majority at 18 is included in the bill under provision 235.

Definitions

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

“abandoned”, in relation to a child, means a child who –
(a) has obviously been deserted by the parent, guardian or care-giver;
(b) has, for no apparent reason, had no contact with the parent, guardian or care-giver for a period of at least three months; or
(c) has been left at any of the premises contemplated in section 210(1)(a) and not been claimed after the expiry of the period referred to in section 210(5);

Point (c) refers to places where babies can be safely dropped off as an alternative to “baby-dumping”.

“abuse”, in relation to a child, means any form of harm or ill-treatment deliberately inflicted on a child, and includes –
(a) assaulting a child or inflicting any other form of deliberate injury to a child;
(b) sexually abusing a child or allowing a child to be sexually abused;
(c) bullying by another child;
(d) a labour practice that exploits a child;
(e) exposing or subjecting a child to behaviour that may harm the child psychologically or emotionally, including intimidation or threats;
(f) depriving a child of his or her rights to the basic conditions of living contemplated in
section 7; and
(g) exposing or subjecting a child to a social, cultural or religious practice which is
detrimental to his or her well-being;

Point (g) is intended to help give effect to section 209.

“access” includes all forms of electronic and telephonic contact conducive to fostering and
maintaining a sound relationship between a child and the parent not having custody;

“adopted child” means a child adopted under this Act or any other law;

“adoption order” means an adoption order issued in terms of section 173;

“Adoption Register” means a register referred to in section 179;

“alternative care” means care of a child, either temporarily or long term –

(a) in foster care;
(b) in kinship care in terms of an order of the children’s court; or
(c) in a place of safety, place of care, shelter, children’s home or education and development
centre.

“board” means a board of management of a place of safety, a children's home or an education
and development centre;

“care-giver” means any person other than a parent or guardian, who takes primary
responsibility for the day-to-day care of a child and includes –

(a) a foster parent;
(b) a kinship care-giver;
(c) a primary caretaker;
(d) a person who cares for a child whilst the child is in a place of safety;
(e) the person at the head of a facility where a child has been placed; and
(f) the child at the head of a child-headed household;
“chairperson” means the chairperson of the Council;

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

“child-headed household” means a household recognised as such in terms of section 206;

“community child care worker” means a child care worker contemplated in section 29;

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

“Children’s Advocate” means the Children’s Advocate appointed in terms of section 26;

“children’s commissioner” means a magistrate contemplated in section 33(4);

“children's court” means the children’s court referred to in section 33(1);

“Children’s Fund” means the fund contemplated in section 27;

“children's home” means a facility referred to in section 63;

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

“contribution order” means an order referred to in section 156, and includes a provisional contribution order referred to in section 157(2);

“Council” means the National Advisory Council on Children established by section 11;

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

“designated child protection organisation” means a child protection organisation designated by the Minister for the purpose of this Act or any part thereof in terms of section 28 to perform designated child protection services;

“designated social worker” means a social worker in the service of the State or a social worker in private practice who is designated by the Minister for the purpose of this Act or any part thereof in terms of section 28, or a social worker in the employ of a designated child protection organisation;

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

“early childhood development centre” means a facility referred to in section 61;

“early intervention services” means services referred to in section 126(2);

“education and development centre” means a facility referred to in section 64, and a reference in any other law to a “place of detention” or a “reform school” for juvenile offenders is deemed to include such a centre;

“family meeting”, for purposes of sections 31(1)(b), 39(1)(b) and 117(a), means a structured meeting of family members convened and presided over by a skilled facilitator, at which the family members attempt to find solutions to a problem involving the care or protection of a child, and which includes an opportunity for private discussion in the absence of the facilitator, with due regard to the principles in this Act on child participation;
“family member” in relation to a child, means –
(a) a parent of the child;
(b) any other person who has parental responsibilities and rights in respect of the child;
(c) a grandparent, brother, sister, uncle, aunt or cousin of the child; or
(d) any other person with whom the child has developed a significant relationship, based on psychological or emotional attachment, which resembles a family relationship;

“foster care” means care of a child by a person who is not the parent, guardian, family member or extended family member in terms of an order of the children’s court;

“foster parent” means a person who has foster care of a child;

“inter-country adoption” means the adoption of a child as contemplated in Part II of Chapter 14;

“in need of protective services”, in relation to a child, means a child who is in a situation contemplated in section 127(1);

“kinship care” means care of a child by a member of the child’s family or extended family;

“kinship care-giver” means a person who has kinship care of a child;

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

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

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

“Magistrate’s Commission” means the Magistrate’s Commission established by section 2 of Magistrates Act, 2003 (Act No. 3 of 2003);
“marriage” means a marriage in terms of any law of Namibia and includes a marriage recognised as such in terms of any tradition, custom or religion of Namibia and any marriage in terms of the law of any country, other than Namibia, which marriage is recognised as a marriage by the laws of Namibia;

“medical intervention” includes dental, physiological, psychological and psychiatric interventions;

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

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

“migrant” means a child who is unlawfully within the territory of Namibia, because of illicit entry into Namibia or because of expiry of a legally acquired visa;

“Minister” means the Minister responsible for child protection and services to children;

“Ministry” means the Ministry responsible for the administration of matters relating to child protection and services to children;

“neglect”, in relation to a child, means a failure in the exercise of parental responsibilities to provide for the child's basic physical, intellectual, emotional or social needs;

“order” includes –
(a) a refusal to make any order; and
(b) a variation or withdrawal of any order made in terms of this Act;

“organ of state” means –
(a) any office, ministry or agency of State or administration in the local or regional sphere of government; or
(b) any other functionary or institution –
(i) exercising a power or performing a function in terms of the Constitution of the
Republic of Namibia; or
(ii) exercising a public power or performing a public function in terms of any law, but does not include a court or a judicial officer;

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

“parent”, in relation to a child, means a woman or a man in respect of whom parentage has been acknowledged or otherwise established in terms of Chapter 6 and includes the adoptive parent of a child, but excludes –
(a) the biological father of a child conceived through the rape of or incest with the child’s mother;
(b) any person who is biologically related to a child by reason only of being a gamete donor for purposes of artificial fertilisation; or
(c) a parent whose parental responsibilities and rights in respect of a child have been terminated.

“parental responsibilities and rights”, in relation to a child, means the responsibilities and rights referred to in section 120;

“parenting plan” means a plan referred to in section 121;

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

“place of care” means a place of care referred to in section 60;

“place of safety” means a facility referred to in section 59 and includes care of a child in a hospital or clinic, a registered children’s home or shelter, an approved private home or any other place where the child can safely be accommodated pending a decision or court order concerning the placement of the child, but excludes care of a child in a prison or police cell;

“prevention services” means services referred to in section 126(1);

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

“probation officer” means a person who complies with the prescribed requirements, and
who has been designated under section 30;

“protective services” means services aimed at providing care, protection or both care and
protection for a child to safeguard his or her safety, security and well-being or improving
such care, protection or both care and protection;

“refugee” means a refugee as contemplated in section 3 of the Namibia Refugees (Recognition
and Control Act), 1999 (Act No.2 of 1999);

“regulation” means a regulation made under this Act;

“residential child care facility” means a place of safety, children’s home or an education
and development centre;

“school” means –
(a)

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

(b)

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

“shelter” means a facility referred to in section 62;

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

“social auxiliary worker” means a person, contemplated in section 29, who is registered or
deemed to be registered as a social auxiliary worker in terms of sections 22 and 61 of the Social
Work and Psychology Act, 2004 (Act No. 6 of 2004);

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“this Act” includes any regulation;

“United Nations Protocol to Prevent Trafficking in Persons” means the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the UN Convention against Transnational Organised Crime, 2000, a copy of the English text of which is set out in Schedule 2; and


Objectives of Act

2. (1) The objectives of this Act are to—

(a) protect and promote the well-being of all children;
(b) give effect to children’s rights as contained in the Constitution of the Republic of Namibia;
(c) give effect to Namibia’s obligations concerning child welfare, development and protection in terms of the United Nations Convention on the Rights of the Child, the African Charter on the Rights and Welfare of the Child and other international agreements binding upon Namibia;
(d) promote the protection of families, and actively involve families in resolving problems which may be detrimental to the well-being of the children in the family;
(e) develop and strengthen community structures which can assist in providing care and protection for children;
(f) establish, promote and co-ordinate services and facilities designed to advance the well-being of children, and prevent, remedy or assist in solving problems which may place children in need of protective services;
(g) provide protective services to children who are in need of such services;
(h) protect children from discrimination, exploitation and other physical, emotional or moral harm or hazards;
(i) ensure that no child suffers any discrimination or disadvantage because of the marital status of his or her parents; and
(j) recognise the special needs that children with disabilities or chronic illnesses may have.

(2) The objectives referred to in subsection (1) must be given due consideration in construing any provision of this Act.

Application

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

(2) This Act binds both natural and juristic persons, to the extent that it is applicable, taking into account the nature of the rights and duties in question.
This chapter contains the basic principles that should guide all actions concerning children.

(1) the “best interests of the child” principle and factors to guide the application of this standard in specific cases;

(2) the principle of child participation;

(3) six general principles:
   (a) adherence to the fundamental rights and freedoms set out in the Constitution, the best interests of the child, and the rights and principles set out in the Act;
   (b) respect for the child’s dignity;
   (c) fair and equitable treatment of all children;
   (c) protection against unfair discrimination;
   (d) recognition of the child’s need for development and opportunity to play; and
   (e) attention to any special needs related to a child’s disability or chronic illness.

(4) four additional principles:
   (a) Give the child’s family an opportunity to express their views in any matter concerning the child.
   (b) Resolve all matters concerning children in a non-conflictual way if possible.
   (c) Avoid delays as far as possible.
   (d) Inform children and their parents and caregivers of matters which could affect them.

(5) provisions on children’s rights to the basic necessities of life, and on basic parental duties and responsibilities

(6) a provision based on the African Charter which notes children’s duties and responsibilities to the family, community and nation

(7) a provision emphasising the special needs of children with disabilities and the right of such children to be treated with dignity.

The principles in this chapter are drawn from the Namibian Constitution, the UN Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child.

Best interests of the child

4. (1) This Act must be interpreted and applied so that in all matters concerning the care, protection and well-being of a child arising under this Act or under any proceedings, actions and decisions by any organ of state in any matter concerning a child or children in general, the best interests of the child concerned is the paramount consideration.

This provision protects the best interests of the child, not only in proceedings under this Act, but in all proceedings, including administrative proceedings, where the interests of a child are at stake.
It is based on Article 3.1 of the **UN Convention on the Rights of the Child** which says: “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.” Similarly, Article 4.1 of the **African Charter on the Rights and Welfare of the Child** says that “In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.”

(2) In determining the best interests of the child, the following factors must be taken into consideration, where relevant:

(a) the child's age, maturity and stage of development, gender, background, and any other relevant characteristics of the child;
(b) the child's physical and emotional security and his or her intellectual, emotional, social and cultural development;
(c) any views or opinions expressed by the child with due regard to the child’s age, maturity and stage of development;
(d) the right of the child to know and be cared for by both parents, unless his or her rights are persistently abused by either or both parents, or continued contact with either parent or both parents would be detrimental to the child’s well-being;
(e) the nature of the personal relationship between the child and other significant persons in the child’s life, including each of the child’s parents, any relevant family member, any other care-giver of the child or any other relevant person;
(f) the attitude of the each of the child’s parents towards the child and towards the exercise of parental responsibilities and rights in respect of the child;
(g) the capacity of the parents, or any specific parent, or of any other care-giver or person, to provide for the needs of the child, including emotional and intellectual needs;
(h) the desirability of keeping siblings together;
(i) the likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from –
   (i) both or either of the parents; or
   (ii) any brother or sister or other child, or any other care-giver or person, with whom the child has been living;
(j) the practical difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially
affect the child's right to maintain personal relations and direct contact with
the parents, or any specific parent, on a regular basis;

(k) the need for the child to maintain a connection with his or her family,
extended family, culture or tradition;

(l) any disability that a child may have;

(m) any chronic illness from which a child may suffer;

(n) the need for a child to be brought up within a stable family environment and,
where this is not possible, in an environment resembling as closely as possible
a caring family environment;

(o) the need to protect the child from any physical or psychological harm that may
be caused by –

(i) subjecting the child to maltreatment, abuse, neglect, exploitation or
degradation or exposing the child to violence or exploitation or other
harmful behaviour;

(ii) exposing the child to maltreatment, abuse, degradation, ill-treatment,
violece or harmful behaviour towards another person; or

(iii) any family violence involving the child or a family member of the
child;

(p) the need to avoid or minimise further legal or administrative proceedings in
relation to the child; and

(q) any other relevant factor.

Child participation

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

(2) Every child has the right to choose not to participate in a matter concerning that
child, but should be given all necessary information and advice as would enable that child to
make a decision on participation which is in his or her best interests.

(3) The following principles must be followed with respect to any child who is able
to participate in terms of subsection (1), regardless of whether or not that child chooses to exercise his or her right to participate:

(a) the child should be informed of the circumstances under which she or he will be asked to express her or his views, of the impact that his or her expressed views will have on the outcome of any decision, and of services that can potentially be provided to the child;

(b) all necessary and reasonable measures should be taken to ensure that the child is not punished or victimized for expressing his or her views;

(c) the child should be informed of the outcome of any decision-making process;

(d) the child should be given an opportunity to complain if he or she feels that his or her right to participate has not been respected; and

(e) the right of child participation should be promoted in respect of any child who may experience barriers to participation for any reason, including disability, language or any form of discrimination.

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

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

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

The principles in subsection (3) are based on the guidelines in General Comment 12 on child participation issued by the UN Commission on the Rights of the Child (CRC/C/GC/12, 20 July 2009).

General principles

6. (1) The principles set out in this section must guide –

(a) the implementation of this Act; and

(b) all proceedings, actions and decisions by any organ of state in any matter
concerning a child or children in general.

(2) All proceedings, actions or decisions in matters concerning a child must –
(a) respect, protect, promote and fulfil the children’s fundamental rights and freedoms set out in the Constitution, the best interests of the child standard set out in section 4 and the rights and principles set out in this Act, subject to any lawful limitation;
(b) respect the child's inherent dignity;
(c) treat the child fairly and equitably;
(d) protect the child from direct or indirect discrimination on grounds of –
   (i) the race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, language or birth of the child or of his or her parents, guardian, care-giver or any other family member of the child; or
   (ii) the family status, health status, socio-economic status, HIV-status, residence status or nationality of the child or of his or her parents, guardian, care-giver or of any of his or her family members;
(e) recognise a child's need for development and to engage in play and other recreational activities appropriate to the child's age; and
(f) respond to any special needs that the child may have as a result of a disability or chronic illness.

(3) If it is in the best interests of the child, any person with parental responsibilities and rights in respect of the child, including the child’s care-giver, if applicable, must be given the opportunity to express their views in any matter concerning the child, provided that the whereabouts of any such person can be reasonably ascertained.

(4) In any matter concerning a child –
(a) an approach which is conducive to conciliation and problem-solving must be followed and conflict must be avoided where appropriate and to the extent possible; and
(b) delays in any action or decision to be taken must be avoided as far as possible.

(5) A child, having regard to his or her age, maturity and stage of development, and
a person who has parental responsibilities and rights in respect of that child, including the child’s
care-giver, if applicable, must, where appropriate, be informed of any action or decision taken in
a matter concerning the child which significantly affects the child, provided that the whereabouts
of any such person can be reasonably ascertained.

Children’s rights to basic conditions of living

7. (1) A child has the right to conditions of living necessary for his or her
development, including adequate –
   (a) food;
   (b) shelter;
   (c) clothing;
   (d) care and protection, which includes adequate health care and immunization;
   (e) education; and
   (f) play and leisure.

   (2) It is the duty of a child’s parents, guardian or other care-giver to secure, within
       their abilities and financial capacities, the conditions of living set out in subsection (1).

Parental duties and responsibilities

8. Every person with parental responsibilities towards a child, and any other
   person legally responsible for a child, has the duty to –
   (a) ensure that the best interests of the child are his or her basic concern at all
times;
   (b) guide and direct the child in the exercise of all of his or her rights under this
       Act or any law in a manner consistent with the child’s evolving capacities;
   (c) protect the child from neglect, discrimination, violence, abuse and harm; and
   (d) ensure that in the temporary absence of a parent or care-giver, the child is
cared for by a competent person.

Children’s duties and responsibilities
9. In the application of this Act, and in any proceedings, actions and decisions by any organ of state concerning any child, due regard must be had to the duties and responsibilities of a child to –
   (a) work for the cohesion of the family, respect the rights of his or her family members and assist his or her family members in times of need;
   (b) serve his or her community, respect the rights of all members of the community and preserve and strengthen the positive cultural values of his or her community in the spirit of tolerance, dialogue and consultation;
   (c) serve his or her nation, respect the rights of all other persons in Namibia and preserve and strengthen national solidarity; and
   (d) contribute to the general moral well-being of society,

provided that due regard must be given to the age, maturity, stage of development and ability of a child and to such limitations as are contained in this Act.

Rights and responsibilities go together. This provision is based on Article 31 of African Charter on the Rights and Welfare of the Child. Similar provisions on children’s responsibilities are included in laws in Kenya and Nigeria.

Children with disabilities

10. (1) No person, authority, institution or other body may treat a child with disabilities in an undignified manner.

   (2) A child with disabilities is entitled to appropriate care and protection and must have effective access, insofar as reasonably possible and in the best interests of the child, to inclusive and non-discriminatory education, training, health care services, support services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to enabling the child to achieve the fullest possible social integration and individual development, ensuring his or her dignity and promoting his or her self-reliance and active participation in the community.
CHAPTER 3
NATIONAL ADVISORY COUNCIL ON CHILDREN, CHILDREN’S ADVOCATE, CHILDREN’S FUND AND DESIGNATED SOCIAL WORKERS AND PROBATION OFFICERS

PART I
NATIONAL ADVISORY COUNCIL ON CHILDREN

The National Advisory Council on Children is a statutory body modelled on the Labour Advisory Council. It would bring together key stakeholders from government, civil society and the private sector to encourage inter-sectoral cooperation on children’s issues, and to advise the Ministry of Gender Equality and Child Welfare on this law and on other matters pertaining to children. Earlier drafts used the name “Child Welfare Advisory Council”, but ‘child welfare’ is considered internationally to be an outdated term.

This body could become the focal point for inter-sectoral initiatives aimed at children, with existing bodies such as the Orphans and Vulnerable Children Permanent Task Force (OVC-PTF) and the National Integrated Early Childhood Development Committee becoming subcommittees of the Council as a way of better coordinating initiatives aimed at children.

Establishment of National Advisory Council on Children

11. A council to be known as the National Advisory Council on Children (“the Council”) is hereby established.

Functions and duties of Council

12. (1) The functions of the Council are to –
   (a) encourage inter-sectoral cooperation on matters relating to children;
   (b) advise government on matters relating to the welfare of children who receive services under this Act and any other law relating to children;
   (c) advise and assist, where appropriate, any organ of state in the carrying out of its functions and duties under this Act and any other law relating to children;
   (d) advise the Minister and where appropriate, any organ of state on the need for reform of the law on matters relating to children;
   (e) prepare and submit annual reports to the Minister relating to the activities of the Council;
(f) design and propose programmes of prevention, protection or care, as the Council considers necessary in the best interests of children, for consideration by the Minister and where appropriate, organs of state;

(g) study, investigate and monitor the implementation of this Act and other laws related to it for the purpose of making such recommendations for improvement to the Minister or any other relevant organ of state, as the Council considers to be in the best interests of children; and

(h) perform any other function assigned to it by the Minister.

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

Access to information

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

Composition of Council

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

(2) The Council consists of the following nineteen members, appointed by the Minister –

(a) the Children’s Advocate, as chairperson;
(b) the Permanent Secretary of the Ministry;
(c) a representative of the Office of the Prime Minister appointed by the Prime Minister;
(d) the Permanent Secretaries of the ministries responsible for health, education, youth, justice, labour, home affairs and safety and security;
(e) the head of the Social Work and Psychology Council established under the Social Work and Psychology Act, 2004 (Act No. 6 of 2004);
(f) the head of the Medical and Dental Council established under the Medical and Dental Act, 2004 (Act No. 10 of 2004);

(g) five members, each representing different stakeholders in civil society, including non-governmental organisations, faith-based organisations and the community, who have particular knowledge of and experience in children’s issues; and

(h) two members, each representing a different stakeholder in the private sector, who have a demonstrated interest in children’s issues.

(3) In appointing members under subsections (2)(g) and (h), the Minister must strive to obtain a reasonable gender balance on the Council as a whole, taking into account the sex of the *ex officio* members.

(4) Before appointing the persons contemplated in subsections (2)(g) and (h), the Minister must invite nominations from stakeholders by –

(a) notice in the *Gazette*;

(b) publishing the invitation in at least two nationally distributed newspapers;

(c) announcing the invitation in such public media as the Minister may consider appropriate; and

(d) sending the invitation by way of written notice to such stakeholders.

(5) If no or insufficient nominations have been received within the period specified in the invitation referred to in subsection (4), the Minister must appoint the required number of persons who qualify to be appointed in terms of this section as he or she deems fit.

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

**Disqualification for appointment**

15. A person does not qualify to be appointed as a member of the Council under section 14(2)(g) and (h) if he or she –
(a) is not a Namibian citizen, holder of a permanent residence permit or domiciled in Namibia;
(b) is a member of the Parliament or a regional council or a local authority council;
(c) is an unrehabilitated insolvent; or
(d) has been convicted, whether in Namibia or elsewhere, of an offence and sentenced to imprisonment without the option of a fine, unless a period of ten years has expired after the date on which the sentence was served.

Term of office of members of Council

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

Vacation of office and filling of vacancies

17. (1) The office of a member of the Council becomes vacant if that member –
(a) becomes subject to a disqualification referred to in section 15;
(b) through a written notice addressed to the Minister resigns as a member of the Council;
(c) is absent from three consecutive meetings of the Council without permission from the Council; or
(d) is for any other reasonable cause removed from office by the Minister.

(2) Before removing a member from office in terms of subsection (1)(d), the Minister must –
(a) notify such member, in writing, of the grounds on which the member is to be removed from office;
(b) give such member an opportunity to make oral or written representations on the matter to the Minister or to any person designated by the Minister; and
(c) consider any representations made in terms of paragraph (b).

(3) If a member of the Council dies or vacates office before the expiry of member’s term of office, the vacancy must be filled by the appointment of another person in
accordance with section 14 for the unexpired portion of the period for which that member was appointed.

Allowances

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

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

Committees

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

Meetings

20. (1) The Council must meet at least twice annually.

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

(3) The chairperson must, upon the request of the Minister or upon a written and motivated request of at least four members of the Council, call a special meeting of the Council.

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

(6) At any meeting of the Council –
(a) a majority of the members of the Council forms a quorum;
(b) a decision of a majority of members of Council present at a meeting is the decision of the Council; and
(c) if there is an equality of votes, the person presiding at the meeting has a casting vote in addition to that person’s ordinary vote.

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

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

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

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

Performance of administrative work of Council

21. (1) The Permanent Secretary must –
(a) make staff members in the Ministry available to perform the clerical work for the Council in the performance of its functions; and
(b) designate a staff member to serve as secretary to the Council.

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

External advisors

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

(2) The expenditure entailed in obtaining any services in terms of subsection (1) must be paid from the Children’s Fund, supplemented, if required, by the State Revenue Fund from moneys appropriated for that purpose by Parliament.

Consultation with Council

23. The Minister and, where appropriate, any organ of state exercising functions which may affect child welfare, must consult with the Council before –

(a) proposing any repeal or amendment of any provision of this Act or any other law that would affect this Act; and

(b) promulgating, repealing or amending any regulation made in terms of this Act or affecting the operation of this Act.

Annual reports by Ministries

24. The Permanent Secretary of each government ministry exercising functions affecting child welfare and identified and notified as such by the Minister must, within one month after the end of each financial year, submit or cause to be submitted to the chairperson of the Council a report on the implementation of laws and policies affecting children in the ministry of which he or she is the Permanent Secretary.
Annual report by Council

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

(a) a report on the activities of the Council;
(b) reports by the ministries referred to in section 24;
(c) a report by the Children’s Advocate referred to in section 26(2); and
(d) any other matter the Minister may consider necessary to be included in the report.

(2) The chairperson of the Council must cause a copy of the report referred to in subsection (1) to be submitted to the Minister as soon as is practicable after its finalisation.

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

PART II

CHILDREN’S ADVOCATE

This section establishes an official within the Office of the Ombudsman to focus on child protection. According to the Office of the Ombudsman, the need for the establishment of a Directorate: Human Rights has already been identified, and it would make sense to include within this directorate a special focus on children’s rights.

The extension of the current Ombudsman’s duties, as opposed to the establishment of a separate Children’s Ombudsperson, will be the most efficient use of national resources. The Office of the Ombudsman will require additional personnel to perform the duties reflected above, but would be able to effect an overall savings by combined travel and outreach programmes and sharing of basic infrastructure and support services. The employment of personnel and the concomitant financial infrastructure are administrative arrangements which can be dealt with in terms of the Ombudsman Act and have therefore not been addressed in the Bill.

This approach is consistent with recommendations by the Committee which administers the Convention on the Rights of the Child:

Where resources are limited, consideration must be given to ensuring that the available resources are used most effectively for the promotion and protection of everyone’s human rights, including children’s, and in this context development of a broad-based National Human Rights Institution that includes a specific focus on children is likely to constitute the best approach. A broad-based National Human Rights Institution should include within its structure either an identifiable children’s commissioner specifically responsible for children’s rights or a specific section or division responsible for children’s rights.
Extension of duties of Ombudsman

26. (1) The Ombudsman, established in terms of section 89 of the Constitution of the Republic of Namibia and regulated by the Ombudsman Act, 1990 (Act No. 7 of 1990), must protect and promote the rights and interests of children and for this purpose, must appoint a Children’s Advocate to—

(a) receive and investigate complaints, from any source, including a child, concerning children who receive services under this Act or any other law, or relating to services provided to children under this Act or any other law, or concerning any violation of the rights of children under the Constitution of the Republic of Namibia or any law, and where appropriate, attempt to resolve such matters through negotiation, conciliation, mediation or other non-adversarial approaches;

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

(c) monitor the implementation of this Act and any other law pertaining to children;

(d) bring proceedings in a court of competent jurisdiction as contemplated in section 5(1)(a)(ii)(dd) of the Ombudsman Act, 1990 (Act No. 7 of 1990) to further the interests of children;

(e) raise awareness throughout Namibia of the contents of this law and the protection of children generally; and

(f) perform such additional duties and functions as may be assigned by the Ombudsman.

(2) The Children’s Advocate must prepare and submit an annual report to the Council on the performance of duties and exercise of powers contemplated in subsection (1) in accordance with section 25(1)(c), which report must contain—

(a) details of the nature of any complaints received and investigations undertaken in respect of children;

(b) findings of any monitoring activities undertaken;

(c) details of any court appearances to further children’s interests in terms of this Act;
(d) an overview of awareness-raising activities; and

(e) information about any other activities linked to his or her functions under this Act.

The proposed focus on children’s rights is an elaboration of the existing duties of the Ombudsman as set forth in section 3(1)-(2) of the Ombudsman Act:

1. The Ombudsman shall enquire into and investigate in accordance with the provisions of this Act, and take such action or steps as may be prescribed by this Act on, any request or complaint in any instance or matter laid before the Ombudsman in accordance with the provisions of subsection (3)(a) or (b), and concerning-

   a) alleged or apparent or threatened instances or matters of violations or infringements of fundamental rights and freedoms, abuse of power, unfair, harsh, insensitive or discourteous treatment of an inhabitant of Namibia by an official in the employ of any organ of Government (whether national or local), manifest injustice, or corruption or conduct by such official which would properly be regarded as unlawful, oppressive or unfair in a democratic society;…

   b) practices and actions by persons, enterprises and other private institutions where such complaints allege that violations of fundamental rights and freedoms have taken place;…

2. Without derogating from the provisions of subsection (1), any request or complaint in respect of instances or matters referred to in that subsection, may include any instance or matter in respect of which the Ombudsman has reason to suspect-

   a) that any decision or recommendation taken or made or about to be taken or made by or under the authority of the State, or any local or regional authority, commission, board, corporation, committee, body or institution established or instituted by or under any law, or any act performed or about to be performed or any omission to act on account of any such decision or recommendation, or any act performed or about to be performed by, or any omission to act of, any person in the employment of the State or any such authority, commission, board, corporation, committee, body or institution, or any act performed or about to be performed, or any omission to act, being an act or omission on behalf of the State or such authority, commission, board, corporation, committee, body or institution, or purporting to be any such act or omission-

      i) abolishes, diminishes or derogates from the fundamental rights and freedoms or will abolish, diminish or derogate from any such rights and freedoms;

      ii) is or will be in conflict with any provision of any law or the common law;

      iii) is or will be unreasonable, unjust, unfair, irregular, unlawful or discriminatory or is based on any practice which may be deemed to be as such;

      iv) is based on a wrong interpretation of the law or the relevant facts;

   b) that the provisions of any law or any other matter is administered by or under the authority of the State or such authority, commission, board, corporation, committee, body or institution, or by any person in its employment, or that any practice is so followed, in a manner which is not in the public interest;…

PART III

CHILDREN’S FUND

This fund would be used to cater for orphans and vulnerable children, the operation of the National Advisory Council on Children and other initiatives aimed at children. It would also serve the functions of
the children’s fund referred to in the National Integrated Early Childhood Development Policy. Such a fund could be used to facilitate regional and local activities aimed at children, and would facilitate inter-sectoral projects.

Establishment of Children’s Fund

27. (1) A fund to be known as the Children’s Fund is hereby established.

(2) The National Advisory Council on Children must appoint a suitably qualified person tasked with the administration of the Children’s Fund.

(2) The Children’s Fund consists of –
(a) such moneys as may be appropriated by Parliament for this purpose;
(b) grants, donations or bequests received by the Council with the approval of the Minister;
(c) income derived from the proceeds of investments; and
(c) such other moneys or assets as may vest in or accrue to the Council, whether in the course of its operations or otherwise.

(3) The Children’s Fund may be used for funding –
(a) any activities of or initiated by the National Advisory Council on Children or the Children’s Advocate;
(b) prevention and early intervention programmes;
(c) early childhood development programmes;
(d) the training of service providers under this law and any other law pertaining to children;
(e) the establishment, maintenance or upgrading of facilities for children contemplated in Chapter 5 or programmes for children at such facilities;
(f) the appointment of external advisors contemplated in section 22; and
(g) any other activities relating to the implementation of this Act and other law pertaining to children.

(4) The accounting records and annual financial statements of the Children’s Fund must be audited annually by a person appointed by the National Advisory Council on Children.
(5) No person may be appointed under subsection (4) unless he or she is registered as an accountant and auditor in terms of the Public Accountants’ and Auditors’ Act, 1951 (Act No. 51 of 1951) and is engaged in public practice.

PART IV

DESIGNATED SOCIAL WORKERS AND PROBATION OFFICERS

The Minister would give authorisation to “designated social workers” who meet particular qualifications to do various types of statutory work. This could include both government and private social workers, but all reports compiled by private social workers in terms of this Act would be channelled through the Ministry for purposes of monitoring and supervision. The authorisation to perform specified statutory duties would have to be renewed every two years as a mechanism for controlling misconduct and substandard professional work. The qualifications for performing various statutory duties (such as years of experience or participation in specialised in-service training) would be set by regulations and could be changed from time to time as necessary.

“Probation officers” would be designated to do work with children (and adults) in respect of criminal matters. This term was used in the past to cover all statutory duties, but this needs to be changed because the term is associated around the world only with criminal matters.

The provisions relating to probation officers have been adapted to make it clear that this term refers only to probation officers working with persons (children or adults) who have come into contact with the criminal justice system – which is the international connotation of “probation officers”. Such probation officers can be designated from within the ranks of existing social workers, or specifically appointed as probation officers. Since section 58 of the Children’s Act 33 of 1960 will fall away when that Act is repealed by this new law, some of the powers contained in that section have been incorporated into the provision above.

The reference to probation officers working with both children and adults is necessary to avoid leaving a gap, since the Children’s Act 1960 is currently the only law dealing with the appointment of probation officers which have duties pertaining to adults under other laws, such as the Criminal Procedure Act. It is possible that future legislation such as the juvenile justice bill will provide further detail on their functions and roles.

Provision is also made for undesignated social workers or persons without formal social work qualifications (such as social auxiliary workers or community child care workers employed by the Ministry) to carry out certain tasks under the supervision of designated social workers, to help alleviate the social work shortage and to free up designated social workers for the most important tasks. This is already happening in practice with the community child care workers formerly known as record clerks who assist social workers in the Ministry with certain matters.

This proposed scheme is based on recommendations from senior government social workers.

Designated social workers and child protection organisations
28. (1) The Minister must appoint or designate, or both appoint and designate, a sufficient number of suitably-qualified –
   (a) state-employed social workers;
   (b) private social workers; and
   (c) child protection organisations,
to perform the functions and duties assigned to social workers and child protection organisations under this Act or any other law: Provided that the Minister may, by regulation, specify the functions to be performed in terms of this Act by any of the functionaries contemplated in paragraphs (a), (b) or (c).

   (2) A social worker or organisation designated in terms of subsection (1) who or which complies with the prescribed requirements and who or which, in the opinion of the Minister, is fit and proper to be entrusted with the performance of functions and duties in terms of this Act, must be provided with a certificate, issued by the Ministry, indicating the functions and duties which such social worker or organisation is authorised to perform.

   (3) A certificate issued in terms of subsection (2) must be submitted to the Ministry for renewal every two years and may be altered or revoked, at any time, if the Ministry is satisfied that such alteration or revocation is required: Provided that the Minister is satisfied, after having given the relevant social worker or child protection organisation the opportunity to be heard orally or in writing, that there is sufficient cause, based on the conduct or circumstances of such social worker or organisation, to alter or revoke such certificate.

   (4) A social worker or the authorised representative of a child protection organisation contemplated in subsection (1) who cannot or refuses to produce a certificate as referred to in that subsection upon the request of any person who can demonstrate that he or she has a direct interest in being provided with such a certificate, or who fails to renew such certificate as contemplated in subsection (3), commits an offence and is liable on conviction to a fine not exceeding N$20 000 or to imprisonment for a period not exceeding five years or to both the fine and imprisonment.

   (5) Any report produced by a social worker in compliance with section 42(2)(g) or 135(1), or any other report produced by a social worker upon the request of the children’s court, must be submitted, in the prescribed manner and within the prescribed period, to an
official in the Ministry designated to examine such report for compliance with the provisions of this Act or with any request made by the children’s court before such report is submitted to such court.

(6) In the event that a report contemplated in subsection (5) is found to be deficient, the official mentioned in that subsection must refer the report in question back to the social worker concerned to rectify such deficiencies within the period stipulated by such official.

Social auxiliary workers and community child care workers

29. The Minister may appoint or designate, or both appoint and designate, suitably qualified social workers or other persons, including social auxiliary workers and community child care workers, to work under the direct supervision of designated social workers and assist them with functions and duties assigned to designated social workers under this Act or any other law: Provided that persons appointed or designated under this section are prohibited from –

(a) facilitating adoptions in terms of Chapter 14;
(b) preparing court reports in terms of section 42(2)(g) or 135(1);
(c) removing children or offenders in terms of section 131 or 132; or
(d) performing any other functions or duties under this Act as may be determined by the Minister by regulation.

Designation of probation officers

30. (1) The Minister may designate state-employed social workers contemplated in section 28 who comply with the prescribed requirements, as probation officers or may appoint probation officers complying with such prescribed requirements, to deal with persons who are alleged to have committed offences or have been convicted of offences and to exercise the powers and to perform the functions and duties conferred or imposed by or under this Act or any other law on a probation officer.

(2) A probation officer is an officer of the High Court, every children’s court and magistrate’s court.
Powers and duties of probation officers in relation to certain children

31. (1) The powers and duties of probation officers in relation to children who are alleged to have committed offences or have been convicted of offences include –

(a) the investigation of the circumstances of such children with a view to –

(i) reporting to the court on their treatment and committal to an institution;

(ii) providing a pre-trial report recommending the desirability or otherwise of prosecution;

(iii) recommending an appropriate sentence; and

(iv) rendering assistance to them and their families;

(b) the reception, assessment and referral of such children and the rendering of early intervention services and programmes, including mediation and family meetings;

(c) the giving of evidence before the court;

(d) the supervision or control of children convicted of offences and placed under the supervision of the probation officer;

(e) the rendering of assistance to such children in complying with their probation conditions in order to improve their social functioning;

(f) the immediate reporting to the court or to the children’s commissioner when such children do not in any manner comply with or in any manner deviate from their probation conditions; and

(g) the reporting to the court or the children’s commissioner, in such manner and at such time as the court or the children’s commissioner may determine, on the progress and supervision of, and the compliance with the probation conditions in question, by such children;

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

Regulations

32. The Minister may make regulations prescribing –
(a) the form of certificates to be issued to designated social workers in terms of section 28(2);
(b) the qualifications and requirements to be complied with by designated social workers who are to perform such functions and duties in terms of this Act or any other law as may be specified by the Minister;
(c) the procedure to be employed when considering conduct or circumstances that may lead to the alteration or revocation of certificates contemplated in section 28(2);
(d) the fees payable to social workers appointed or designated in terms of section 28(1);
(e) the qualifications and requirements to be complied with by social workers appointed or designated as probation officers in terms of section 30 who are to perform functions and duties in terms of this Act or any other law;
(f) the procedure for examination of a social worker’s report by an official in the Ministry contemplated in section 28(5) and the powers of such official in relation to such report;
(g) the fees payable to social workers appointed or designated as probation officers in terms of section 30; and
(h) the designation of probation officers for different purposes in different categories.
CHAPTER 4
CHILDREN’S COURTS AND COURT PROCEEDINGS

Every Magistrate’s Court is a Children’s Court and every Magistrate is a Children’s Commissioner. It is also possible for the Magistrate’s Commission to assign a Magistrate as a dedicated Children’s Commissioner, such as Namibia already has in Windhoek.

Children’s Courts would operate in much the same way as they do under the Children’s Act 1960, with a few new innovations:

• encouraging the use of mediation and family meetings to resolve disputes;
• authorizing a broad range of people to approach the court to protect a child;
• applying the existing provisions for vulnerable witnesses in criminal cases, such as the use of child-friendly court facilities, to proceedings in children’s courts;
• providing for legal representation for children, by means of state-funded legal aid lawyers if necessary, in problematic cases; where this service is not available, prosecutors may continue to act as children’s court assistants.

PART I
CHILDREN'S COURTS AND CHILDREN’S COMMISSIONERS

Children's courts, children’s commissioners and children’s court assistants

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

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

(3) A children’s court is a court of record and has a similar status to that of a magistrate’s court at a district level.

(4) Every magistrate appointed for a district is a children’s commissioner for that district and every additional and assistant magistrate is an additional and assistant children’s commissioner for that district.
(5) For the purposes of this Act, the Magistrate’s Commission may assign magistrates as dedicated children’s commissioners for a specific children’s court or for more than one children’s court.

(6) A children’s commissioner is subject to the Magistrates Act, 2003 (Act No. 3 of 2003).

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

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

(9) A children’s commissioner must perform such functions as may be assigned to him or her under this Act or any other law.

(10) Any officer delegated by the Prosecutor-General to conduct prosecutions at the public instance before the magistrate's court of any district is ex officio a children's court assistant of any children's court held within that district.

(11) The minister responsible for justice –
(a) must ensure that children’s commissioners receive training regarding the implementation of this Act and in their specific duties and functions before assuming any duty or function under this Act; and
(b) may appoint dedicated children’s court assistants for any children’s court to assist such court in the manner contemplated in section 53(7).

Clerks of children’s court

34. (1) Subject to the laws governing the public service, the minister responsible for justice may, for every children’s court, appoint or designate one or more persons as clerks of the children’s court, who must –
(a) at any proceedings of the children's court to which they are attached, perform the functions as may be prescribed by or under this Act or any other law; and
(b) generally assist that court in performing its functions.
(2) If an appointed or designated clerk is for any reason unable to act as such, or if no clerk has been appointed or designated under subsection (1) for any children's court, the presiding children’s commissioner of that court may assign, after consultation with the Chief: Lower Courts, any competent staff member in the ministry responsible for matters relating to justice, to act as a clerk for as long as the appointed or designated clerk is unable to act as such or until a clerk is appointed or designated under that subsection.

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

(4) The minister responsible for justice must ensure that clerks of the children’s court receive training regarding the implementation of this Act and in their specific duties and functions before assuming any duty or function under this Act.

Assessors

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

(2) Assessors may only be summoned if it is in the interest of the administration of justice to do so: Provided that the Minister may from time to time prescribe the matters in respect of which the assistance of an assessor or assessors is compulsory.

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

(4) In considering whether summoning assessors in terms of subsection (2) would be in the interest of the administration of justice, the children’s commissioner must take into account -

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

(5) An assessor may not hear any evidence unless he or she takes an oath or makes an affirmation, administered by the relevant children’s commissioner, to the effect that he or she will decide on the issues to be tried in a truthful and honest manner, based on the evidence placed before the court.

(6) Subject to subsections (7) and (8), an assessor who takes an oath or makes an affirmation becomes a member of the children’s court.

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

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

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

(10) Section 147 of the Criminal Procedure Act applies with the changes required by the context where an assessor dies or becomes, in the opinion of the relevant children’s commissioner, incapable of continuing to act as an assessor.

Assessors, who could be experts such as child psychologists or social workers, could assist children’s commissioners who may be unfamiliar with family law issues or unused to working with children. They could also assist in cases where a child is too frightened to present clear information, for example, or where the matter involves cultural issues with which the Children’s Commissioner is not familiar.
Geographical area of jurisdiction of children’s court

36. (1) The children’s court that has jurisdiction in a particular matter is –

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

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

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

Referral of children by other court for investigation

37. (1) If it appears to any court in the course of any proceedings that a child involved in or affected by those proceedings is or may be in need of protective services, the court must order that the matter be referred to a designated social worker for an investigation contemplated in section 135.

(2) If in the course of any proceedings before any court relating to divorce, maintenance or domestic violence or, in the case of proceedings before the children’s court relating to custody, access to a child or guardianship, such court forms the opinion that a child of any of the parties to the proceedings has been abused or neglected, the court –

(a) may suspend the proceedings pending an investigation contemplated in section 135 into the question whether the child is in need of protective services; and

(b) must request the Prosecutor-General to attend to any allegations of criminal conduct.
(3) A court issuing an order in terms of subsection (1) or suspending the proceedings in terms of subsection (2) may also order that the child be placed in a place of safety if it appears to the court that this is necessary for the safety and welfare of the child.

(4) The best interests of the child must be the determining factor in any decision on whether a child in need of protective services should be removed and placed in a place of safety, and all relevant facts must for this purpose be taken into account including –

(a) the safety and welfare of the child as the first priority;
(b) where possible, the views of the child in question; and
(c) the possible alternative of removing the alleged offender in terms of section 131(1)(b) or 133 from the home or place where the child resides.

Pre-hearing conferences

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

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

(2) The child involved in the matter has the right to participate in the pre-hearing conference, as contemplated in section 5, unless the children’s court decides otherwise.

(3) A children’s court ordering the holding of a pre-hearing conference must –

(a) prescribe how and by whom the conference should be set up, conducted and by whom it should be attended;
(b) prescribe the manner in which a record is to be kept of any agreement or settlement reached between the parties and any fact emerging from such conference which ought to be brought to the notice of the court;
(c) determine the period within which the pre-hearing conference must be concluded; and
(d) consider the report on the conference when the matter is heard.
This procedure is commonly used in other settings to narrow the issues for decision. For example, perhaps there is a case involving allegations of child abuse where the parties agree that the child was injured but disagree on the cause of the injuries. If this is determined at a pre-hearing conference, it would make the court hearing easier because there would then be no need to listen to evidence on whether the child is injured; the hearing could focus only on the facts which were really in dispute.

Lay-forums

39. (1) The children’s court may, subject to subsections (2) and (5), where circumstances permit, refer a matter brought or referred to such court, to a lay-forum hearing, which may include –
   (a) mediation by a social worker or other person with the prescribed qualifications; or
   (b) a family meeting convened by a person with the prescribed qualifications, in an attempt to settle the matter out of court.

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

   (3) Before referring parties to a lay forum, the court must take into account all relevant factors, including –
       (a) the vulnerability of the child concerned;
       (b) the ability of the child to participate in the proceedings;
       (c) the power relationships within the family; and
       (d) the nature of any allegations made by parties in the matter.

   (4) A children’s court ordering the referral of a matter to a lay-forum must –
       (a) prescribe the manner in which a record is kept of any agreement or settlement reached between the parties and any fact emerging from the lay-forum process which ought to be brought to the notice of the court;
       (b) determine the period within which the lay-forum process must be concluded;
       (c) prescribe how and by whom the lay-forum hearing should be set up, conducted and by whom it should be attended; and
       (d) consider the report on the proceedings before the lay-forum when the matter is heard.
(5) A children’s court may not refer a matter to a lay-forum unless satisfied that an appropriate cost-free option is available, or that the parent, guardian or care-giver of the child concerned or any other person involved in the proceedings has the financial ability to bear any costs involved.

This would encourage families to resolve disputes through mediation or meetings with extended family members before turning to the court for a decision. This meets the principle of avoiding conflict and also helps to free up court resources for issues that must be seen by a magistrate.

Settling of matters out of court

40. (1) If a matter is settled out of court in terms of section 39 and the settlement is accepted by all parties involved in the matter, the clerk of the children’s court must submit the settlement to the children’s court for confirmation or rejection.

(2) The court must consider the settlement and may –
(a) confirm the settlement and make it an order of court if it is in the best interests of the child concerned;
(b) before deciding to confirm or reject the settlement, refer the settlement back to the parties for reconsideration of any specific issues; or
(c) reject the settlement if it is not in the best interests of the child and order that the matter be brought before the children’s court.

Appeals

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

(2) An appeal in terms of subsection (1) must be dealt with as if it were an appeal against a civil judgment of a magistrate’s court.
PART II
CHILDREN’S COURT PROCEEDINGS AND RULES

Children’s courts would operate in much the same way as they do now, but with new rules on child participation, on who may approach the court, the addition of the vulnerable witness provisions already in use in the criminal context and new rules about legal representation for children.

Children’s court proceedings, rules and general orders

42. (1) Except where otherwise provided for in this Act, the Magistrates’ Courts Act, 1944 (Act No. 32 of 1944), and the rules made in terms of that Act, including the rules made by the Rules Board under section 25 of that Act, apply, with the changes required by the context, to the children’s court with regard to –

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

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

(a) grant interdicts and auxiliary relief in respect of any matter it may adjudicate upon in terms of this Act;
(b) extend, withdraw, suspend, vary or monitor any of its orders;
(c) impose or vary time deadlines with respect to any of its orders;
(d) make appropriate orders as to costs in matters before the court;
(e) order the removal of a person from the court after noting the reason for the removal on the court record;
(f) appoint a curator ad litem in respect of any particular child if such appointment would, in the opinion of the court, be in the best interests of the child, notwithstanding the fact that such child may have legal representation;
(g) order a designated social worker or any other person to carry out a further investigation into the circumstances of a child, and compile a written report addressing such matters as the court may require;
(h) order a medical practitioner, psychologist, developmental or educational practitioner, to assess a child who is the subject of the proceedings and compile a written report addressing such matters as the court may require; and

(i) order the ministry responsible for home affairs to issue a birth certificate in respect of a particular child notwithstanding any inability on the part of that child or his or her parent, guardian or care-giver to comply with any requirements of that ministry.

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

Reports ordered by court

43. (1) A written report ordered by the children’s court in terms of section 42(2)(g) or (h) must be submitted to the court within five court days after the order was made.

(2) A copy of the report referred to in subsection (1) must be served in the prescribed manner on the parties to the hearing, including a person designated in terms of section 139(2), immediately upon the submission of the report to the children’s court.

(3) The person who compiled the report in terms of section 42(2)(g) or (h) may –

(a) obtain supplementary evidence or reports from other suitably qualified persons; and

(b) be required by the court to present the findings of the investigation to the court by testifying before the court.

(4) Any person ordered to compile a written report in terms of section 42(2)(g) or (h) who is not in the full-time employment of the state or a designated child protection organisation, must be compensated for his or her services in connection with the investigation or assessment from public funds in accordance with a tariff determined by the minister responsible for justice in consultation with the minister responsible for finance.

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

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

(a) if the person is not a party to the proceedings before the court, cause such person to be brought before the court; and

(b) give that person the opportunity –

(i) to question or cross-examine the author of the report in regard to a matter arising from the report; or

(ii) to refute any statement contained in the report.

Adjournments

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

(a) on good cause shown, taking into account the best interests of the child; and

(b) for a period of not more than 30 days at a time.

(2) A children’s commissioner may excuse any person from appearing at adjournment proceedings.

Monitoring of court orders

46. (1) A children’s court may monitor –

(a) compliance with an order made by it in any matter; or

(b) the circumstances of a child following an order made by it.
(2) For purposes of monitoring compliance with an order made by a children’s court or the circumstances of a child following an order, the court –
   (a) when making that order, may direct –
      (i) any person involved in the matter to appear before it at any future date;
      or
      (ii) that reports by a designated social worker be submitted to the court within a specified period or from time to time as specified in the order;
   (b) at any time after making an order or when a report of non-compliance mentioned in subsection (4) is referred to it, may call or recall any person involved in the matter to appear before it.

(3) When a person appears before the court in terms of subsection (2), the court may –
   (a) inquire whether the order has been or is being complied with, and if not, about the reasons for non-compliance;
   (b) confirm, vary or withdraw the order; or
   (c) enforce compliance with the order, if necessary through a criminal prosecution in a magistrate’s court.

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

(5) A person referred to in subsection (4) is not subject to civil liability for making any report permitted in terms of that subsection, unless the person makes the report or provides information knowing it to be false or misleading.

Who may approach court

47. (1) Except where otherwise provided in this Act, any person listed in this section may bring a matter which falls within the jurisdiction of the children’s court, to a clerk of the children’s court for referral to the children’s court.
(2) The persons who may approach a children’s court, are –
(a) a child who is affected by or involved in the matter to be adjudicated;
(b) anyone holding or exercising parental responsibilities and rights in respect of a child;
(c) the care-giver of a child;
(d) anyone acting in the interest of a child;
(e) anyone acting on behalf of a child who cannot act in his or her own name;
(f) anyone acting as a member of, or in the interest of, a group or class of children;
(g) anyone acting in the public interest, including the Minister or an authorised representative of the Minister; and
(h) the Children’s Advocate acting on behalf of a child or children generally.

Parties in children’s court proceedings

48. (1) The Minister, or a duly authorised representative of the Minister, and the Children's Advocate have the right to be a party to any proceedings before a children's court in terms of this Act involving a particular child or children in general.

(2) Any child who is affected by a matter to be adjudicated in the children’s court is automatically a party to the proceedings in question.

Children's court environment

49. Children’s court hearings must, as far as is practicable, be held in a room which is –
(a) furnished and designed in a manner aimed at putting children at ease;
(b) conducive to the informality of the proceedings and the active participation of all persons involved in the proceedings without compromising the prestige of the court;
(c) not ordinarily used for the adjudication of criminal trials; and
(d) accessible to disabled persons and persons with special needs.

Private nature of proceedings and vulnerable witnesses
Proceedings of a children’s court are closed and may be attended only by –

(a) the child involved in the matter before the court and any other party in the matter;
(b) a person who has been instructed in terms of this Act by the clerk of the children’s court to attend those proceedings;
(c) the legal representative of a party to the proceedings, including the legal representative of the child involved in the proceedings;
(d) a person who has obtained permission to be present from the children’s commissioner presiding at the proceedings;
(e) a person performing official duties in connection with the work of the court or whose presence is otherwise necessary for the proceedings; and
(f) the designated social worker concerned.

Having regard to the vulnerability of a particular child witness involved in any matter before a children’s court, the court may –

(a) exercise its power to order the removal of any person from the court in terms of section 42(2)(e);
(b) on the request of any party to such proceedings, the child concerned or on its own initiative, apply any of the special arrangements provided for in section 158A of the Criminal Procedure Act, in which case the relevant provisions of that section will apply with the changes required by the context to proceedings in a children’s court;
(c) apply any of the provisions in section 166(3) to (6) of the Criminal Procedure Act, in which case the relevant provisions of those subsections will apply with the changes required by the context to proceedings in a children’s court;
(d) admit any previous statements by a child younger than 14 years as provided for in section 216A of the Criminal Procedure Act, in which case the relevant provisions of that section will apply with the changes required by the context to proceedings in a children’s court;
(e) allow a party to the proceedings to give an opinion or to participate, in the manner determined by the children’s commissioner, without being present in court;
(f) allow the child concerned, upon the request of such child or on its own initiative, to consult privately with the presiding children’s commissioner;

(g) intervene in the questioning or cross-examination of a child if the court finds that this would be in the best interests of the child; or

(h) apply any of the provisions of paragraphs (a) to (g) in combination.

The provisions above apply the existing vulnerable witness provisions from the criminal law context to proceedings in a children’s court. This step was unanimously recommended in consultations throughout the country.

**Conduct of proceedings**

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

(a) call any person to give evidence or to produce a book, document, photographic, digital or electronically produced material or other written instrument;

(b) question or cross-examine that person; or

(c) to the extent necessary to resolve any factual dispute which is directly relevant in the matter, allow that person to be questioned or cross-examined by –

(i) the child involved in the matter;

(ii) the parent of the child;

(iii) a person who has parental responsibilities and rights in respect of a child;

(iv) a care-giver of the child;

(v) a person whose rights may be affected by an order that may be made by the court in those proceedings; or

(vi) the legal representative of any person involved in the proceedings.

(2) Children’s court proceedings must be conducted in an informal manner and, as far as possible, in a relaxed and non-adversarial atmosphere which is conducive to attaining the co-operation and participation of everyone involved in the proceedings.

These provisions provide for a less adversarial atmosphere in the children’s court.
(3) (a) The clerk of the children’s court must, on the directions of the children’s commissioner, by written notice in the prescribed manner, notify the relevant child’s parents, guardian, custodian, care-giver or any person identified by the court or the relevant social worker as having an interest in the matter before the court, including the social worker concerned, to attend the proceedings of the children’s court.

(b) A person who fails to comply with the written notice referred to in paragraph (a) commits an offence and is liable on conviction to a fine not exceeding N$20 000 or to imprisonment for a period not exceeding five years, or to such imprisonment without the option of a fine or to both such fine and such imprisonment.

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

(b) A person who fails to comply with the provisions of paragraph (a) commits an offence and is liable on conviction to a fine not exceeding N$20 000 or to imprisonment for a period not exceeding five years, or to such imprisonment without the option of a fine or to both such fine and such imprisonment.

(5) The children’s commissioner presiding at the proceedings must explain to the child and any other person present at the proceedings the nature and significance of the proceedings, and the explanation must be in a manner that can be understood by the child or person at whom it is directed so as to ensure participation to the full extent of such child or person's abilities.

(6) The children’s court –

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

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

Subsection (6) is included because there could be instances where excluding the child from certain discussions would be in the child’s best interests. An example of such a situation in the UK involved a case where there was sexual abuse of a child while that child was still a baby. The child had no
memory of the abuse and the presiding officer felt that no purpose would be served by disclosing it to
the child in this way.

Recording of non-participation by child

52. (1) The children’s commissioner presiding in a matter before a children’s
court must record the reasons if the court finds that the child is unable to participate in the
proceedings or is unwilling to express a view or preference in the matter.

(2) The court –
(a) may, at the outset or at any time during the proceedings, order that the matter,
or any issue in the matter, be disposed of separately and in the absence of the
child, if it is in the best interests of the child; and
(b) must record the reasons for any order in terms of paragraph (a).

The underlying right of a child to participate in the proceedings is covered in section 5 as one
of the law’s basic principles.

Legal representation and children’s court assistants

53. (1) A person who is a party in a matter before a children’s court, including
a child, is entitled to appoint a legal representative of his or her own choice and at his or her
own expense.

(2) Where a child involved in a matter before the children’s court is not
represented by a legal representative, the court must order that legal representation be
provided for the child in the following instances –
(a) where it is requested by the child, with due regard to the child’s age, level of
maturity and stage of development and the reasonableness of the request;
(b) where it is recommended in a report by a social worker;
(c) where there is evidence or allegations of sexual, physical or psychological
abuse of the child;
(d) where the placement recommended by a social worker is contested by the
child, a parent, guardian or care-giver, or a prospective foster or adoptive
parent;
(e) where two or more adults are contesting for the placement of the child with them;
(f) where any other party besides the child has legal representation;
(g) in any other situation where it appears that the child would benefit substantially from legal representation either as regards the proceedings themselves or as regards achieving the best possible outcome for the child.

(3) If the children’s court has ordered that legal representation be provided for a child as contemplated in subsection (2), the court may –

(a) order one or more of the parties to pay the costs of such representation; or
(b) order that legal aid as defined in the Legal Aid Act, 1990 (Act No. 29 of 1990), be provided to that child, if the child’s parent, guardian or care-giver is unable to pay the costs of a legal representative and if the court is satisfied that substantial injustice would otherwise occur.

(4) The children’s court may order that legal aid as defined in the Legal Aid Act, 1990 (Act No. 29 of 1990), be provided to an adult party in any proceedings under this Act if such party is unable to pay the costs of a legal representative and if the court is satisfied that substantial injustice would otherwise occur.

(5) A legal representative appointed to represent the child or any other party may adduce any relevant evidence and may cross-examine any witness called by any other party to the proceedings.

(6) If the children’s court, irrespective of whether a child has legal representation, is of opinion that substantial injustice would occur if such child is not assisted, the court may obtain assistance from any person who is a children’s court assistant for that court pursuant to section 33(10) or section 33(11)(b), or may designate any other person whom the court considers to be qualified as a children’s court assistant to assist in the proceedings before the court.

(7) A children’s court assistant designated in terms of subsection (6) or acting in terms of section 33(10) or section 33(11)(b) may –

(a) adduce any available evidence relevant to those proceedings;
(b) cross-examine any witness called by another party to the proceedings; and
(c) generally assist the court in the performance of its functions.

(8) The consent or assistance of the child’s parent or guardian is not required in respect of legal representation or assistance to the child in terms of this section.

(9) The parent, guardian or other person with physical control of the child may not prevent reasonable private access to the child by a legal representative or children’s court assistant who is representing or assisting the child in terms of this section for purposes of consultation or examination.

These provisions provide guidance to the court on when a child is in need of legal representation, based on proposals made by the Task Force appointed by the Ministry in 2003. Provision has also been made for state-funded legal representation in the case of indigent parties.

Following on the suggestions of the current Children’s Commissioner and the Chief of Lower Courts, the Bill retains the possibility of using prosecutors as children’s court assistants to assist in complex cases where legal representation is not possible to obtain (as provided for in the current Children’s Act).

Witnesses

54. (1) The clerk of a children's court must summons a person to give evidence or produce any book or document, photographic, digital or electronically produced material or other written instrument at any proceedings of that court, on request by –

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

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

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

55. (1) Witness fees and allowances payable to witnesses in criminal proceedings in a magistrate's court must, subject to subsection (2), be paid out of state funds to a person who is summoned in terms of section 54(1)(a) and (d) and who complied with that summons.

(2) A person summoned in terms of section 54(1)(b) or (c) is not entitled to an allowance from state funds unless the presiding children’s commissioner orders that such allowance be paid.

Prohibition on publication or disclosure of child’s identity

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

(2) A person who contravenes subsection (1) commits an offence and is liable on conviction to a fine not exceeding N$100 000 or to imprisonment for a period not exceeding five years, or to both the fine and imprisonment.

Confidentiality of records of children's court proceedings

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

(a) for the purpose of performing official duties in terms of this Act;
(b) in terms of a court order if the court finds that disclosure is compatible with the best interests of the child;
(c) for the purpose of review or appeal;
(d) for the purpose of investigation by the Children’s Advocate; or
(e) for the purposes of research carried out on behalf of or authorised by the Minister, the Children’s Advocate or the National Advisory Council on Children.

**Regulations**

**58.** The minister responsible for justice, after consultation with the Minister, may make regulations concerning –

(a) the procedures to be followed at or in connection with proceedings of children’s courts and the powers, duties and functions of clerks of the children’s court in as far as they relate to the proceedings of children’s courts;

(b) the form of any application, authority, certificate, consent, notice, order, process, register or subpoena to be made, given, issued or kept;

(c) the holding of pre-hearing conferences in terms of section 38, procedures regulating such conferences and information that must be submitted to the children’s court;

(d) the holding and monitoring of lay-forum hearings in terms of section 39, procedures regulating such hearings and information that must be submitted to the children’s court;

(e) the qualifications and experience of persons facilitating pre-hearing conferences and lay-forum hearings;

(f) documents in connection with matters brought to a children’s court and records of the proceedings of children’s courts, including regulations determining –

(i) the person by whom, the period for which and the manner in which those documents and records must be kept; and

(ii) access to those documents and records;

(g) the keeping of records with regard to matters brought to and dealt with by the children’s court;

(h) the payment of persons who are not employed by the state;

(i) the establishment of guidelines regulating the relationship between a child involved in any proceedings under this Act and his or her legal representative and the experience or accreditation of legal practitioners appointed to represent children in proceedings under this Act; and

(j) any other matter required or permitted to be prescribed under this Act.
CHAPTER 5
RESIDENTIAL CHILD CARE FACILITIES, PLACES OF CARE AND SHELTERS

The Bill provides for the registration and monitoring of various facilities for the care of children,

Some of these facilities would be used as forms of alternative care for children who have been abandoned or are not safe in their usual homes. Some may also be utilised as alternatives to police cells and prisons for young offenders. These alternative care facilities, to be known as residential child care facilities, would include

- **places of safety**
- **children’s homes**
- **education and development centres**.

The Bill also provides for the registration of:

- **places of care** which would include crèches, day care and community-run hostels
- **early childhood development centres**, which have structured learning activities for children between birth and school age
- **shelters** for ‘street children’ or for abused women and children.

Basic minimum standards are included here. More detailed standards for these various types of facilities would be contained in regulations rather than in the law, to allow for easier adjustment from time to time.

Places of safety

59. (1) A place of safety is used for the temporary reception and care of children–

(a) removed in terms of section 131 or 132;
(b) pending their placement in terms of an order of the children’s court;
(c) in terms of an order under the Criminal Procedure Act;
(d) awaiting trial or sentence; or
(e) for any other prescribed purpose.

(2) A person approved for purposes of foster care may in accordance with conditions imposed in the approval, subject to subsection (3)(b), act as a place of safety.

(3) The Minister may –

(a) approve the use of a private children's home, a private hospital or any other private facility which the Minister deems suitable, as a place of safety;
(b) upon application by any person, approve a private home as a place of safety if the applicant can prove that –
(i) children will be cared for in a healthy, hygienic and safe environment in line with the reasonable standards of the community in which the home is situated;

(ii) children will be provided with adequate nutrition and sleeping facilities;

(iii) the person is willing and suitable to provide care to children; and

(iv) that person or any other persons living in the home has or have not been convicted of an offence contemplated in section 232(2);

(c) in consultation with the minister responsible for education, approve the use of a school hostel as a place of safety; or

(d) in consultation with the relevant responsible minister, approve the use of any other appropriate state-owned building or place as a place of safety.

(4) The Minister may issue a letter of authorisation to a person contemplated in subsection (2) or (3)(b) which must be renewed in the manner and frequency and subject to such conditions as may be determined by the Minister.

(5) If children cannot be accommodated in any place of safety approved under subsection (3), the Minister may, out of moneys appropriated by Parliament for the purpose or from the Children’s Fund, establish and maintain places of safety of varying classifications based on different children's needs and the interests of community safety that are sufficient to accommodate all children who have to be placed in such places.

(6) A child must be placed in a place of safety –

(a) if practicable and consistent with the best interests of the child, in the community or region in which the child normally resides; and

(b) if it is consistent with the best interests of the child and the interests of community safety, with an individual or a family approved for the purposes of foster care, in preference to placement in a place of safety approved under subsection (3).

(7) A child accommodated in a place of safety who is not awaiting trial for a criminal offence or awaiting sentence after being convicted of an offence must, for all purposes and at all times, be kept separate from children in that place of safety who are awaiting trial or awaiting sentence.
(8) A place of safety or a place of detention established or deemed to have been established under section 38 of the Children’s Act, 1960 (Act No. 33 of 1960) and which is in existence at the date of commencement of this Act, is as from that date regarded to be a place of safety established and maintained in accordance with this Act.

**Places of care**

60. (1) A place of care is used for the care, whether for or without reward, of more than six children on behalf of their parents or care-givers during specific hours of the day or night, or for a temporary period, in terms of a private arrangement between the parents or care-givers and such person, and includes, but is not limited to a community hostel whether regulated by the minister responsible for education or not, but excludes the care of a child –

(a) by a school as part of tuition, training and other activities provided by the school;

(b) as a boarder in a school hostel or other residential facility managed as part of a school; or

(c) by a hospital or other medical facility as part of the treatment provided to the child.

(2) A place of care, other than one maintained and controlled by the state or one regarded as a place of care in terms of subsection (3), may only be used as a place of care if it –

(a) is registered as such under this Act; and

(b) is operated in compliance with all conditions of registration.

(3) A place of care registered or deemed to have been registered under section 42 of the Children’s Act, 1960 (Act No. 33 of 1960), and which is in existence at the date of commencement of this Act, is as from that date regarded to be a place of care registered in accordance with this Act.

**Early childhood development centres**
61. (1) An early childhood development centre is a facility used to care for children from birth to the age of formal schooling and which offers a structured set of learning activities.

(2) A facility may only be used as an early childhood development centre if it –
   (a) is registered as such in terms of this Act; and
   (b) is managed and maintained in accordance with any conditions subject to which the facility is registered.

(3) The minister responsible for education must administer all matters relating to activities at early childhood development centres registered under this Act.

Shelters

62. (1) A shelter is a facility located at a specific place for the purpose of providing basic services, including overnight accommodation, to –
   (a) children living or working on the streets;
   (b) abused women and children; or
   (c) children who voluntary attend the facility but who are free to leave.

(2) A shelter established by an organ of state or a non-governmental organisation only qualifies for funding from money appropriated by Parliament for that purpose if it complies with the requirements of this Act and any standards for shelters prescribed in terms of this Act.

(3) Any person may establish or operate a shelter if the shelter –
   (a) is registered in terms of law; and
   (b) is managed and maintained in accordance with any conditions subject to which the shelter is registered.

(4) An existing shelter registered in terms of law and operated in accordance with the registration certificate is from the date of commencement of this section regarded to have been registered in terms of this section.

Children's homes
63. (1) A children's home is a facility for the reception and provision of
residential care of children other than in their family environment –
(a) who have been abandoned or orphaned;
(b) who for any reason cannot be placed in kinship care or foster care;
(c) who are awaiting trial or sentence;
(d) who are placed in such home in terms of an order under the Criminal
Procedure Act; or
(e) for any other purpose that may be prescribed.

(2) A child must, if possible, be placed in a children's home in the community or
region in which the child normally resides.

(3) A child may only be placed in a children’s home for purposes of paragraphs (c)
and (d) of subsection (1) if such home provides a programme for the reception, development and
secure care of children.

(4) The Minister may, out of moneys appropriated by Parliament or from the
Children’s Fund, establish and maintain children's homes sufficient to accommodate all children
who have to be placed in such a home and cannot be accommodated in other children's homes
registered under section 68.

(5) A place, other than one maintained and controlled by the state, may only be used
as a children's home if it –
(a) is registered as such in terms of this Act; and
(b) is managed and maintained in accordance with any conditions subject to which
the children’s home is registered.

(6) A children's home established and maintained under section 41(3)(a) of the
Children’s Act, 1960 (Act No. 33 of 1960), and which is in existence at the date of
commencement of this Act, is from that date regarded to be a children's home established and
maintained in accordance with this Act.
(7) A children’s home registered or deemed to have been registered under section 42 of the Children’s Act, 1960 (Act No. 33 of 1960), and which is in existence at the date of commencement of this Act, is as from that date regarded to be a children’s home registered in accordance with this Act.

**Education and development centres**

**64.** (1) An education and development centre is used for the reception, care and training of children –

(a) in terms of an order under the Criminal Procedure Act;
(b) in terms of an order under this Act placing the child in an education and development centre;
(c) transferred to such centre in terms of section 76;
(d) awaiting trial or sentence;
(e) with behavioural and emotional difficulties; or
(f) for any other purpose that may be prescribed.

(2) The Minister, after consultation with the minister responsible for education, must, from money appropriated by Parliament or from the Children’s Fund, establish and operate education and development centres for the reception, care and training of children contemplated in subsection (1).

(3) The Minister may, after consultation with the minister responsible for education, approve the use of any school administered by that minister as an education and development centre for any or all of the purposes for which such centres may be used in terms of subsection (1).

(4) An education and development centre –

(a) must be managed and maintained in accordance with this Act; and
(b) must comply with the prescribed standards and the structural, safety, health and other requirements prescribed by the law applicable in the area where the centre is situated.
(5) The minister responsible for education must administer all matters relating to learning activities at education and development centres registered under this Act.

(6) Any organisation may establish or operate an education and development centre, provided that the centre –
   (a) is registered with the Minister;
   (b) is managed and maintained in accordance with this Act and any conditions subject to which the centre is registered; and
   (c) complies with the prescribed standards.

(7) A school of industries or a reform school established and maintained under section 39 of the Children’s Act, 1960 (Act No. 33 of 1960), and which is in existence at the date of commencement of this Act, is from that date regarded to be an education and development centre approved under this Act.

Minimum standards for residential child care facilities, places of care, early childhood development centres and shelters

65. (1) Premises or places used as residential child care facilities, places of care, early childhood development centres or shelters must have –
   (a) a safe area for the children to play;
   (b) adequate space and ventilation;
   (c) safe drinking water;
   (d) hygienic and adequate toilet facilities;
   (e) access to services for the disposal of refuse or other adequate means of disposal of refuse generated at the facility;
   (f) a hygienic area for the preparation of food for the children; and
   (g) appropriate first-aid supplies.

(2) A child accommodated in a facility, place, centre or shelter contemplated in subsection (1) who is not subject to secure care or who is not awaiting trial or sentence must, for all purposes and at all times, be kept separate from children in that facility who are subject to such care or who are awaiting trial or sentence.
(3) All residential child care facilities, places of care, early childhood development centres and shelters must have systems in place for children accommodated there to receive relevant information and to express their views in all decision-making processes affecting them according to their age, maturity, stage of development and experience, including mechanisms to ensure that such views receive due consideration.

(4) The Minister may, after consultation with the minister responsible for health and social services, prescribe additional standards with which facilities, places, centres or shelters contemplated in subsection (1) must comply.

Management boards for children's homes and education and development centres

66. (1) Every children’s home and education and development centre must have a management board consisting of not less than three and not more than nine members.

(2) The members of a management board are appointed by –
(a) the minister responsible for education, in the case of an education and development centre established by the minister; and
(b) the Minister, in the case of a children’s home established by the Minister; and
(c) the registration holder in accordance with the prescribed procedures, in the case of a privately operated children’s homes and education and development centres.

(3) When appointing members of the management board, the relevant minister or registration holder must ensure fair representation of all stakeholders including the community in which in the home or centre is situated.

(4) A person unsuitable to work with children may not be appointed as a board member.

(5) The board exercises powers and perform duties conferred on it in terms of this Act.
Application for registration of places of care, early childhood development centres, shelters, children's homes and education and development centres

67. (1) A person who wishes to register a place of care, early childhood development centre, shelter, children's home or an education and development centre must make an application, in the prescribed form and manner, to the Minister.

(2) The Minister may, before considering any application for registration under subsection (1), require the applicant to –
   (a) show that there is a reasonable need for a place of care, early childhood development centre, shelter, children's home or an education and development centre;
   (b) provide information relating to the applicant’s existing and prospective financial position; and
   (c) furnish any information which is relevant to the application.

Registration of places of care, early childhood development centres, shelters, children's homes and education and development centres

68. (1) The Minister –
   (a) may, in the granting of an application for registration under section 60, impose such conditions as he or she considers appropriate to promote the best interests of the child;
   (b) must register a place of care, early childhood development centre, shelter, children's home or an education and development centre if the Minister has reason to believe that the facility in question will be managed and operated in the best interests of the children who will be accommodated there; and
   (c) must issue a certificate of registration in respect of the facility registered under paragraph (b), and that certificate is valid for a period of five years from the date of its issue.

(2) The Minister may at any time amend a certificate of registration referred to in subsection (1)(c) to impose additional conditions or to withdraw certain conditions on the
exercise of powers by the place of care, early childhood development centre, shelter, children’s home or education and development centre.

(3) The holder of a certificate of registration referred to in subsection (1)(c) must apply for the renewal of that certificate at least three months before the date of expiry of the certificate and the Minister must renew that certificate if he or she is satisfied that the place, home, shelter or centre concerned continues to comply with the requirements for registration, unless the holder of such certificate wishes to withdraw the registration in which case the certificate must forthwith be returned to the Ministry for cancellation.

(4) The Minister may on application by the holder of a certificate of registration amend the certificate by written notice to that person.

(5) The Minister must from time to time publish a notice in the Gazette recording the registrations of all facilities under this section, and any renewals or cancellations thereof.

Eligibility of registered facilities for state funding and contributions in kind

69. (1) A residential child care facility, place of care, early childhood development centre or shelter established by an organ of state or a non-governmental organisation which is registered in terms of this Chapter and complies with the requirements of this Act and any prescribed standards for such facility, place, centre or shelter is eligible to seek funding from money appropriated by Parliament or from the Children’s Fund for—

(a) upgrading or equipping the facility, place, centre or shelter;

(b) training of staff or volunteers;

(c) programmes for children at the facility, place, centre or shelter; and

(d) other expenses reasonably related to the facility, place, centre or shelter and its purposes.

(2) A residential child care facility, place of care, early childhood development centre or shelter which qualifies for state funding under subsection (1) is eligible to receive donations in kind from the state, including but not limited to equipment, toys and food supplements for children.
Reporting by children’s homes and education and development centres

70. A children’s home and an education and development centre registered in terms of section 61 must submit an annual report to the Ministry containing information on –
(a) the number, age and sex of children accommodated;
(b) in the case of privately-run facilities, the financial position of the facility; and
(c) any other prescribed information.

Inspection of facilities, places of care, early childhood development centres, and shelters

71. (1) Any registered or unregistered residential child care facility, place of care, early childhood development centre, shelter or any other place where children are cared for, is subject to an inspection in terms of section 231 without advance notice.

(2) A social worker must inspect every registered or approved residential child care facility, place of care, or shelter, and an official designated by the minister responsible for education, must inspect an early childhood development centre, in order to achieve the objects of section 231, at least once a year during the period of registration or approval of such facility, place, centre or shelter.

Cancellation of certificate of registration

72. (1) The Minister may at any time, after giving a written notice to the holder of a registration certificate contemplated in section 68(1)(c), cancel the certificate –
(a) if the registered facility is not maintained in accordance with this Act or any other law;
(b) if the holder of the certificate of registration fails to comply with the condition of the certificate; or
(c) for any other reasonable cause.

(2) The Minister may not cancel a certificate of registration unless he or she has given the holder of the certificate a reasonable opportunity to be heard.
(3) The notice referred to in subsection (1) must clearly indicate the reasons for the proposed cancellation and specify the date on which the cancellation is to take effect, but the effective date of cancellation must not be earlier than three months from the date of the notice, unless the Minister and the person operating or managing the place of care, early childhood development centre, shelter, children's home or education and development centre, as the case may be, agree to a different date.

(4) The person operating or managing a place of care, early childhood development centre, shelter, children's home or education and development centre, referred to in subsection (3) may, during the three months' period referred to in that subsection, present to the Minister information opposing the proposed cancellation, and the Minister must consider such information in deciding whether to cancel the registration or rescind the notice.

Voluntary closure of a place of care, early childhood development centre, shelter, children’s home or an education and development centre

73. The holder of a certificate of registration may close the facility in respect of which the certificate is held, by –

(a) written notice to the Minister or other person authorised by the Minister; and

(b) surrendering the certificate to the Minister.

Notice of enforcement

74. (1) The Minister may by written notice instruct –

(a) a person operating or managing an unregistered place of care, early childhood development centre, shelter, children’s home or an education and development centre to –

(i) stop operating such place, shelter, home or centre; or

(ii) apply for registration in terms of this Act within a period specified in that notice; and

(b) a person operating or managing a registered place of care, early childhood development centre, shelter, children’s home or education and development centre to –

(i) stop operating such place, shelter, home or centre; or

(ii) apply for registration in terms of this Act within a period specified in that notice; and
centre in contravention of such conditions of registration as may have been imposed, to comply with the conditions.

(2) A written notice issued under subsection (1)(a) must contain reasons for the instructions contained in that notice.

(3) A person who has received an instruction in terms of subsection (1), may be given permission to continue operating during the period of the notice and, if that person applies for a certificate of registration, until that person’s application has been dealt with under this Act.

(3) Any person who fails to comply with a written notice contemplated in subparagraph (i) of subsection (1)(a) commits an offence and is liable on conviction to a fine of N$100 for each day on which such facility continues to operate.

**Transfer of child in event of cancellation of certificate of registration**

75. If a children’s home or an education and development centre is closed due to cancellation in terms of section 72 or voluntary closure in terms of section 73, every child placed in that facility must be transferred in accordance with section 76.

**Transfer of child**

76. (1) The Minister may by order in writing, subject to subsections (3) and (4), transfer any child –

(a) from a particular foster home to another foster home or to kinship care; or

(b) from a particular residential child care facility to another residential child care facility of the same or a less secure type, or to foster care or kinship care.

(2) The Minister may by order in writing, subject to subsections (3) to (5), transfer any child –

(a) from court-ordered kinship care to foster care; or

(b) from foster care or court-ordered kinship care to a place of safety, a children’s home or education and development centre; or
(c) from a residential child care facility to a more secure residential child care
facility,
provided that the transfer must be ratified by a children’s court in the prescribed manner.

(3) Before the Minister issues an order in terms of subsection (1) or (2), a
designated social worker must submit a written report to the Minister containing an
assessment of the best interests of the child, addressing the possible reunification of the child
with his or her immediate family or other family members and reporting on consultations
held with –

(a) the child concerned;

(b) the parent or care-giver of the child, if available;

(c) the child and the place, home or centre or person in whose care that child has
been placed; and

(d) the child and the place, home centre or person to whom the child is to be
transferred.

(4) An order in terms of subsection (1) or (2) is subject to the condition that –

(a) the transfer must be managed under the supervision of a designated social
worker to monitor the child’s integration into the new placement;

(b) the Minister may at any time revoke the transfer; and

(c) the Minister must revoke the transfer if the child and the designated social
worker so request.

(5) If the Minister transfers a child from a secure residential child care facility to a
less secure facility the Minister must be satisfied that the transfer will not be prejudicial to
other children.

(6) An order in terms of subsection (1) may not have the effect of extending the
original placement order made by the court in terms of section 141 unless the order has been
extended in terms of section 147.

(7) A transfer of a child from or to an education and development centre can only be
done after consultation with the minister responsible for education.
(8) An order in terms of subsection (1) must be considered proof of eligibility for any form of state support.

**Conditional discharge of child**

77. (1) The Minister may by order in writing, subject to subsections (2) to (4), conditionally discharge any child from an alternative placement made in terms of section 141 and transfer such child to the care of the child’s parents, guardian or former care-giver.

(2) The order must specify the conditions, if any, with which the child and the parent, guardian or care-giver must comply.

(3) Before the Minister issues an order in terms of subsection (1), a designated social worker must submit a written report to the Minister containing an assessment of the best interests of the child and the prospects for successful reunification of the child with the child’s parents, guardian or former care-giver and reporting on consultations held with –
   (a) the child concerned;
   (b) the parent, guardian or care-giver concerned; and
   (c) the place, home, centre or person who has been caring for the child in terms of the alternative placement.

(4) An order in terms of subsection (1) is subject to the condition that –
   (a) the conditional discharge must be managed under the supervision of a designated social worker, which must include visits to the child at least once a month during the period of conditional discharge, to monitor the reunification of the child with the child’s the child’s parents, guardian or former care-giver.
   (b) the Minister may at any time revoke the conditional discharge and return the child to the previous alternative placement or another alternative placement of the same type; and
   (c) the Minister must revoke the conditional discharge if the child and the designated social worker so request.
(5) If any requirement referred to in subsection (2) is contravened, the designated social worker concerned may bring the child before a children’s court, which may, after an inquiry, vary the order issued by the Minister or make a new order in terms of section 141.

**Discharge of child**

78. (1) The Minister may, subject to subsections (2) and (3), issue a notice directing that a child be discharged from foster care, court-ordered kinship care or a residential child care facility as from the date specified in the notice.

(2) Before the Minister issues a notice in terms of subsection (1), a designated social worker must submit a written report to the Minister containing an assessment of the best interests of the child, addressing the prospects of reunification of the child with his or her immediate family or other family members and reporting on consultations held with –
   
   (a) the child concerned;
   
   (b) the parent or care-giver of the child, if available;
   
   (c) the child and the place, home or centre or person in whose care the child is prior to the contemplated discharge; and
   
   (d) the person in whose care the child would be placed upon discharge.

(3) A notice in terms of subsection (1) is subject to the condition that the discharge must be managed under the supervision of a designated social worker, which must include visits to the child at least once a month for a period of six months following the discharge if it has not been preceded by a conditional discharge in terms of section 77.

(4) A notice in terms of subsection (1) relieves the foster parent or residential child care facility from any further responsibilities with respect to the child.

**Appeal and review**

79. (1) A child or a person aggrieved by a decision in terms of this Chapter, other than a decision made by a children’s court, may lodge an appeal against that decision in the prescribed form with the children’s court having jurisdiction, who must decide on the appeal within 90 days of receipt thereof.
(2) A child or a person who is not satisfied with the outcome of an appeal lodged as contemplated in subsection (1) may apply to the High Court to review that decision, in which case the procedures contemplated in section 88(3) and (4) apply with such changes as may be required by the context.

Death of a child in foster care or a registered facility

80. If –
   (a) a child who has been placed in foster care, a residential child care facility or a place of care dies while in such care; or
   (b) a child otherwise dies on the premises of any registered facility, or from injuries received at any registered facility—

the management of that facility or place or the person in whose care the child was placed must immediately report the matter to a member of the police and, if applicable, the designated social worker involved, who must forthwith notify the child’s parent, guardian or family and carry out an investigation into the cause of the child’s death if required in the circumstances.

Child in foster care or residential child care facility prohibited from leaving Namibia

81. (1) A child in foster care or a residential child care facility may not leave Namibia without the permission of the Minister, unless the child’s absence will be due to his or her involvement in a cultural, artistic, social or sporting activity for a period not exceeding three days, as evidenced by a signed letter from the person in control of such activity.

(2) In granting the approval in terms of subsection (1) the Minister may impose terms and conditions to protect the child’s best interests.

Leave of absence from foster care or residential child care facility

82. (1) Leave of absence may, subject to subsection (2) and such limitations and conditions as may be prescribed, be granted to a child in foster care or a residential child care facility –
(a) by the management of a children’s home or an education and development centre in whose care the child has been placed;
(b) by the person in whose care the child has been placed; and
(c) by the Minister in the case of a child in a residential child care facility, a shelter or a private home or any other place pending a decision or court order concerning the placement of the child, unless the child’s absence will be due to his or her involvement in a cultural, artistic, social or sporting activity for a period not exceeding three days, as evidenced by a signed letter from the person in control of such activity.

(2) If a child has been placed under the supervision of a designated social worker, leave of absence may only be granted with the approval of that social worker.

(3) The management or person referred to in subsection (1), or designated social worker may at any time cancel any leave of absence granted in terms of subsection (1).

(4) In the case of foster care, the supervising designated social worker may at any time cancel any leave of absence granted in terms of subsection (1).

(5) When a child’s leave of absence has been cancelled, the management or person referred to in subsection (1) or designated social worker must request that the child be returned to the person or facility in whose care such child is.

Apprehension of child absent without authorisation from foster care or residential child care facility

83. (1) A member of the police or a designated social worker may apprehend any child who –

(a) has absconded from foster care, a residential child care facility or any other place in which the child has been placed; or
(b) has been granted leave of absence by a person contemplated in section 82(1) and who on cancellation or expiration of such leave of absence fails to return to the person or relevant facility.
(2) If a member of the police or a designated social worker contemplated in subsection (1) has reasonable grounds to believe that a child is in or on certain premises, the member of the police or designated social worker may, without warrant, enter and search the premises for the purpose of apprehending the child.

(3) A police official referred to in subsection (1) or (2) may use such force as may be reasonably necessary to overcome any resistance by the child or against the entry or search of the premises as contemplated in subsection (2), including the breaking of any door or window of such premises: Provided that the member of the police must first audibly demand admission to the premises and announce the purpose for which such member seeks to enter the premises.

(4) A child who is apprehended under subsection (1) or (2) must be brought before a children’s commissioner within five days for an enquiry as to the reason for the unauthorised absence.

(5) A child may, depending on his or her best interests, until he or she is brought before a children’s commissioner in terms of subsection (4), be returned to the person from whom or residential child care facility from where he or she left, or be kept in a place of safety.

(6) During an enquiry under subsection (4) a children’s commissioner –
(a) must give the child an opportunity to explain his or her unauthorised absence; and
(b) may, in the best interests of the child, allow the child to give the explanation referred to in paragraph (a) without the presence of his or her parents, a guardian, foster parents or members of or representatives of the management board of the residential child care facility concerned.

(7) A children’s commissioner may, after an enquiry under subsection (4), make an order in the best interests of the child, requiring –
(a) that the child be returned, on such conditions as the children’s commissioner may consider necessary, to the person from whom or the residential child care facility from which he or she was absent; or
(b) that the placement of the child be changed, in which case the clerk of the children’s court must notify the child’s parent or guardian and the person or
facility in whose care the child had been immediately before the change, of such change, unless such parent, guardian, person or representative of such facility is present at the enquiry.

(8) A person who directly or indirectly counsels, induces or aids any child who is absent without authorisation from a residential child care facility, foster care, a court-ordered kinship care placement or an in-home placement not to return to the care thereof, unless such person is acting in good faith or what appears to be in the interests of the child, or who prevents him or her from returning to such care after the order under subsection (7)(a) has been made, commits an offence and is liable on conviction to a fine not exceeding NS$20 000 or to imprisonment for a period not exceeding five years or to both the fine and imprisonment.

Delegation

84. (1) The Minister may, by agreement with a local or regional authority, assign the performance of some or all of the functions contemplated in sections 67, 68, 72, 73 and 74 to a local authority if the Minister is satisfied that the local authority has the capacity to perform the functions concerned.

(2) The local or regional authority referred to in subsection (1) may delegate any power conferred or duty assigned to it in terms of this section to its staff members.

(3) A delegation in terms of subsection (2) –
(a) is subject to any limitations, conditions and directions which the delegating official may impose;
(b) must be in writing; and
(c) does not divest the delegating official of the responsibility concerning the exercise of the power or the performance of the duty.

(4) The delegating official may –
(a) confirm, vary or revoke any decision taken in consequence of a delegation in terms of this section, subject to any rights that may have accrued to a person as a result of the decision; and
(b) at any time withdraw a delegation.

(5) An applicant aggrieved by a decision of a local or regional authority with regard to matters referred to in sections 67, 68, 72, 73 and 74, may lodge an appeal with the local authority council against that decision.

**Regulations**

85. The Minister may make regulations prescribing –

(a) the procedure to be followed in connection with the lodging and consideration of –
   (i) applications for registration of places of care, shelters, children's homes or education and development centres;
   (ii) applications for renewal or amendment of such registrations; and
   (iii) objections to applications made in terms of sub-paragraphs (i) and (ii);

(b) the conditions and standards with which applicants must comply before, during or after the lodging of their applications;

(c) the format and contents of registration certificates;

(d) methods and procedures to enforce compliance with registration conditions;

(e) matters relating to training, qualifications and experience of staff of places of care, early childhood development centres, shelters, children's homes or education and development centres;

(f) the rights of children in places of care, early childhood development centres, shelters, children's homes or education and development centres;

(g) management, disciplinary and other practices in places of care, early childhood development centres, shelters, children's homes or education and development centres;

(i) the keeping of records of children in places of care, early childhood development centres, shelters, children's homes or education and development centres; and

(j) the provision of programmes at places of care, early childhood development centres, shelters, children's homes or education and development centres to meet the developmental, therapeutic and recreational needs of children.
DIVISION B: FAMILY ARRANGEMENTS

CHAPTER 6
PROOF OF PARENTAGE AND CHILDREN BORN OUTSIDE MARRIAGE

The provisions in Chapters 5 and 6 restate the current provisions of the Children’s Status Act 6 of 2006. It was strongly suggested by magistrates and by the technical legal drafters in the Ministry of Justice that the Children’s Status Act should be repealed and its provisions incorporated in the Child Care and Protection Act to ensure harmony on issues such as child participation, legal representation for children, vulnerable witness provisions for children, the factors courts should use to assess the child’s best interests.

Some technical and procedural aspects of the Children’s Status Act have proven to be problematic in practice and the opportunity has been taken to amend certain provisions to address these matters. The basic principles of the Children’s Status Act have not been altered.

The regulations made in terms of the Children’s Status Act have also proved to be problematic in many respects, but those problems can only be addressed once the Child Care and Protection Act, now incorporating the Children’s Status Act, has been approved and a new set of regulations enacted.

PART I
GENERAL PROVISIONS AND PROOF OF PARENTAGE

Factors to be considered by children’s court

86. (1) When making any decision pertaining to custody or guardianship of or access to a child, the children’s court must, when deciding what is in the best interests of the child as contemplated in section 4, also consider –

(a) the degree of commitment and responsibility which the respective parents have shown towards the child, as evidenced by such factors as financial support, maintaining or attempting to maintain contact with the child or being named as a parent on the child’s birth certificate; and

(b) the financial positions of the parents, but –

(i) the financial positions of the parents are not the decisive factor; and

(ii) the court may not approve an application for the custody of a child if the application is based on a desire to avoid the payment of maintenance in respect of that child.
(2) In the interpretation of this Chapter, regard must be had to the right of a child to know and be cared for by both parents and to the goal of resolving disputes in a non-adversarial manner if possible.

**Jurisdiction of children’s court**

87. A children’s court has jurisdiction over any proceedings brought before it in terms of this Part.

The provisions on legal representation and legal practitioners have been removed from this section and incorporated in the general provision on legal representation in Chapter 4 on children’s courts. The provision on children who are unable or refuse to participate in proceedings has also been removed and harmonised with section 52. This approach will ensure a consistent approach to all children’s court proceedings.

**Review of certain decisions**

88. (1) Despite anything to the contrary contained in any law, a children’s court may alter an order of the High Court pertaining to custody, guardianship or access made in connection with a divorce or in any other proceedings if circumstances have changed or in order to ensure compliance with such order.

(2) An order which is altered by a children’s court in terms of subsection (1) is subject to automatic review by a judge of the High Court in chambers.

(3) Review proceedings contemplated in this section must be instituted and conducted in the form and manner prescribed and within the prescribed periods.

(4) In review proceedings instituted in terms of subsection (3), the High Court or a judge thereof must consider the record of the proceedings together with any other documents submitted in accordance with subsection (3) and any further information or evidence which may at the request of the judge be supplied or taken by the children’s court in question, and the High Court or judge may –

(a) confirm, alter or set aside the decision of the children’s court;
(b) make any order which the High Court or judge believes ought to have been made by the children’s court in terms of this Part; or
(c) remit the case to the children’s court with instructions to deal with the matter in such manner as the High Court or judge may see fit.

Suspension of order pending review or appeal

89. Where an order or a decision of the children’s court is being reviewed in terms of section 88 or where an appeal has been lodged in terms of section 41, the children’s court may, pending the outcome of the review or appeal –
   (a) suspend the operation of any order or decision of the children’s court or the children’s commissioner; or
   (b) make any other order which is in the best interests of the child, but in either case, the best interests of the child are the paramount consideration.

Procedure for proof of parentage

90. (1) For the purpose of this section –
   (a) “putative father” means a man who claims or is alleged to be the father of a person for whom paternity has not yet been established or acknowledged without dispute; and
   (b) “putative mother” means a woman who claims or is alleged to be the mother of a person for whom maternity has not yet been established or acknowledged without dispute.

   (2) Proceedings to establish parentage may be brought by –
   (a) the mother or putative mother of the person whose parentage is in question;
   (b) the father or putative father of the person whose parentage is in question;
   (c) the person whose parentage is in question;
   (d) someone, other than the mother or father of the person whose parentage is in question, who is acting as the primary caretaker of such person; or
   (e) a person authorised in writing by the Minister to act on behalf of the person whose parentage is in question.
(3) The mother or putative mother and the father or putative father of a person whose parentage is in question are competent and compellable witnesses in any proceedings in which the issue of parentage is raised, but nothing in this section is to be construed as compelling a person to testify against his or her spouse.

(4) Proof on a balance of probabilities is required in order to establish parentage in proceedings brought under subsection (2).

Presumption of paternity

91. (1) Despite anything to the contrary contained in any law, a rebuttable presumption that a man is the father of a person whose parentage is in question exists if –
   (a) he was at the approximate time of the conception, or at the time of the birth, of the person in question, or at any time between those two points in time, married to the mother of such person;
   (b) he cohabited with the mother of the person in question at the approximate time of conception of such person;
   (c) he is registered as the father of the person in question in accordance with the provisions of the Births, Marriages and Deaths Registration Act, 1963 (Act No. 81 of 1963);
   (d) both he and the mother acknowledge that he is the father of the person in question; or
   (e) he admits or it is otherwise proved that he had sexual intercourse with the mother of the person in question at any time when such person could have been conceived.

(2) Corroboration of evidence led to establish a presumption of paternity is not required and no special cautionary rules of evidence are applicable to such evidence.

Presumption on refusal to submit to scientific tests

92. (1) At any legal proceeding at which the parentage of any person has been placed in issue, the refusal by either party –
   (a) to submit himself or herself; or
(b) to cause any child over whom he or she has parental authority to be submitted, to any procedure which is required to carry out scientific tests relating to the parentage of the person in question, must be presumed, until the contrary is proved, to be aimed at concealing the truth concerning the parentage of that person.

(2) Regardless of anything contained in subsection (1), the High Court as the upper guardian of all children has the power to order that a child be submitted to a physical procedure referred to in subsection (1) if this is in the opinion of that Court in the best interests of the child.

PART II
CHILDREN BORN OUTSIDE MARRIAGE, VOID AND VOIDABLE MARRIAGES AND ARTIFICIAL FERTILITY TECHNIQUES

Procedures for certain orders apply to children of divorced parents

93. The procedures for orders pertaining to custody in section 95, orders pertaining to guardianship in section 96(3) to (6), orders restricting or denying access to a parent not having custody of a child in section 97(5) to (8) and orders dealing with the unreasonable denial or restriction of access in section 97(11) and (13) apply with the changes required by the context to children of divorced parents.

Custody

94. (1) Both parents of a child born outside marriage have equal rights to custody of the child.

(2) One parent must have custody of the child and both parents may agree on who should have such custody, provided that such agreement-
(a) must be in writing and signed by both parents in the presence of two witnesses; and
(b) may be accompanied by a parenting plan contemplated in section 121.
(3) (a) The parties to a written agreement contemplated in subsection (2) may decide to have such agreement registered, in which case the agreement must be registered in the prescribed manner.

(b) A registered agreement constitutes \textit{prima facie} proof that the parent named in that agreement has custody of the child and has the legal power to act in that capacity.

Requiring agreements between parents to be in writing will contribute to legal certainty and also conforms with the principle that parenting plans must be in writing.

There is a difference between the agreement discussed here and the concept of parenting plans in Chapter 9. This provision on agreements authorises unmarried parents to make an agreement on which one of them will be the child’s custodian. (Without such an authorisation, such an agreement would not be legally valid.) Parenting plans are agreements between persons who \textit{already} have parental rights and responsibilities on the \textit{details} of how those rights and responsibilities will be exercised. Agreements made in terms of this section could be supplemented by parenting plans.

(4) Where there is no agreement as to who should have custody of a child, either of the parents or any of the persons referred to under section 95 may, in the manner set out in that section, make an application to the children’s court to be appointed as the person having custody.

\textbf{Procedure for obtaining custody}

95. (1) The following persons may seek an order pertaining to the custody of a child born outside marriage or a child of divorced parents, provided that such a proceeding is brought by or on behalf of the person who is seeking custody of the child:

(a) the father, regardless of whether he is a major or a minor;

(b) the mother, regardless of whether she is a major or a minor; or

(c) someone, other than the mother or father of the child, who is acting as the care-giver of the child or who can show that he or she is acting in the best interests of the child.

(2) A person who seeks a court order in terms of subsection (1) must make an application in the prescribed form and manner and the children’s court must consider the application in the presence of the applicant or his or her authorised legal representative.
(3) An order for the appointment of a person having custody in terms of this section may only be made after the prescribed attempts have been made to notify the child’s parents, the child’s care-giver, if applicable, any person or persons with custody or guardianship of the child immediately prior to the application or any other person identified by the court or the social worker concerned as having an interest in the application, and that person has or those persons have been given an opportunity to be heard.

(4) On receipt of a response made in terms of subsection (3) the court must, in the prescribed manner, hear and determine the matter and make any order which is appropriate in the circumstances having regard to the best interests of the child.

(5) Before deciding on an application for custody and irrespective of whether a hearing took place in terms of subsection (4), the children’s court must order and consider a social worker’s report, to be completed within the period specified by the court, on the matter and may institute any investigation that it deems necessary and order any person to appear before it, and may order one or more of the parents or, if the applicant is not a parent, such applicant, to pay the costs of such investigation or appearance.

Subclause (5) reflects proposals made by Namibian magistrates during the consultation process. The magistrates felt a social worker report is needed to provide guidance on issues like custody, guardianship and access. (Similar social work report requirements have been inserted into the relevant provisions below.)

(6) Any order made in terms of this section may be varied or withdrawn by the children’s court if the court is satisfied that changed circumstances warrant a variation or withdrawal, on application by any of the persons listed in subsection (1) and subsections (2), (3) and (4) apply to any application for variation or withdrawal.

Guardianship

96. (1) (a) A person with custody of a child in terms of section 94 will also be the sole guardian of that child, unless a competent court, on application made to it, directs otherwise.
(b) A guardian appointed for a child in terms of this Part (to be known in this Part as “the legal guardian”), excluding a person who is also a natural guardian of the child, may not administer any property belonging to the child or take care of the child’s person as tutor unless he or she has been appointed by the Master of the High Court as a tutor in terms of section 72(1) of the Administration of Estates Act, 1965 (Act No. 66 of 1965).

(c) The Master of the High Court may make the appointment of a tutor as contemplated in paragraph (b) on application and must give preference to a legal guardian appointed under this Act: Provided that the Master may, if it is considered to be in the interests of the child concerned, appoint another suitable person as tutor.

(d) Any tutor appointed to administer the property of a child of which the value, at the date of issuing of the Letters of Tutorship, does not exceed the value referred to in section 18(3) of the Administration of Estates Act, 1965 (Act No. 66 of 1965), may wholly or partially be exempted from the requirement of security as contemplated in section 77 of that Act.

(e) A tutor referred to in paragraph (d) must comply with such requirements and is entitled to such remuneration as are prescribed by section 82 to 84 of the Administration of Estates Act, 1965 (Act No. 66 of 1965) to the extent specified by the Master in the Letters of Tutorship.

(2) If a parent is a minor, guardianship of such parent’s child, unless a competent court directs otherwise, vests in the guardian of such parent.

(3) The following persons may seek a court order granting legal guardianship to one or both parents, or to some other person or persons, or to one or both parents and another person or persons:

(a) either parent;
(b) the child;
(c) someone, other than the mother or father of the child, who is acting as the care-giver of the child; or
(d) a person authorised in writing by the Minister to act on behalf of the child.

(4) A person who seeks a court order in terms of subsection (1) or (3) must make an application in the prescribed form and manner and the court must consider the application in the presence of the applicant or his or her authorised legal representative.
(5) An order for legal guardianship in terms of this section may only be made after the prescribed attempts have been made to notify the child’s parents, the child’s caregiver, if applicable, any person or persons with custody or guardianship of the child immediately prior to the application or any other person identified by the court or the social worker concerned as having an interest in the application, and that person has or those persons have been given an opportunity to be heard.

(6) On receipt of a response made in terms of subsection (5) the court must, in the prescribed manner, hear and determine the matter and make any order which is appropriate in the circumstances having regard to the best interests of the child.

(7) Before deciding on an application for legal guardianship and irrespective of whether a hearing took place in terms of subsection (6), the children’s court must order and consider a social worker’s report, to be completed within a period specified by the court, on the matter and may institute any investigation that it deems necessary and order any person to appear before it, and may order one or more of the parents or, if the applicant is not a parent, such applicant, to pay the costs of such investigation or appearance.

(8) Unless the children’s court orders otherwise, the written consent of both parents is required for the adoption of the child, subject to the provisions for dispensing with any required consent as contemplated in section 168(11), (12) and (14).

(9) Unless the children’s court orders otherwise, the written consent of both parents is required for the removal of a child from Namibia.

(10) Despite subsection (9), no consent is required from a parent of a child if—
(a) the parent cannot be located through any of the prescribed means of notice within the prescribed period;
(b) the parent in question cannot give valid consent because he or she is mentally incapacitated; or
(c) in any other circumstances the children’s court finds that the consent requirement would not serve the best interests of the child.
(11) Lack of consent on any matter referred to in subsection (9) may be overruled by a children’s court if the consent is being unreasonably withheld.

(12) Any order made in terms of this section may be varied or withdrawn by the children’s court if the court is satisfied that changed circumstances warrant a variation or withdrawal, on application by any of the persons listed in subsection (3), and subsections (4), (5) and (7) apply to any application for variation or withdrawal.

A number of technical concerns were raised about the harmonisation of guardianship in this section, and in Chapter 7 below, with the Administration of Estates Act 1965. The re-drafting of the provisions pertaining to guardianship is based on input from the Master of the High Court, the former Master of the High Court and a Namibian estate lawyer.

Access

97. (1) Despite anything to the contrary contained in any other law, the parent of a child born outside marriage who does not have custody has a right of reasonable access to such child, subject to any parenting plan that may have been agreed upon in terms of section 121, unless a competent court, on application made to it, directs otherwise, but the right accrues only where the parent in question has voluntarily acknowledged parentage of the child.

(2) The right of access referred to in this section does not give the parent not having custody the right to remove the child from the home of the person who has custody or from any other place where the child resides without the consent of the person who has custody.

(3) Any access by the parent not having custody is subject to the reasonable control of the person who has custody, or any other person who has been entrusted by the person who has custody with responsibility for the care and control of the child.

(4) The following persons may seek a court order restricting or denying access to the parent not having custody of a child born outside marriage:

- the parent or other person who has custody of the child;
- the child;
(c) anyone, other than the mother or father of the child, who is acting as the care-
giver of the child; or

(d) a person authorised in writing by the Minister to act on behalf of the child.

(5) A person who seeks a court order restricting or denying access to the parent
who has custody of a child must make an application in the prescribed form and manner and
the children’s court must consider the application in the presence of the applicant or his or her
authorised legal representative.

(6) An order applied for in terms of subsection (5) may only be made after the
prescribed attempts have been made to notify the child’s parents, the child’s care-giver, if
applicable, any person or persons with custody or guardianship of the child immediately prior
to the application or any other person identified by the court or the social worker concerned
as having an interest in the application, and that person has or those persons have been given
an opportunity to be heard.

(7) Before making a final decision on an application referred to in subsection (5),
the children’s court must order and consider a social worker’s report, to be completed within
a period specified by the court, on the matter and may institute any investigation that it deems
necessary and order any person to appear before it, and may order one or more of the parents
or, if the applicant is not a parent, such applicant, to pay the costs of such investigation or
appearance.

(8) If, in an application made in terms of subsection (5), the applicant proves that
there is a risk of immediate harm to the child from continued access by the parent not having
custody, the children’s court may make a temporary *ex parte* order restricting or denying
access to the parent not having custody with immediate effect, which order remains in force
until such time as the consideration of an application for a court order restricting or denying
access to the parent not having custody in terms of subsection (5) is concluded.

(9) A parent not having custody who has not voluntarily acknowledged parentage
of a child born outside marriage may, in the prescribed form and manner, apply to the
children’s court for an order granting a right of reasonable access to that child, and the parent
who has custody or any other person who has custody of the child must be made a party to the proceedings.

(10) The court may make an order applied for in terms of subsection (9) and subsections (3) and (4) apply to the parent not having custody who has been granted the right of access to a child.

(11) Where a person has rights of access to a child, including a child of divorced parents, in terms of this Act or a court order issued under this Act or any other law, and that access is being unreasonably denied or restricted by the person who has custody, the person with rights of access may apply to the children’s court for an order specifying details of such access.

(12) Subsections (5), (6) and (7) apply to an application made in terms of subsection (11).

(13) An order restricting or denying access to the parent not having custody may be varied or withdrawn by the children’s court if the court is satisfied that changed circumstances warrant a variation or withdrawal, on application by any of the persons listed in subsection (4), and subsections (5), (6), (7) and (8) apply with the changes required by the context to any application for variation or withdrawal.

Other access

98. (1) The court may, on application by a member of the family or extended family of a child, including a child of divorced parents, make an order granting access to the child by such family member.

(2) Subsections (5), (6) and (7) of section 97 apply, with such changes as may be required by the context, to an application in terms of subsection (1).

(3) The court may, in making an order contemplated in subsection (1), impose such conditions as it may deem necessary in the best interests of the child concerned.
This provision seeks to ensure that contact rights of the non-custodial parent’s extended relatives (e.g., grandparents, siblings) are recognised where this is deemed to be in the best interests of the children.

Children born outside marriage as a result of rape or incest

99. (1) Perpetrators of rape or incest which results in the conception of a child outside marriage have no rights to custody, guardianship or access in terms of this Part, unless a competent court, on application made to it, orders otherwise.

(2) For the purposes of this section, ‘rape’ means the common law crime of rape and the crime of rape referred to in section 2 of the Combating of Rape Act, 2000 (Act No. 8 of 2000), where the perpetrator has been convicted of the crime.

Inheritance

100. (1) For the purposes of subsection (5), ‘rape’ means the common law crime of rape and the crime of rape referred to in section 2 of the Combating of Rape Act, 2000 (Act No. 8 of 2000), where the perpetrator has been convicted of the crime.

(2) Despite anything to the contrary contained in any statute, common law or customary law, a person born outside marriage must, for purposes of inheritance, either intestate or by will or other testamentary disposition, be treated in the same manner as a person born inside marriage.

(3) It must be presumed that the words “children” or “issue” or any similar term used in a will or other testamentary disposition, apply equally to persons born outside marriage and children born inside marriage, unless there is clear evidence of a contrary intention on the part of the testator.

(4) Nothing in this section is to be understood or interpreted as affecting the freedom of testamentary disposition.

(5) With respect to rape or incest which results in the conception of a person born outside marriage, the person or, in the case of incest, the persons who committed the crime
has or have no right to inherit intestate from the person born as a result of the rape or incest, but the person born as a result of the rape or incest may inherit intestate from the perpetrator or, in the case of incest, the perpetrators, and will be deemed to be included in the terms “children” or “issue” or any similar term used in a will or other testamentary disposition.

Duty to maintain

101. (1) Despite anything to the contrary contained in any law, a distinction may not be made between a person born outside marriage and a person born inside marriage in respect of the legal duty to maintain a child or any other person.

(2) Despite subsection (1), a person conceived as a result of rape has no legal duty to maintain a parent who was convicted of the rape, nor any legal duty to maintain that parent’s relations.

Domicile

102. Despite anything to the contrary contained in any law, a child born outside of marriage is deemed to be domiciled at the place or in the country with which he or she has the closest connection.

Effect of subsequent marriage of parents

103. Any child born of parents who marry each other at any time after the child’s birth must be treated as a child born inside marriage in all respects as from the date of birth, regardless of whether the parents could not have legally married each other at the time of the child’s conception or birth.

Status of children of void or voidable marriages

104. The status of any child conceived or born of a voidable marriage is not affected by the annulment of that marriage by a competent court.
Safeguarding of interests of dependent and minor children of void or voidable marriages

105. (1) A voidable marriage may not be annulled until the competent court concerned has enquired into and considered the safeguarding of the interests of any child or dependent child of that marriage, and for the purposes of this Chapter or any law relating to divorce, proceedings to annul the marriage must be regarded as proceedings for the granting of a decree of divorce.

(2) In case of a void marriage involving any child or dependent child or children, a competent court must enquire into the best interests of the child or children and make provision for safeguarding the interests of the child or children born of that marriage.

(3) A reference in any law to –
(a) a maintenance order;
(b) an order relating to the custody or guardianship of, or access to, a child; or
(c) the rescission, suspension or variation of such orders,
must be construed as including references to any similar orders made in terms of subsection (1) or (2).

Status of children born of artificial insemination or in vitro fertilisation

106. (1) Whenever the gamete or gametes of any person, other than a married woman or her husband, have been used with the consent of both such woman and her husband for artificial insemination or in vitro fertilisation, any child born as the result of such techniques is, for all purposes, deemed to be the biological child of such woman and her husband.

(2) For the purposes of subsection (1), it must be presumed, until the contrary is proved, that both such woman and her husband have granted the relevant consent.

(3) For the purposes of this section –
(a) “artificial insemination”, in relation to a woman, means the introduction, other than by natural means, of a male gamete or gametes into the internal
reproductive organs of such woman for the purpose of reproduction, otherwise than in accordance with a surrogacy agreement;

(b) “in vitro fertilisation”, in relation to a woman, means the placing of the product of a union of a male and female gamete or gametes which have been brought together outside the human body into the womb of such woman for the purpose of reproduction, otherwise than in accordance with a surrogacy agreement; and

(c) “gamete” means either of the two generative cells essential for human reproduction.

Application of this Chapter

107. Application of this Chapter

(1) Subject to subsection (2), this Chapter applies to all children or persons, where applicable, and to all matters relating to children or persons, where applicable, irrespective of whether the children or persons, where applicable, were born or the matters arose before or after the coming into operation of this Chapter.

This subsection has been amended to harmonise with the ruling in the case of Frans v Paschke and Others 2007 (2) NR 520 (HC). The Children’s Status Act 2006 generally has retrospective effect, but there is an exception in respect of the provision on inheritance by children born outside marriage which applies only “to estates in which the deceased person died after the coming into operation of this Act” (section 26(2)). This exception was made in an effort not to upset transactions which were regarded as settled. However, the Frans case held that the common law rule which preceded the statute is unconstitutional with effect since 21 March 1990. This section has now been amended to encompass the Frans holding.

(2) Despite subsection (1) this Chapter does not affect any order or decision made by a competent court in respect of a matter governed by this Chapter except that such order or decision may, on application made to a children’s court, be revoked, varied or substituted in terms of this Chapter.

Regulations

108. (1) The Minister may make regulations in relation to any matter required or permitted to be prescribed by this Chapter or that may be necessary or expedient in order
(1) To achieve the objects of this Chapter and, without derogating from the generality of this subsection, the Minister may make regulations relating to the following matters:

(a) the manner of registration of written agreements pertaining to the custody of children born outside marriage;

(b) prescribing the fees to be paid for proceedings instituted in terms of this Chapter or for any expenses incurred which a party is liable to pay in terms of this Chapter;

(c) other means by which paternity can be acknowledged apart from formal registration of birth; and

(d) generally the manner of conducting any investigation or hearing in terms of this Chapter.

(2) The Minister may, after consultation with the Minister responsible for justice, make rules relating to the following matters:

(a) the form and manner in, and time within, which reviews as contemplated in section 88 are to be made to the High Court;

(b) the manner in which affected persons are to be notified of any proceedings brought in terms of this Chapter; and

(c) the form and manner in which applications are to be made under this Chapter.

(3) Regulations or rules made under this section may –

(a) create an offence for any contravention thereof or any failure to comply with a provision thereof; and

(b) prescribe penalties in respect of any such offence not exceeding a fine of N$5 000 or imprisonment for a period not exceeding one year.
Based on input from the magistrates consulted, only written wills will be **automatically** recognised as naming custodians and/or guardians. This is because there is currently no system for verifying the validity of an alleged oral will without hearing evidence regarding its existence. However, a person appointed as a custodian or guardian in an oral will which is shown to be valid would be given preference in the procedures for naming a custodian or guardian under this Chapter unless this would for some reason be contrary to the child’s best interests. In this way, the proposed draft respects the procedures for wills under customary law.

Custody on death of person having custody

109. (1) Where the person who has custody of a child dies, and there is no provision in a written will naming another person to have custody or to be a guardian for the child, or where there is, for any other reason, no competent person to have custody of a child, an application for the appointment of a person to have custody of the child may be made in accordance with section 95 and must also comply with section 110(5) with such changes as may be required by the context: Provided that the children's court must, if a person has been named as guardian in a testamentary disposition other than a written will, give preference to that person as custodian if satisfied of the validity of such testamentary disposition and the suitability of such person to be the custodian of the child in question.

(2) A parent with sole custody of a child may, by a written will appoint any other person to have custody of the child, and where a written will appoints a guardian without naming a person to have custody, that guardian has custody of the child unless a competent court, on application made to it, directs otherwise.

(3) Where a parent shares joint custody with another parent because the parents are or were married, or in terms of any law or agreement, the surviving parent acquires sole custody upon the death of the other parent, unless a competent court, on application made to it, directs otherwise.

(4) Where no person is appointed by a written will to have custody or to be the guardian of a child, a person appointed as a legal guardian in terms of section 110 is the
person having custody of the child unless a competent court, on application made to it, directs otherwise.

**Guardianship on death of guardian**

110. (1) On the death of one of two equal guardians, the surviving guardian, unless a competent court directs otherwise, acquires sole guardianship over a child.

(2) A person with sole guardianship of a child may, by testamentary disposition, name another person as the legal guardian of that child.

(3) The provisions of section 96(1)(b) to (e) relating to the administration of the property of a child apply to a legal guardian nominated or appointed under this section.

This provision has been amended to incorporate technical input from the Master of the High Court, the former Master of the High Court and a Namibian estate lawyer.

(4) Where there is no provision in a written will naming a guardian for a child, or where there is for any other reason no competent guardian for a child, a legal guardian can be registered for the child by means of the procedure contained in this section: Provided that the children's court must, if a person has been named as guardian in a testamentary disposition other than a written will, give preference to that person as guardian if satisfied of the validity of such testamentary disposition and the suitability of such person to be appointed as the guardian of the child in question.

(5) (a) Any person who has a genuine interest in a child, whether or not related to the child, and who wants to be appointed as a legal guardian of the child, must in the prescribed form and manner apply for guardianship of the child to the clerk of the children’s court.

(b) In the event that the clerk of the children’s court receives more than one application for legal guardianship of a particular child, such clerk must cause the applications to be considered together.
This new provision on handling multiple guardianship applications together should facilitate a decision as to what would be in the best interests of the child. Magistrates consulted around the Bill suggested that this procedural clarification would be very useful.

(6) An application made in terms of subsection (5) must –

(a) be supported by such information and documents as may be prescribed including a statement to the effect that the family members of the child have been consulted with an indication as to whether or not the application is disputed;

(b) be supported by a certification from the Master of the High Court, in the prescribed form, that there is no valid will of the child’s former guardian or guardians or, if there is such a will, that it contains no provision relating to the appointment of a guardian for the child; and

Subclause (6)(b) reflects proposals made by magistrates during the consultation process. Since the Master’s Office handles wills, the magistrates will need some certification from them as to whether or not there is a will naming a guardian for a child.

(c) in the prescribed form and manner, be served on the child’s parent, the person having custody, the child’s care-giver, if applicable, or any other person identified by the court or the social worker concerned as having an interest in the application, requesting such persons to make representations on the application.

Subclause (6)(b) reflects proposals made by magistrates during the consultation process. Since the Master’s Office handles wills, the magistrates will need some certification from them as to whether or not there is a will naming a guardian for a child.

(7) On receipt of an application made in terms of subsection (5), the clerk of the children’s court must as soon as reasonably possible, refer the application to the children’s commissioner who –

(a) must summon the applicant or applicants for questioning;

(b) may summon other relevant persons for questioning; and

(c) must order a social worker’s report on the matter to be completed within the period specified by the children’s commissioner.

Subclause (7)(c) makes an investigation by a social worker compulsory. This provision was proposed by Namibian magistrates during the consultation process.
(8) On receipt of an application made in terms of subsection (5), the children’s commissioner must consider the application, any supporting information and documents, the results of the investigation carried out by a social worker in terms of subsection (7)(c) and any representations made, upon which the children’s commissioner may –

(a) approve the application and direct the clerk of the children’s court to issue a certificate of guardianship to the applicant;
(b) in the case of an application for the appointment of a guardian for a child in a child-headed household, refer the matter to the Minister for the possible recognition of such household in terms of section 193; or
(c) refuse the application and give written reasons for the refusal.

(9) The clerk of the children’s court must cause a copy of the certificate issued in terms of subsection (8) to be filed at the court in question and with the Master of the High Court.

(10) Preference for appointment as legal guardian in terms of this section must be given to close family members of the child, or to a person who has custody or is the primary caretaker of the child, subject to the best interests of the child.

Complaints about a child’s guardian or tutor

111. (1) Any person who has a genuine interest in the welfare of a child may, in the prescribed form and manner, lodge a complaint to the clerk of the children’s court, to alert the court to the fact that a natural or legal guardian or a person appointed as a tutor under Letters of Tutorship by the Master of the High Court is not acting in the best interests of the child.

(2) When a complaint made in terms of subsection (1) is received, the children’s court must order an investigation to be carried out by a social worker within the period specified by the court and the social worker must, subject to the directives or conditions set by the court, investigate the complaint and, in the manner prescribed, report to the court.

(3) After considering the report of the social worker, the children’s court, if of the opinion that a guardian or tutor has not been acting in the best interests of a child –
(a) may, in the case of a guardian, alter the appointment of guardianship as is deemed fit and if necessary issue a new certificate of guardianship in accordance with section 110(8)(a); or
(b) must, in the case of a tutor, direct the clerk of the children’s court to notify the Master of the High Court who may alter the appointment of the tutor as is deemed fit and if necessary issue new Letters of Tutorship.

Application of this Chapter

112. (1) Subject to subsection (2), this Chapter applies to all children or persons, where applicable, and to all matters relating to children or persons, where applicable, irrespective of whether the children or persons, where applicable, were born or the matters arose before or after the coming into operation of this Chapter.

This subsection has been amended to harmonise with the ruling in the case of Frans v Paschke and Others 2007 (2) NR 520 (HC). The Children’s Status Act 2006 generally has retrospective effect, but there is an exception in respect of the provision on inheritance by children born outside marriage which applies only “to estates in which the deceased person died after the coming into operation of this Act” (section 26(2)). This exception was made in an effort not to upset transactions which were regarded as settled. However, the Frans case held that the common law rule which preceded the statute is unconstitutional with effect since 21 March 1990. This section has now been amended to encompass the Frans holding.

(2) Despite subsection (1) this Chapter does not affect any order or decision made by a competent court in respect of a matter governed by this Chapter except that such order or decision may, on application made to a children’s court, be revoked, varied or substituted in terms of this Chapter.

Regulations

113. (1) The Minister may make regulations in relation to any matter required or permitted to be prescribed by this Chapter or that may be necessary or expedient in order to achieve the objects of this Chapter and, without derogating from the generality of this subsection, the Minister may make regulations relating to the following matters:

(a) prescribing the fees to be paid for proceedings instituted in terms of this Chapter or for any expense incurred which a party is liable to pay in terms of this Chapter; and
(b) generally the manner of conducting any investigation or hearing in terms of this Chapter.

(2) The Minister may, after consultation with the Minister responsible for justice, make rules relating to the following matters –
   (a) the manner in which affected persons are to be notified of any proceedings brought in terms of this Chapter; and
   (b) the form and manner in which applications are to be made under this Chapter.

(3) Regulations or rules made under this section may –
   (a) create an offence for any contravention thereof or any failure to comply with a provision thereof; and
   (b) prescribe penalties in respect of any such offence not exceeding a fine of N$5,000 or imprisonment for a period not exceeding one year.
Kinship care is a new concept in Namibian law (although it is already used in some other countries). It is designed to cover the common situation where families make their own arrangements for children to live with and be cared for by someone other than their birth parents – such as extended family members, friends or someone in the local community. (A non-relative can be classified as a kinship care-giver by virtue of the broad definition of “family member” in section 1.)

The old Children’s Act did not cater for kinship care, with the result that people in such arrangements had to go to court to be named as “foster parents” in order to be eligible for grants. This placed a burden on courts and social workers, and did not really add to the protection of the child since the courts ended up just rubber-stamping arrangements made by the child’s family. There are also many cases where needy households are unable to access the grant because the placement of the child has not been approved through the court.

The Bill makes a distinction between “foster care” (placement of a child with persons previously unknown to the child by a court) and “kinship care” (which will usually be a private arrangement made without court involvement). A court can also order a placement in kinship care where a child has been removed from the home, if this would be in the best interests of the child. However, it is anticipated that few kinship care arrangements will be the result of court orders.

If a kinship caregiver wants to access a children’s grant, the Bill requires that the kinship caregiver and the child’s parent or guardian must enter into a written agreement and register the agreement with the clerk of the court. This simple administrative procedure will serve as a safeguard to prevent people from snatching children as a means to obtain money.

Parents and kinship caregivers can make a parenting plan to set out how they will exercise parental rights and responsibilities over the child, and disputes can be resolved by means of family meetings or mediation. The idea is that courts should become involved only where the child is in need of protective services, or where there is a dispute that families cannot resolve on their own.

### Kinship care and kinship care agreements

**114.** (1) A child is in kinship care if the child has been placed in the care of a member of the child’s family or extended family (“the kinship care-giver”), other than the parent or guardian of the child or a person who has parental responsibilities and rights in respect of the child, with the express or implied consent of the child’s parent or guardian, or by order of court in terms of section 141(3)(c)(i).

(2) A child’s parent or guardian may conclude a kinship care agreement with the kinship care-giver in terms of subsection (3), and, in the absence of a court order placing the child in kinship care, must conclude such an agreement with the kinship care-giver and register the agreement with the clerk of the children’s court in terms of subsection (4) before
the kinship care-giver is eligible to receive any grant or maintenance payment in terms of which the child is a beneficiary.

(3) A kinship care agreement appointing a kinship care-giver for a child must –
(a) be recorded in writing and signed by two witnesses;
(b) set out information about the delegation of parental rights and responsibilities to the kinship care-giver in relation to the child, subject to section 145(3); and
(c) be concluded after due consideration to the views of the child.

(4) A kinship care agreement in terms of subsection (3) may –
(a) be facilitated by a designated social worker or a traditional leader;
(b) include directions on the duration of the agreement and supervision by a designated social worker;
(c) include directions on the termination of the agreement;
(d) be registered with the clerk of the children’s court having jurisdiction; and
(e) include agreement on the matters specified in section 121(2).

(5) A kinship care agreement must comply with the best interests of the child standard as provided for in section 4.

Parental responsibilities and rights in respect of kinship care by court order

115. (1) Where a court has placed a child in kinship care in terms of section 141, the kinship care-giver of such child has parental responsibilities and rights in respect of the child as contemplated in section 145, as well as any additional parental rights and responsibilities set out in –
(a) the order of the children’s court placing the child in kinship care with that kinship care-giver; and
(b) an order of the children’s court amending the initial order.

Amendment or termination of kinship care arrangement and agreement

116. (1) A parent with custody or guardianship of a child, or any other guardian of that child, may amend or terminate an unregistered kinship care arrangement at any time.
(2) A kinship care agreement registered with the clerk of the children’s court in terms of section 114(4)(d) may be amended or terminated by the persons who concluded that agreement, in which case such persons must register the amended agreement with or notify the clerk of the children’s court of its termination within seven court days of the amendment or termination, as the case may be.

(3) A children’s court may, upon application by any person who has an interest in the welfare of a child, terminate a kinship care agreement contemplated in section 114, whether registered with the clerk of the children’s court or not, if the court finds that the child is or may be in need of protective services as contemplated in section 127 and may make such additional order or orders as it deems appropriate.

Disputes relating to kinship care agreements

117. In the event of a dispute relating to the exercise of a kinship care agreement or in respect of its termination or amendment, such dispute may be referred –

(a) to mediation or a family meeting contemplated in section 39(1) for resolution; or

(b) upon application in the prescribed manner, to the children’s court having jurisdiction for making an appropriate order, in which case the provisions of section 123(2) to (4) relating to parenting plans apply with the changes required by the context.

Application for access by kinship care-giver after termination of agreement

118. (1) If a kinship care agreement, whether registered with the clerk of the children’s court or not, is unilaterally terminated by a parent after the agreement has been in place for a period of at least one year, and the child has factually been cared for primarily by the kinship care-giver during this period, the kinship care-giver may apply to the children’s court in the prescribed manner for access to the child in question, in which case section 98 applies with the changes required by the context.
(2) The court may allow an application for access by a kinship care-giver in terms of subsection (1) after a kinship care agreement has been in place for a shorter period if this would be in the best interests of the child concerned.

Regulations

119. The Minister may make regulations prescribing –

(a) the form of a kinship care agreement contemplated in section 114;

(b) any other ancillary or incidental administrative or procedural matter that is necessary to be prescribed for the proper implementation or administration of this Chapter.
CHAPTER 9
PARENTING PLANS

Parenting plans are written agreements between co-holders of parental responsibilities and rights, confirmed by two witnesses, about things like

- where and with whom the child will live
- maintenance
- contact with various persons
- schooling and religious upbringing
- medical care, medical expenses and medical aid coverage.

They are voluntary agreements which are intended to help prevent disputes, although provision is made for getting help to mediate a plan where there is disagreement. Parenting plans can be registered with the children’s court, which makes them enforceable in court.

Parental responsibilities and rights

120. (1) For purposes of this Chapter the parental responsibilities and rights that a person may have in respect of a child, include the responsibility and right –

   (a) to have custody of the child, including responsibility for decisions relating to the child’s day-to-day upbringing;
   (b) to maintain contact with the child;
   (c) to act as guardian of the child; and
   (d) to contribute to the maintenance of the child.

(2) More than one person, including the parent and alternative care-giver of a child, may hold parental responsibilities and rights in respect of the same child (in this Act referred to as “co-holders of parental responsibilities and rights”).

(3) A person may have either full or specific parental responsibilities and rights in respect of a child.

Parenting plans

121. (1) The co-holders of parental responsibilities and rights in respect of a child may agree on a parenting plan, other than a written agreement contemplated in section 94(2), determining the exercise of their respective responsibilities and rights in respect of the child, and may, before concluding the parenting plan, seek advice from a legal practitioner,
social worker or other appropriate professional or make use of mediation through a social worker or other person suitably qualified to do mediation.

(2) A parenting plan may determine details relating to the exercise of parental responsibilities and rights, including –
   (a) where and with whom the child is to live;
   (b) the maintenance of the child;
   (c) contact with or access to the child by –
       (i) any of the parties; or
       (ii) any other person,
   (d) the responsibility for any costs associated with the contact contemplated in paragraph (c);
   (e) the schooling and religious upbringing of the child; and
   (f) responsibility for medical care, medical expenses and medical aid coverage.

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

(4) A parenting plan must be in writing and signed by the parties to the agreed plan in the presence of two witnesses, and must afford due consideration to the views of the child in question.

(5) A parenting plan concluded in terms of subsection (1) may be registered with the clerk of the children’s court within whose area of jurisdiction the child concerned is ordinarily resident.

(6) The co-holders of parental responsibilities and rights who are parties to a parenting plan concluded in terms of subsection (1), whether such plan is registered with the clerk of the children’s court or not, may lodge an application in the prescribed form for such plan to be made an order of the children’s court within whose area of jurisdiction the child concerned is ordinarily resident.

**Amendment or termination of parenting plan not made an order of court**
122. (1) The co-holders of parental responsibilities and rights who are parties to a parenting plan may, by mutual agreement, amend or terminate a parenting plan not registered with the clerk of the children’s court at any time.

(2) A parenting plan registered with the clerk of the children’s court in terms of section 121(5) may be amended or terminated by the co-holders of parental responsibilities and rights who are parties to the plan, by mutual agreement, in which case such co-holders must register the amended parenting plan with or notify the clerk of the children’s court of its termination within seven court days of the amendment or termination, as the case may be.

Amendment or termination of parenting plan made an order of court

123. (1) A parenting plan that was made an order of court may be amended or terminated only by that court on application by –
   (a) one or more of the co-holders of parental responsibilities and rights who are parties to the plan;
   (b) the child acting with leave of the court; or
   (c) any other person acting in the interests of the child.

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

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

(4) For purposes of the hearing the court may order that –
   (a) an investigation must be made by a social worker or any other person designated by the court and a report on that investigation submitted to the court;
   (b) the parties must seek to reach agreement on the amendment or termination of the plan by means of external intervention or mediation as described in section 121(1);
(c) a person specified by the court must appear before it to give or produce evidence; or

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

Disputes relating to parenting plans

124. (1) A co-holder of parental responsibilities and rights aggrieved by the manner of compliance or the non-compliance with any provision of a parenting plan registered with the clerk of the children’s court, or with any provision of a parenting plan which has been made an order of court, may make an application in the prescribed form and manner to the children’s court having jurisdiction for an appropriate order and the children’s court must consider the application in the presence of the applicant or his or her authorised legal representative.

(2) An order applied for in terms of subsection (1) may only be made after the prescribed attempts have been made to notify any other co-holder of parental responsibilities and rights, the parents of the child concerned if they are not co-holders of such responsibilities and rights, the child’s primary care-taker, any person or persons with custody or guardianship of the child immediately prior to the application or any other person identified by the court or the social worker concerned as having an interest in the application, and that person has or those persons have been given an opportunity to be heard.

(3) The provisions of section 123(2) to (4) apply with such changes as may be required by the context in respect of an application contemplated in subsection (1).
DIVISION C: PROTECTIVE SERVICES

CHAPTER 10
PREVENTION AND EARLY INTERVENTION

This chapter covers services that can reduce the risk of violence or other harm within the family environment. The goal is to help children before their situations become so serious that they need to be removed from the home and placed in foster care or residential child care facilities.

Powers and duties of Minister

125. (1) The Minister must, from money appropriated by Parliament, from the Children’s Fund or from any other source –

(a) ensure the provision of prevention and early intervention services, including early childhood development programmes, to children and families; and

(b) ensure the establishment of such facilities and programmes as the Minister considers necessary for the provision of prevention and early intervention services,

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

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

Prevention and early intervention services

126. (1) Prevention services means services –

(a) designed to serve the purposes mentioned in subsection (3); and

(b) provided to families in order to strengthen and build their capacity and self-reliance to address problems in the family.

(2) Early intervention services means services which are –

(a) designed to serve the purposes mentioned in subsection (3); and

(b) provided to families with children identified as being vulnerable to or at risk of harm or removal into alternative care.
(3) Prevention and early intervention services must be aimed at one or more of the following objectives –

(a) preserving a child’s family structure;
(b) developing appropriate parenting skills and the capacity of parents and caregivers to safeguard the well-being and best interests of their children, including but not limited to the promotion of positive, non-violent forms of discipline and raising awareness about the procedure to be followed in the registration of births and the importance of such registration;
(c) developing appropriate parenting skills and the capacity of parents and caregivers to safeguard the well-being and best interests of children with disabilities and chronic illnesses;
(d) establishing appropriate interpersonal relationships within the family;
(e) providing psychological, rehabilitation and therapeutic programmes for children;
(f) preventing the neglect, abuse or inadequate supervision of children and preventing other failures in the family environment to meet children’s needs;
(g) preventing the recurrence of problems in the family environment that may harm children or adversely affect their development;
(h) preventing developmental delays in young children due to inadequate or inconsistent nutrition, stimulation, physical and emotional care;
(i) preventing criminal activities by children and diverting children away from the criminal justice system; or
(j) avoiding the removal of a child from the family environment.

(4) Prevention and early intervention programmes may include, without being limited to, one or more of the following components –

(a) assisting families to obtain the basic necessities of life, including assistance with application for state grants;
(b) empowering families to obtain such necessities for themselves;
(c) providing families with information to enable them to access services;
(d) providing families with information about the dangers of alcohol and other drugs and assisting them to address abuse of alcohol or drugs by any family member;
(e) providing families with information about gambling addiction and assisting them to address such addiction of any family member;

(f) supporting and assisting families with a chronically ill or terminally ill family member;

(g) assisting families to provide or access appropriate early childhood development opportunities for young children;

(h) addressing specific issues affecting or potentially affecting families in the community, such as gender-based violence, health and nutrition issues, reproductive and sexual health issues, child labour, child trafficking or child behaviour problems; and

(i) promoting the well-being of children and the realisation of their full potential.

(5) Prevention and early intervention programmes must involve and promote the participation of families, parents, care-givers and children in identifying and seeking solutions to their problems.

(6) A children’s court may make an order regarding the provision of prevention and early intervention services, summarily, in terms of section 136(4), or after a child protection hearing, in terms of section 142(b).
CHAPTER 11
CHILD PROTECTION PROCEEDINGS

This chapter covers situations when a child’s living circumstances may be endangering the child. It provides for quick removal of the child or the alleged offender if there is imminent danger to the child’s well-being, and for a social worker investigation to see what kinds of protective services (if any) are needed.

The court is given a wide range of options for orders to protect the child, based on consultation with magistrates and social workers. For example, the child could be placed in alternative care, or remain in the usual home with some sort of supervision or counselling.

The old term “child in need of care or protection” has been replaced with the term “child in need of protective services”. This is more accurate and more clear, since all children need “care” and “protection”. Many persons in regional consultations felt that the old term was confusing.

Child in need of protective services

127. (1) In this Chapter, a child is in need of protective services, if the child –
   (a) is abandoned or orphaned and has insufficient care or support;
   (b) is engaged in behaviour that is, or is likely to be, harmful to the child or any other person and the parent or guardian or the person in whose care the child is, is unable or unwilling to control that behaviour;
   (c) lives or works on the streets or begs for a living;
   (d) lives in or is exposed to circumstances which may seriously harm the physical, mental, emotional or social welfare of the child;
   (e) is in a state of physical or mental neglect;
   (f) is addicted to alcohol or other dependence producing drug and is without any support to obtain treatment for such dependency;
   (g) is below the age of 14 years and is involved in an offence other than a minor criminal matter;
   (h) is an unaccompanied migrant or refugee;
   (i) is chronically or terminally ill and lacks a suitable care-giver;
   (j) is being kept in premises which, in the opinion of a medical officer, are overcrowded, highly unsanitary or dangerous; or
   (k) is being, or is likely to be, neglected, maltreated or abused.
A child in the following circumstances may be a child in need of protective services and must be referred for investigation by a designated social worker:

(a) a child who is a victim of child labour;
(b) a child in a child-headed household;
(c) a child who is a victim of child-trafficking;
(d) a child whose parent has been imprisoned and who lacks a suitable care-giver;
(e) a child below the age of 16 years who is found to be pregnant;
(f) a child who has been the victim of a serious crime against the child’s person;
(g) a child who is engaged in commercial sex work or has been subjected to any form of sexual exploitation;
(h) a child who may be at risk if allowed to remain in the custody of the parent, guardian or the person in whose care the child is, as there is reason to believe that he or she will live in or be exposed to circumstances which may seriously harm the physical, mental or social welfare of the child;
(i) a child living in a violent family environment, including a child named in a protection order issued under the Combating of Domestic Violence Act, 2003 (Act No. 4 of 2003);
(j) a child below the age of 16 years who is habitually absent from school;
(k) a child whose parent, guardian or care-giver unreasonably withholds consent to necessary medical or therapeutic intervention;
(l) a child below the age of 16 with any sexually transmitted infection, or any child with multiple or repeated sexually transmitted infections;
(m) any child involved in a case referred for investigation under this Chapter by the Children’s Advocate or the National Advisory Council on Children; and
(n) any child reasonably suspected of falling under subsection (1).

Subclause (2) has been added, with due regard to comments made during the consultation process, to identify factors which should trigger an investigation, while leaving open the court’s discretion to decide if the child falls into the narrower category of a child in need of protective services.

The criteria contained in both of these subclauses are based on extensive consultations with stakeholders.

**Reporting in respect of a child who may be in need of protective services**
128. (1) Despite the provisions of any other law, if a person who performs professional or official duties with respect to children, obtains during the course of performing those duties information that gives rise to a suspicion that a child is or may be in need of protective services as contemplated in section 127, that person must report such information in the prescribed form to any social worker or a member of the police.

(2) For the purpose of subsection (1), a person who performs professional or official duties with respect to children includes a school principal, teacher, medical practitioner, pharmacist, school counsellor, dentist, psychologist, nurse, physiotherapist, speech therapist, occupational therapist, traditional leader, traditional health practitioner, legal practitioner, religious leader, family counsellor, labour inspector or member of staff at a place of safety or any facility registered under this Act.

(3) Any person, other than a person referred to in subsection (2), including another child, who reasonably believes that a child is or may be in need of protective services as contemplated in section 127, may report that belief to any social worker or a member of the police.

(4) Subsection (1) applies irrespective of the fact that the information on which the belief is based may be confidential and its disclosure prohibited under any law, but does not apply in the case of legal professional privilege.

(5) A person referred to in subsection (1) or (3) is entitled to have his or her identity kept confidential if the report is made in good faith, unless the interests of justice require otherwise, and is not subject to civil liability for producing or making any report required or permitted in terms of this section, except if the person produces or makes the report or provides information knowing it to be false or misleading.

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

The Bill proposes mandatory reporting for professionals and voluntary reporting for other people on the grounds that resources should be focused on assisting children, rather
than on prosecuting members of the general public for failure to report child abuse or neglect. The theory is that public awareness campaigns to encourage voluntary reporting would probably be more effective and efficient than the threat of criminal punishment.

During the consultations, public opinion was divided on whether there should be mandatory reporting for everyone, or whether this mandatory duty should apply only to professionals.

People who supported mandatory reporting by everyone made the following points:
- It will help protect children, who are an especially vulnerable group.
- It will increase the number of cases of child abuse and neglect which are reported to authorities.
- It raises awareness of the need for everyone in society to work together to protect children.
- It will help overcome the perception that family matters are always private ones.
- It may help family members or community members justify their reporting of abuse by other family members/community members.
- Some children will never encounter professionals such as doctors.

People who supported mandatory reporting only by professionals who work with children made the following points:
- There is a culture of fear and silence and a law on mandatory reporting will not overcome this
- It is better to encourage reporting by members of the public than to punish failure to report as a crime. There should be encouragement through public awareness campaigns.
- Untrained people will not make accurate reports. This could result in stigma against someone who was not actually an abuser. Non-professionals will also not be sure when there is enough evidence to warrant a report – how sure do you have to be about the abuse?
- There may be so many reports that there are not enough social workers to investigate them.
- Mandatory reporting by everyone may lead to further abuse as a reaction to a report, or the withdrawal of family support and assistance. It could break down trust and family relationships.
- Mandatory reporting by everyone may deny children and families the opportunity of finding other ways to deal with the problem. Someone should speak to the parents to see whether the situation can be improved before the case is reported. It will also put members of the public in a difficult position if the child does not think that there is a problem or does not want it reported.
- Family members may be afraid of the consequences of reporting abuse by other family members. (Some suggested that an exception to the criminal penalty could be provided for a spouse or family member who does not report because of fear.)
- What happens to the child if both parents are punished (one for being abusive and one for not reporting it)?

Some people offered other suggestions:
- Some said that mandatory reporting should apply to all persons, but that there should be stiffer penalties for professionals who fail to report. Members of the public should have punishments like community service, not imprisonment.
- Some emphasised the need to ensure that the identity of anyone who reports abuse is kept confidential. (This is now covered in the Bill.)
- Almost everyone consulted emphasised the need to make sure that anyone who reports abuse in good faith is not liable in any way if they are wrong. (This is now covered in the Bill.)

Self-reporting by children

129. A child, whether the recipient of protective services in terms of an order of the children’s court as contemplated in this Chapter or not, may report any person in whose care such child is or has been placed to a community child care worker, social auxiliary worker or
social worker if in the view of such child he or she is or may be in need of protective services contemplated in section 127, upon which the prescribed procedure must be followed.

Immediate response to report that a child may be in need of protective services

130. (1) If a report made under section 128(1) or (3) or section 129 creates a reasonable suspicion that a crime has been or will be committed, the member of the police or social worker receiving the report must take all reasonable actions consistent with his or her duties under any law in respect of the suspected crime in addition to the duties set forth in subsections (2) to (4).

(2) A member of the police or a social worker who receives a report that a child may be in need of protective services must within 24 hours make an initial assessment of the report to establish whether the child’s safety or welfare appears to be at imminent risk and may –

(a) if satisfied that it is in the best interests of the child to be removed from his or her home or place where he or she resides, approach a children’s commissioner for the issue of a warrant for the removal of the child in terms of section 131, or remove the child without a warrant in terms of section 132 if the circumstances mentioned in section 131(1) require such removal; or

(b) if satisfied that it is in the best interests of the child not to be removed from his or her home or place where he or she resides, but that the removal of an alleged offender from such home or place would secure the safety and welfare of the child, take appropriate steps to secure the removal of the alleged offender in terms of section 131 or 133.

(3) If a report of a child who may be in need of protective services is made under section 128(1) or (3) or section 129 to a member of the police or to a social worker who is not a designated social worker, that member of the police or social worker must, in addition to the initial assessment made in terms of subsection (2), submit the report to a designated social worker within 48 hours, or if the 48 hours expire on a day which is not a court day, on the first court day thereafter, including information on any steps taken in accordance with subsections (1) or (2).
(4) A designated social worker who receives a report that a child may be in need of protective services in terms of section 37(1), 128, 129, 196(b)(iv), 210(2) or (4), 216(5), 226(2), 227(3) or subsection (3) of this section must without delay –
   (a) report the matter and any steps taken in terms of this section to the Director of Social Services in the Ministry; and
   (b) launch an investigation in terms of section 135.

(5) In the absence of a report under subsection (4), this section applies with the changes required by the context if it comes to the attention of a designated social worker or a member of the police that a child may be in need of protective services.

**Removal of child or alleged offender with warrant**

**131.** (1) If, on evidence given by any person on oath or affirmation before a children’s commissioner it appears that the safety or welfare of a child who resides in his or her area of jurisdiction is at imminent risk, the children’s commissioner may issue a warrant authorising a member of the police, a social worker or any other person authorised by the children’s commissioner –
   (a) to search for and remove a child and place the child in a place of safety if the children’s commissioner is satisfied that the removal of the child is necessary for the safety and welfare of the child; or
   (b) to search for and remove any alleged offender from the home or place in which the child resides pending the appearance of such offender in the children’s court if the children’s commissioner is satisfied that the removal of such offender is necessary for the safety and welfare of the child.

(2) A warrant issued in terms of subsection (1) must identify the child or the alleged offender, as the case may be, in sufficient detail to execute the order.

(3) A person authorised by a warrant under subsection (1) may, whether alone or accompanied by a member of the police –
   (a) enter any premises where the child or the alleged offender named in the warrant is believed to be;
(b) remove the child or the alleged offender, as the case may be, from the premises; and

(c) carry out the instructions of the court.

(4) A person authorised by a warrant issued under subsection (1) may use such force as may be reasonably necessary to overcome any resistance against the entry of the premises contemplated in subsection (3)(a) or against the removal of the child or the alleged offender, including the breaking of any door or window of such premises, but must first audibly demand admission to the premises and announce the purpose for which he or she seeks to enter the premises.

(5) The person who has effected a removal in terms of this section, must –

(a) in the case of the removal of a child, without delay, but within 24 hours, inform the parent, guardian or the person in whose care the child had been of the removal, if that person can be traced;

(b) not later than the next court day inform the relevant clerk of the children’s court of the removal of the child or the alleged offender, as the case may be, who must record the information in the prescribed form.

(6) The best interests of the child must be the determining factor in any decision whether a child in need of protective services should be removed and placed in a place of safety, and all relevant facts must for this purpose be taken into account, including –

(a) the safety and welfare of the child as the first priority;

(b) where possible, the views of the child in question; and

(c) the possible alternative of removing the alleged offender in terms of section 131(1)(b) or 133 from the home or place where the child resides.

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

(8) Any person who hinders or obstructs a member of the police, a designated social worker or other authorised person in the execution of a warrant in terms of this section, commits an offence and is liable on conviction to a fine not exceeding N$20 000 or to imprisonment for a period not exceeding five years or to both the fine and imprisonment.
(9) To the extent that this section authorises the interference with the privacy of persons’ homes as contemplated in Article 13(1) of the Constitution of the Republic of Namibia, this section is enacted on the authority of Sub-Article (2) of that Article.

Removal of child without warrant

132. (1) Despite the provisions of section 131, a member of the police or a designated social worker may without a warrant remove a child and place the child in a place of safety if there is reason to believe –

(a) that the child faces a substantial risk of serious harm;
(b) that any delay in obtaining a warrant is likely to jeopardise the child’s safety and welfare; and
(c) that the removal of the child from his or her home environment is the best way to secure the child’s safety and welfare.

The standard for removal of a child without a warrant in terms of section 132 is much higher than the imminent risk standard in section 131. To remove a child without a warrant, there must be a substantial risk of serious harm. All three factors in paragraphs (a), (b) and (c) also have to be present, which are not required for the section 131 procedure. The goal is to encourage police and social workers to obtain warrants unless there is really a serious, imminent danger to the child.

(2) If a member of the police or a designated social worker has removed a child under subsection (1), that member of the police or designated social worker must –

(a) without delay, but within 24 hours, inform the child’s parent, guardian or the person in whose care the child had been of the removal, if that person can be traced; and
(b) by not later than the next court day submit a sworn statement to the clerk of the children’s court having jurisdiction setting out the reasons for the removal of the child without a warrant, who must record the information in the prescribed form.

(3) The best interests of the child must be the determining factor in any decision whether a child in need of protective services should be removed and placed in temporary safe care, and all relevant facts must for this purpose be taken into account, including –

(a) the safety and welfare of the child as the first priority;
(b) where possible, the views of the child in question; and

(c) the possible alternative of removing the alleged offender in terms of section 131(1)(b) or 133 from the home or place where the child resides.

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

(5) Misuse of a power referred to in subsection (1) by a social worker constitutes grounds for disciplinary proceedings against such social worker as contemplated in section 38 of the Social Work and Psychology Act, 2004 (Act No. 6 of 2004).

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

(7) Any person who hinders or obstructs a member of the police or a social worker in the exercise of his or her powers in terms of this section, commits an offence and is liable on conviction to a fine not exceeding N$20 000 or to imprisonment for a period not exceeding five years or to both the fine and imprisonment.

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

Removal of alleged offender by written notice in lieu of removal of offender with warrant

133. (1) A member of the police to whom a report is made in terms of section 128 or 129 may, if he or she is satisfied that, on the strength of the information contained in the report or the request, it will be in the best interests of the child if the alleged offender is removed from the home or place where the child resides, issue a written notice, in lieu of obtaining a warrant to remove such offender in terms of section 131, which –

(a) specifies the names, surname, residential address and occupation of the alleged offender;
(b) calls upon the alleged offender to leave the home or place where the child resides and refrain from entering such home or place or having contact with the child until the court hearing specified in paragraph (c);

(c) calls upon the alleged offender to appear at a children’s court at a place and on a date and at a time specified in the written notice to advance reasons why he or she must not be permanently prohibited from entering the home or place where the child resides, but the date so specified must be the first court day after the day upon which the notice is issued; and

(d) contains a certificate under the hand of the member of the police that he or she has handed the original of such written notice to the alleged offender and that he or she has explained to the alleged offender the importance thereof.

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

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

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

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

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

(a) issue an order prohibiting the alleged offender from entering the home or place where the child resides or from having any contact with the child, or both from entering such home or place and having contact with the child, for such period of time as the court considers appropriate;
(b) order that the alleged offender may enter the home or the place where the child resides or have contact with the child upon such conditions as would ensure that the best interests of the child are served;

(c) order that the alleged offender will be responsible for the maintenance of his or her family during the period contemplated in paragraph (a);

(d) direct the clerk of the children’s court to notify the relevant police station commander of misuse of a power by a member of the police referred to in subsection (1);

(e) make such other order with regard to the matter as the court considers appropriate.

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

(8) An alleged offender who –

(a) fails to appear at a children’s court on the date and at the time specified in the written notice contemplated in subsection (1);

(b) refuses to leave the home or the place where the child resides; or

(c) has contact with the child in contravention of the written notice;

commits an offence and is liable on conviction to a fine not exceeding N$20 000 or to imprisonment for a period not exceeding five years or to both the fine and imprisonment.

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

Placement of child pending disposition of case

134. (1) A child removed under section 131 or 132 must be brought before a children’s court as soon as possible after removal and in no case later than 48 hours, or if the 48 hours expire on a day which is not a court day, on the first court day after the removal for purposes of reviewing the placement of the child.
(2) Upon the review of the placement of the child in a place of safety, the children’s court must, after consideration of the reasons for the placement of the child and such other information as may be furnished, on oath, by the parent, guardian or care-giver of the child, the social worker concerned or member of the police and any other person with relevant information –

(a) confirm the placement of the child in a place of safety;
(b) make an alternate placement order;
(c) direct that the child be restored to the custody of his or parent, guardian or care-giver, or
(d) direct the clerk of the children’s court to notify, in the case of a member of the police, the relevant police station commander, or, in the case of a designated social worker, the authority with whom such social worker is registered, of misuse of the power conferred on such member or social worker in terms of section 132(1),

and may direct the designated social worker to compile a report on whether the child is in need of protective services by no later than 30 days from the date of the review of the placement.

**Designated social worker’s powers and duties to investigate**

135. (1) A designated social worker who receives a report that a child may be in need of protective services in terms of section 37(1), 128, 129, 130, 210(2) or (4), 216(5), 226(2) or 227(3) must, within a period of 45 days from the receipt of such report, or within a period of 30 days if the court has so ordered in terms of section 134(2), investigate the circumstances of the child and compile a report in the prescribed manner for submission to the children’s court.

(2) A children’s commissioner may, upon the written request of a designated social worker and on good cause shown, authorise an extension of the period referred to in subsection (1).

(3) For purposes of an investigation made pursuant to this section, a designated social worker may –
(a) question any person who may have relevant information in order to establish the facts surrounding the circumstances giving rise to the concern;
(b) evaluate the child’s family circumstances;
(c) evaluate the child’s environmental circumstances;
(d) identify sources who may verify any alleged neglect, maltreatment or abuse of the child;
(e) identify the level of risk to the child’s safety or well-being;
(f) identify actual and potential protective and supportive factors in the home and broader environment to minimise risk to the child;
(g) make an assessment of the child’s developmental, therapeutic and other needs;
(h) request entry into any premises in order to obtain relevant information;
(i) enter any premises without a warrant if there is good reason to believe that the delay involved in obtaining a warrant would prevent the obtaining of relevant information which is critical to the investigation;
(j) be accompanied by a member of the police; and
(k) recommend any appropriate protective measures or intervention as provided for in this Act.

These powers are designed to enable the designated social worker to conduct a thorough investigation into the circumstances of the child which can guide decision-making. There was some debate regarding the time period permitted to compile the report. The time periods chosen are a reflection of the different comments received and are intended to provide sufficient time to investigate while still ensuring that the best interests of the child, including the avoidance of delay, are met.

(4) A designated social worker must, for purposes of an investigation pursuant to this section, have due regard to the principles of child participation set out in section 5.

(5) A report made by a designated social worker pursuant to an investigation under this section must include an opinion as to whether a child is or is not in need of protective services and the reasons for this opinion.

(6) If the designated social worker concludes that the child is not in need of protective services, the report must include information on:

(a) the measures, if any, recommended to assist the family which may include counselling, mediation, early intervention measures, family
reconstruction and rehabilitation, behaviour modification, problem solving or referral to another suitably qualified person or organisation; and

(b) any other measures which in the social worker’s view would assist the child.

(7) If the designated social worker concludes that the child is in need of protective services, the report must include information on:

(a) the measures recommended to protect the child;

(b) the measures recommended to the family to protect a child who is allowed to remain in the usual home, or to allow for eventual reunification where a child is removed from the usual home; and

(c) any other measures which in the social worker’s view would assist the child.

(8) A designated social worker must, if he or she has reason to believe, after an investigation in terms of this section, that an offence in relation to the abuse, maltreatment, neglect or trafficking of such child has been committed, forthwith report such alleged offence to a member of the police for investigation.

Procedure if social worker report concludes that child is not in need of protective services

136. (1) If, after an investigation in terms of section 135, the designated social worker concludes that the child is not in need of protective services, such social worker must submit the report referred to in that section to a children’s court for review in the prescribed manner.

(2) If the children’s court upon review finds that, contrary to the social worker’s opinion, the child appears to be in need of protective services, the court must proceed in terms of section 138.

(3) The children’s court may upon review confirm the opinion of the designated social worker that the child is not in need of protective services.
(4) If the children’s court confirms the opinion of the designated social worker that the child is not in need of protective services but determines that the child is living in a situation which could be detrimental to the child’s best interests and which, if not addressed, is reasonably likely to lead to the temporary or permanent removal of that child, the court may summarily make orders relating to the recommendations by the designated social worker, including an order –

(a) regarding the provision of specified prevention or early intervention services contemplated in section 126, in respect of the child and such child’s parent, family or care-giver if the court considers the provision of such services appropriate in the circumstances; and

(b) obligating the child and his or her parent, family or care-giver to participate in a specified prevention or early intervention programme, and any monitoring thereof as it deems fit.

(5) An order made in terms of subsection (4)(b) must be for a specified period not exceeding six months.

(6) When a case resumes after the expiry of the specified period referred to in subsection (5), the designated social worker assigned to the matter must submit to the children’s court a report setting out progress with early intervention programmes provided to the child and his or her parent, family or care-giver.

(7) After considering the report, the court may –

(a) decide the question whether the child should be removed;

(b) order the continuation of the early intervention programme for a further period not exceeding six months; or

(c) make no further order.

(8) Any person aggrieved by a summary order issued in terms of subsection (5) may request the children’s court to conduct a child protection hearing for review of the order.

Procedure if social worker report concludes that child is in need of protective services
137. If, after an investigation contemplated in section 135, a designated social worker concludes that the child who is the subject of the investigation is in need of protective services, such social worker must, in the prescribed manner, apply for a child protection hearing without delay and may, as an interim measure, arrange for early intervention services to be provided to the child or the child’s family.

**Scheduling of child protection hearing**

138. (1) Upon receiving an application for a child protection hearing as contemplated in section 137, the children’s court must determine the date of the hearing as soon as possible but not later than 30 days from the date on which the application was made.

(2) A protection hearing must be heard and determined within 60 days from the date on which it commences.

(3) The children’s court may enquire into the reason for any delays by any person in adhering to the time-frames specified in this section and may make any order as it deems fit, including an order that disciplinary proceedings be instituted against any person.

**Notice of child protection hearing**

139. (1) The clerk of a children’s court must make all reasonable efforts to cause a written notice of a child protection hearing to be served personally or by registered post on a child’s parents, guardian or care-giver at least 14 days before such hearing, which notice must contain –

(a) particulars about the nature of the hearing;
(b) the date, time and place of the hearing;
(c) the basis of the application by the designated social worker;
(d) the reasons for the removal of the child, if any; and
(e) the types of orders that may be made under section 141 or 142 at the conclusion of the hearing.
(2) The children’s court may, on the written request by any person, including the designated social worker, designate a person as having sufficient interest in the child protection hearing –

(a) who is the child’s extended family member; or

(b) any other person having a close connection with the child.

(3) A person who has been designated in terms of subsection (2) becomes a party to the child protection hearing and the clerk of the children's court must make all reasonable efforts to cause a written notice of the child protection hearing to be served personally or by registered post on such person in accordance with subsection (1).

(4) The children's court must issue a written notice to the child’s parent, guardian or care-giver directing that the child who is the subject of the hearing be brought before the children's court for the duration of the hearing, in which case the provisions of section 52(2) apply in respect of a child who is unable to participate in the proceedings or is unwilling to express a view or preference in the matter.

**Adjournments of child protection hearings**

140. (1) A child protection hearing may not be adjourned for longer than 14 days at a time.

(2) If an adjournment is required for any reason, the children’s court may order that the child must –

(a) remain in the place of safety where the child is;

(b) be transferred to another place of safety;

(c) remain in the care of the person who was caring for the child prior to the hearing;

(d) be placed in the care of a family member or other relative; or

(e) be placed in temporary safe care, if the child is not already in such care.

**Court orders when child in need of protective services**
141. (1) On the completion of a child protection hearing, and subject to section 142, a children’s court must make any order in terms of this section which is in the best interests of the child.

(2) When making a determination whether a child is in need of protective services, the court –

(a) must have regard to the designated social worker’s report contemplated in section 135, and any other report requested by the court in terms of section 42(2)(g) or (h); and

(b) may not consider the occupation, means of income or poverty of the child’s parent, guardian or care-giver alone as indicating that the child is in need of protective services, unless such occupation or means of income has an effect on the general well-being or development of the child or unless, in the case of poverty, the child’s parent, guardian or care-giver is unable or refuses to accept assistance to alleviate the child’s situation.

(3) A court which determines that a child is in need of protective services may make an order –

(a) confirming that the person under whose custody the child is may retain custody of the child, if the court finds that that person is a suitable person to provide for the safety and welfare of the child, subject to such conditions as the court considers to be appropriate;

(b) that the child be returned to the person under whose care the child had been before the child was placed in a place of safety, if the court finds that that person is a suitable person to provide for the safety and welfare of the child, subject to such conditions or supervision as the court considers to be appropriate;

(c) of supervision, placing a child, or the parent or care-giver of a child, or both the child and the parent or care-giver, under the supervision of a social worker or other person designated by the court;

(d) that the person under whose care the child had been must make arrangements for the child to be taken care of in a place of care at the expense of such person, if the court finds that the child became in need of protective services
because such person failed to provide adequate arrangements for such child during his or her temporary absences from home;

(e) if the child does not have a parent or care-giver or has a parent or care-giver who is unable or unsuitable to care for the child, that the child be placed in –

(i) foster care with a suitable foster parent or in kinship care;

(ii) a place of safety, pending an application for, and finalisation of, a foster care placement or adoption of the child;

(iii) shared care where different care-givers or centres alternate in taking responsibility for the care of the child at different times or periods; or

(iv) a children’s home or an education and development centre that provides a programme suited to the child's needs;

(f) if the child lives in a child-headed household, that the child remain in that household under the supervision of an adult person designated by the court;

(g) placing a child in a child-headed household in the care of the child heading the household under the supervision of an adult person designated by the court;

(h) interdicting a person from maltreating, abusing, neglecting or degrading the child or from having any contact with the child, instructing that a person be removed from the child’s home, or allowing access to or contact with the child by a person only on conditions specified by the court if the court finds that –

(i) the child has been or is being maltreated, abused, neglected or degraded by that person;

(ii) the relationship between the child and that person is detrimental to the welfare or safety of the child; or

(iii) the child is exposed to a substantial risk of imminent harm;

(i) giving consent to medical intervention in respect of, or to an operation to be performed on, a child;

(j) directing that the child receive appropriate medical, psychological or psychiatric treatment or attendance, if needs be at state expense, if the court finds that the child is in need of such treatment or attendance;

(k) instructing a hospital to retain a child who on reasonable grounds is suspected of having been subjected to abuse or neglect, pending further inquiry;

(l) directing that the child be admitted as an inpatient or outpatient to an appropriate facility if the court finds that the child is in need of treatment for addiction to a dependence-producing substance;
(m) directing that the child be placed in a facility designated by the court which is managed by an organ of state or registered, recognised or monitored in terms of any law, for the care of children with disabilities or chronic illnesses, if the court finds that –

(i) the child has a physical or mental disability or chronic illness; and

(ii) it is in the best interests of the child to be cared for in such facility;

(n) instructing a parent, guardian or care-giver of a child to undergo professional counselling, or to participate in mediation, a lay-forum or other appropriate problem-solving forum;

(o) instructing a child or other person involved in the matter to participate in a professional assessment;

(p) instructing a person to undergo a specified skills development, education, training, treatment or rehabilitation programme;

(q) instructing a person who has failed to fulfil a statutory duty towards a child to appear before the court and to give reasons for the failure;

(r) instructing an organ of state to assist a child in obtaining access to a public service to which the child is entitled, failing which, to appear through its representative before the court and to give reasons for the failure;

(s) of contribution in terms of section 156;

(t) temporarily directing a person to make periodic payments in respect of the maintenance of the child, if that person is legally liable to support the child, as an emergency measure where no such maintenance order is already in force;

(u) of protection as contemplated in the Combating of Domestic Violence Act, 2003 (Act No. 4 of 2003), if the evidence placed before the court supports the issue of such a protection order;

(v) of early intervention as contemplated in section 126; or

(w) any other order which in the court’s view are appropriate in the circumstances and in the best interests of the child.

(4) The court that makes an order contemplated in subsection (3) may order that the child concerned be kept in a place of safety until such time as effect can be given to the court’s order: Provided that such period may not exceed six months.

(5) An order made by the court in terms of subsection (3) –
(a) is subject to such conditions as the court may determine which, in the case of the placement of a child in terms of paragraphs (a), (b), (e)(i), (ii), (iii), or (iv) of that subsection, may include a condition –

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

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

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

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

Court orders when child not in need of protective services

142. If the children’s court, after a child protection hearing contemplated in section 137, determines that a child is –

(a) not in need of protective services, the court may dismiss the application and order that the child be returned to the person in whose care the child had been, but such order does not constitute an order for the custody of the child; or

(b) not in need of protective services but is living in a situation which could be detrimental to the child’s best interests and which, if not addressed, is reasonably likely to lead to the temporary or permanent removal of that child, the court may issue any of the orders referred to in section 136(4)(a) or (b), in which case the provisions of subsections (5) to (8) of that section apply with the changes required by the context, or in section 141(3), excluding a placement order, in respect of the child.

The clause above provides that the child must be at risk of needing protective services in future if the court is to intervene in any way - in order to protect home environments that are safe against unwarranted intervention.
Court orders for alternative placement

143. (1) Before a children’s court makes an order in terms of section 141 for the removal of a child from the care of the child’s parent, guardian or care-giver, the court must –

(a) be satisfied that removal of the child is in such child’s best interests with due regard to the child’s need for family preservation and reunification;

(b) consider the best way of securing stability in the child’s life, and for this purpose consider placement options in the following order of preference unless some special circumstance would justify a departure from this order of preference in the best interests of the child –

(i) leaving the child in the care of the parent, guardian or care-giver under the supervision of a designated social worker, provided that the child’s safety and welfare must receive first priority;

(ii) referring the child to a designated social worker for consideration of the conclusion of a kinship care agreement contemplated in section 114(2), either temporarily or permanently or making the child available for adoption by relatives;

(iii) placing the child in temporary foster care as geographically close to the parent, guardian or care-giver as possible to encourage visiting by the parent, guardian or care-giver;

(iv) placing the child in permanent foster care or making the child available for adoption by non-relatives, preferably of similar ethnic, cultural and religious backgrounds or making the child available for adoption by relatives;

(v) placing the child in a place of safety or a children’s home for a limited period to allow for the reunification of the child and the parent, guardian or care-giver with the assistance of a designated social worker; or

(vi) placing the child in a place of safety, a children’s home or an education and development centre with or without terminating parental responsibilities and rights of the parent, guardian or care-giver.
Stakeholders consulted expressed some concerns about permanency plans as expressed in the old law, because the concept of a stable nuclear family composed of married parents and their biological children is not the norm in Namibia. As an alternative, an attempt had been made to prioritise the various placements of the child, giving due consideration to the role played by the extended family in many Namibian communities, as well as the fact that some Namibian cultures do not approve of adoption.

(2) A children’s court may order a designated social worker, if it is in the best interests of a child, to facilitate the reunification of the child with his or her family in the case of a placement contemplated in subsection (1)(b)(i), (ii), (v) and (vi) and for this purpose the designated social worker must—

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

(3) When issuing an order involving the removal of the child from the care of the child’s parent or care-giver, the court may, if appropriate in the circumstances, include in the court order instructions for the implementation of a permanency plan for the child.

Family access to children in alternative placements

144. A children’s court making an order that a child be placed in alternative care may make an order regarding regular access to such child by any member of the child’s family, including a step-parent, or any other person if the court finds that such access would be in the child’s best interests, and may impose such conditions relating to such access as it deems fit.

It seems appropriate to provide for access to a child in alternative care, particularly where family reunification is being attempted. During the consultation process, examples were given of situations where family members were unable to visit children who had been placed in alternative care.

Transfer of certain parental powers at placement
145. (1) If a child is placed in foster care, kinship care or a residential child care facility under this Act or the Criminal Procedure Act, any existing right of custody or control over that child is transferred, subject to subsection (3), to the foster parent, kinship care-giver or the management of the residential child care facility, as the case may be, for the duration of the placement.

(2) Custody or control transferred under subsection (1) includes the duty to –

(a) promote the child’s well-being and development, particularly as regards education and health;

(b) encourage the child to have contact with parents, relatives and friends, unless such contact is prohibited by an order of the children’s court or would not be in the child’s best interests;

(c) inform the child’s parents, guardian or other care-giver immediately prior to the child’s placement of his or her progress;

(d) where consistent with the child’s best interests, plan with the social worker concerned for a trial return home; and

(e) where a child is unable to return to his or her parents, encourage and assist the child to become independent and self-reliant.

(3) Custody or control transferred under subsection (1) does not include the power to deal with the property of the child or to consent to the marriage or adoption of that child, and is subject to subsection (4).

(4) A foster parent, kinship care-giver or residential child care facility in whose care a child had been placed must obtain –

(a) basic medical intervention for the child if reasonable grounds exist to believe that he or she requires such intervention; and

(b) a surgical operation on the child if there are reasonable grounds to believe that –

(i) the child urgently requires the operation; and

(ii) deferring the operation to permit consultation with the person or persons from whom custody or control has been transferred would prejudice the child’s health or welfare.
(5) The management of a residential child care facility may authorise its manager to exercise any of the powers vested in it with regard to the care of the child.

Discharge of orders

146. An order made in terms of this Chapter may be discharged in the best interest of the child by the children’s court on good cause shown and on application by –

(a) a member of the child’s family;
(b) a social worker;
(c) a member of the police;
(d) a parent, guardian or care-giver of the child; or
(e) any person with parental responsibility in respect of the child.

Duration, extension and monitoring of orders

147. (1) An order made by a children’s court in terms of section 141 or 142(b) –

(a) lapses on expiry of –
   (i) two years from the date the order was made; or
   (ii) such shorter period for which the order was made;
(b) may be extended by a children’s court, on its own initiative or upon application by a designated social worker in the prescribed manner, for a period not exceeding two years at a time if such extension would be in the best interests of the child; and
(c) may be withdrawn, suspended, varied or otherwise dealt with in terms of section 42(2).

(2) Notwithstanding subsection (1), a children’s court may, after having considered the need for creating stability in the child’s life, order the placement of a child in kinship care or foster care for more than two years and may order that such placement subsists, subject to subsection (5), until the child turns 18 years.

(3) When deciding on an extension of the period of a court order in terms of subsection (1) or (2), the court must take cognisance of the views of –
(a) the child;
(b) the parent and any other person who has parental responsibilities and rights in respect of the child;
(c) where appropriate, the management of the centre where the child is placed; and
(d) the care-giver of a child placed in alternative care.

(4) A court order referred to in subsection (1), except for an order made in terms of section 141(3)(m), may not extend beyond the date on which the child in respect of whom it was made reaches the age of 18 years.

(5) A child placed in foster care, kinship care, a children’s home or an education and development centre is entitled, after having attained the age of 18 years, to remain in that care until the end of the year in which that person has attained the age of 18 years.

(6) The Minister may on application by a child placed in foster care, kinship care, a children’s home or an education and development centre allow that child to remain in that care until the end of the year in which that person has attained the age of 21 years if—
(a) the current alternative care-giver is willing and able to care for that person; and
(b) the continued stay in that care is necessary to enable that person to complete his or her education or training.

(7) A children’s court making an order in terms of section 141 or 142(b) may give such directions to any specific person or persons and impose such conditions relating to the supervision or monitoring of the order as the court deems appropriate: Provided that a designated social worker must visit a child subject to an order in terms of section 141 or 142 at least once every six months, or less frequently in the case of kinship care which has been extended in terms of subsection (2), and may consult with the child separately from the persons providing his or her care.

**Offence of unauthorised removal from alternative placement**
148. Any person who, without reasonable cause, removes –
   (a) a child from a place of safety; or
   (b) a child placed in an alternative placement by court order made in terms of this Chapter from the location where such child had been placed, without the authority or permission of the person under whose care the child is placed, commits an offence and is liable upon conviction to a fine of N$20 000 or to imprisonment for a term not exceeding five years or to both the fine and imprisonment.

Regulations

149. The Minister may –
   (a) in consultation with the minister responsible for safety and security, make regulations prescribing the form of a written notice to be issued by a police official in terms of section 133;
   (b) in consultation with the minister responsible for justice, make regulations prescribing the form of any order by a children’s court in terms of this Chapter which is considered to be expedient to be prescribed;
   (c) make regulations prescribing the removal of children with or without a warrant and the issue of authorisations in respect of such removal;
   (d) in consultation with the minister responsible for justice, make regulations prescribing the reasonable efforts to be made in order to serve a written notice contemplated in section 139(1) and (3);
   (e) make regulations prescribing the form of a report by a designated social worker in terms of section 135(1); and
   (f) make regulations prescribing generally, any other ancillary or incidental administrative or procedural matter that may be necessary to prescribe in order to facilitate the implementation or administration of this Chapter.
Because the Bill provides separately for “kinship care” in Chapter 8, “foster care” will now refer ONLY to situations where children are placed by court order with a person or family previously unknown to them. These foster parents will be recruited and approved by social workers before children are matched and placed with them. There will be a register of prospective foster parents which social workers can draw on as the need arises.

Because kinship care is now a separate category, the provisions for foster care by strangers will involve a much smaller pool of people. Foster parents, many of whom will undergo specialised training, will provide a professional service aimed at children who have no one to care for them. This could include children with behavioural problems or other special needs. The Ministry will establish support services for children and foster parents, and develop formal guidelines and standards.

There will be a separate category of grants aimed at such foster parents.

### Foster care

150. (1) A child is in foster care if the child has been placed in the care of a person (“the foster parent”) who is not the parent, guardian, family member or extended family member of the child in terms of an order of a children’s court under section 141(3)(e)(i) after a child protection hearing contemplated in section 137.

(2) The Minister may, by regulation, establish and regulate the registration of such support structures, including cluster foster care programmes, as may be required to assist foster parents in caring for children placed in their care in terms of this section in general and, in particular, children with special needs or disabilities.

### Application for approval as prospective foster parent

151. (1) A person who wishes to be approved as a prospective foster parent must make an application, accompanied by such information as may be prescribed, to a designated social worker.

(2) The designated social worker must, in the prescribed manner, assess prospective foster parents for compliance with section 152(1) and (2).
(3) The Minister must approve a person in respect of whom an assessment has been made and who complies with the requirements of this Act as a prospective foster parent, subject to such conditions as the Minister may consider necessary to impose.

(4) The Minister must keep a register, to be known as the Register of Prospective Foster Parents, in the form and manner determined by the Minister, of prospective foster parents approved as such in terms of this section.

(5) The Register of Prospective Foster Parents contemplated in subsection (4) must contain such information as may be prescribed.

**Prospective foster parent**

152. (1) A prospective foster parent must be –
   (a) a fit and proper person to be entrusted with the care of the child concerned;
   (b) willing and able to undertake the parental rights and responsibilities associated with foster care, and exercise and maintain those rights and responsibilities;
   (c) properly assessed by a designated social worker for compliance with paragraphs (a) and (b); and
   (d) in possession of a valid police clearance certificate as contemplated in section 232.

(2) A person who has been convicted of an offence contemplated in section 232(2) is not a fit and proper person to be entrusted with the foster care of a child.

(3) Registration of a person as a prospective foster parent –
   (a) is valid for a period of three years;
   (b) may be renewed as prescribed;
   (c) ceases –
      (i) on written notice of withdrawal being given to the Minister;
      (ii) on the death of the registered person;
      (iii) on cancellation by the Minister if the registered person is no longer –
(aa) a fit and proper person to be entrusted with parental responsibilities and rights in respect of a child; and
(bb) willing and able to undertake, exercise and maintain those responsibilities and rights;
(iv) if a child is removed from the care of that registered person as contemplated in Chapter 11; or
(v) if the registered person is convicted of an offence referred to in section 232(2).

Parental responsibilities and rights of foster parent

153. The foster parent of a child has parental responsibilities and rights in respect of the child as contemplated in section 145, as well as any additional parental rights and responsibilities set out in –
(a) the order of the children’s court placing the child in the foster care of that foster parent; and
(b) an order of the children’s court amending the initial order.

Number of children to be placed in foster care

154. A child may not be placed in foster care if such placement would cause the total number of children cared for by the prospective foster parent to exceed six children, unless the court determines that exceeding this number would be in the best interests of all the children concerned.

Termination of foster care

155. (1) Foster care may be terminated by a children’s court only if it is in the best interests of the child.

(2) Before terminating the foster care of a child, the court must take into account all relevant factors, including –
(a) the bond that exists between the child and the child’s biological parent, if the biological parent reclams care of the child;
(b) the bond that developed between –
   (i) the child and the foster parent; and
   (ii) the child and the family of the foster parent; and

(c) the prospects of achieving permanency in the child’s life by –
   (i) returning the child to the biological parent;
   (ii) allowing the child to remain permanently in foster care with the foster parent;
   (iii) placing the child in any other care; or
   (iv) adoption of the child.
CHAPTER 13
CONTRIBUTION ORDERS

A contribution order is a children’s court order which requires a parent or some other person who is legally responsible for maintaining a child to contribute to the costs incurred by the state in assisting a child in need of protection or for holding such a child in alternative care. It is similar to a maintenance order. The proposed Child Care and Protection Bill provides a system for contribution orders that is similar to the one in the current Children’s Act 1960. Technical adjustments have been made based on inputs from the Law Society.

Issue of contribution orders

156. (1) For purposes of this Chapter, “respondent” means any person legally liable to maintain or to contribute towards the maintenance of a child.

(2) A children's court may make a contribution order instructing a respondent to pay a sum of money or a recurrent sum of money –

(a) as a contribution towards the maintenance or treatment of, or the costs resulting from any special needs of, a child –

(i) placed in foster care or a residential child care facility by court order; or

(ii) temporarily removed by order of the court from the child's family for treatment, rehabilitation, counselling or another reason; or

(b) as a short-term emergency contribution towards the maintenance or treatment of, or the costs resulting from, any urgent needs of a child.

(3) A contribution order takes effect from the date on which it is made unless the court orders that it takes effect from an earlier or later date.

(4) A children’s court may vary, suspend or rescind a contribution order or revive the order after it has been rescinded.

(5) If a court other than the court which made a contribution order varies, suspends, rescinds or revives the order in terms of subsection (4), the clerk of the first-mentioned court must immediately inform the clerk of the last mentioned court of such variation, suspension, rescission or revival.
157. (1) A contribution order may be made, varied, suspended, rescinded or revived by the children's court of the area in which –

(a) the respondent is ordinarily resident, carries on business or is employed; or

(b) the child involved in the matter is ordinarily resident or has been placed in terms of a court order under section 141.

(2) A provisional contribution order may be made by a children's court having jurisdiction in terms of subsection (1)(b) against a respondent resident in any country which is a proclaimed country within the meaning of the Reciprocal Enforcement of Maintenance Orders Act, 1995 (Act No. 3 of 1995).

158. (1) A contribution order must direct the person against whom it is made to pay, in such manner and at such times as the court concerned may determine, the amount specified in that order to an officer of the court granting or confirming the order, or to such other officer as the court may determine.

(2) A children's court may, in such circumstances and subject to such conditions as may be prescribed, grant a contribution order for the maintenance of a person who is 18 years of age or older.

159. (1) A contribution order and a provisional contribution order have the effect of a maintenance order and a provisional maintenance order in terms of the Maintenance Act 2003 (Act No. 9 of 2003) and the Reciprocal Enforcement of Maintenance Orders Act, 1995 (Act No. 3 of 1995), as the case may be.

(2) Sections 33 and 39 of the Maintenance Act, 2003 (Act No. 9 of 2003), read with such changes as the context may require, apply to a person who refuses or fails to comply with a contribution order.
Attachment of wages of respondent

160. (1) A children's court which has made a contribution order against a respondent may order the employer of the respondent –
   (a) to deduct the amount of the contribution which that respondent has been ordered to pay, from the respondent's remuneration; and
   (b) to pay such amount to a person or institution specified in the order.

(2) For purposes of subsection (1) “remuneration” includes any salary, wages, allowances or any other form of remuneration or any other income which is paid periodically to any person.

Change of residence or work by respondent

161. (1) A respondent against whom a contribution order is in force must –
   (a) give notice, in writing, to the clerk of the children's court which made the order, of any change in that person's residential address or place of work; and
   (b) state in that notice the new residential address or the name and address of the new employer, as the case may be.

(2) Any person who refuses or fails to comply with the provisions of subsection (1) commits an offence and is liable to a fine not exceeding N$2 000 or to imprisonment for a period not exceeding six months.

Appeals

162. If an appeal is brought by a person against whom a contribution order was made, the Minister must be cited as the respondent in the appeal.

Service of process, execution of contribution orders and costs

163. (1) A summons, a subpoena or a notice in connection with any proceedings under this Chapter may be served by a member of the police without charging any fee in the
manner provided for by the rules made under the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), for the service of similar documents in civil proceedings in magistrates' courts, unless any other manner of service has been prescribed.

(2) A writ of attachment in execution of a contribution order must be executed by the messenger of the magistrate's court of the district in which the property to be attached is situated, and the messenger's fees and charges for the execution must be paid out of the proceeds of the sale of any such property attached in execution and must be levied in addition and in preference to the amount payable under the contribution order, and if no such sale in execution is held, such fees must be payable by the respondent.

(3) Except as provided in subsection (2), a party to the proceedings under this Chapter, including a party to an appeal, may not recover any costs from any other party, and must not pay any court fee in connection with the issue or furnishing of any document in any such proceedings.
DIVISION D: GENERAL

CHAPTER 14

ADOPTION

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

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

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

The Bill begins by laying out a framework for domestic adoption which is similar to the existing law. One new provision contains rules about consent of biological fathers who are not married to the mother of the child, who previously had no right of consent at all. They now have a right of consent, with appropriate exceptions. Open and closed adoptions are still possible under the new law, as at present, but all adoptive children would be entitled to certain information about their birth parents when they reach age 18.

The Bill also includes an additional framework on intercountry adoption under the Hague Convention. It is anticipated that Namibia will adopt the Hague Convention to regulate intercountry adoption, and that such adoptions will be very rare. The Bill establishes a central register or prospective adoptive parents within Namibia, which would provide a mechanism for easily checking for local options before turning to intercountry adoption. It also contains strict prohibitions on advertising and compensation in respect of adoption.

PART I

DOMESTIC ADOPTION OF CHILDREN

Adoption orders
164. The adoption of a child is effected by an order of the children’s court of the district in which the adopted child resides, granted on application as provided for in this Chapter.

Adoptable children

165. (1) A child is adoptable if –
   (a) the child does not have a parent and has no suitable guardian or care-giver willing to care for him or her;
   (b) the whereabouts of the child's parent or guardian cannot be established;
   (c) the child has been abandoned;
   (d) the child is in need of a permanent alternative placement; or
   (e) the child’s parent or guardian has consented to the adoption.

   (2) A designated social worker must make an assessment of whether a child may be adopted.

   (3) For the purposes of subsection (1)(d), a child who is in permanent foster care or permanent kinship care is not in need of a permanent alternative placement.

Persons who may adopt a child

166. (1) A child may be adopted by –
   (a) the partners in a marriage, jointly;
   (b) the spouse of a parent of the child; or
   (c) a widower, widow, divorced or unmarried person, including the foster parent, kinship care-giver or primary caretaker of the child.

   (2) A prospective adoptive parent must be –
   (a) fit and proper to fulfil parental responsibilities and rights;
   (b) willing and able to exercise, undertake and maintain parental responsibilities and rights;
   (c) 25 years of age and older, unless the applicant or applicants can show grounds why he, she or they should be allowed to adopt a child at a younger age:
Provided that the adoption of a child by a married couple jointly is allowed where at least one of the spouses is 25 years of age or older;

(d) properly assessed by a designated social worker for compliance with paragraphs (a) and (b), and any proposed exception to the age limit in (c); and

(e) in possession of a valid police clearance certificate as contemplated in section 232.

(3) A person who wishes to be approved as a prospective adoptive parent, must in the prescribed manner make an application to a designated social worker for an assessment contemplated in subsection (2).

(4) A designated social worker must assess a prospective adoptive parent for compliance with subsection (2).

(5) A person may not be disqualified from adopting a child by reason of that person’s financial status: Provided that the prospective adoptive parent is able to provide for the adoptive child’s basic needs.

(6) A person who has been convicted of an offence contemplated in section 232(2) is not a fit and proper person to be an adoptive parent.

Register of Adoptable Children and Prospective Adoptive Parents

167. (1) The Minister must keep a register of children who may be adopted and of prospective adoptive parents, to be known as the Register of Adoptable Children and Prospective Adoptive Parents (“the register”).

(2) The name and other identifying information of a child may be entered into the register if the child is adoptable.

(3) The name and other identifying information of a child must be removed from the register if the child has been adopted.
(4) The name and other identifying information of a person approved as a prospective adoptive parent, including such person’s citizenship and residency status, must be entered in the register.

(5) A person who is habitually resident in Namibia but is not a citizen of Namibia may, subject to section 166(2), be registered as a prospective adoptive parent if the Minister is satisfied –

(a) that the country of which that person has citizenship will recognise the adoption, and
(b) that the child will be allowed to enter such country and remain there permanently.

(6) Registration of a person as a prospective adoptive parent –

(a) is valid for a period of three years;
(b) may be renewed as prescribed;
(c) ceases –

(iii) on written notice of withdrawal being given to the Minister;
(iv) on the death of the registered person;
(iii) on cancellation by the Minister if the registered person is no longer –

(aa) a fit and proper person to be entrusted with full parental responsibilities and rights in respect of a child; and
(bb) willing and able to undertake, exercise and maintain those responsibilities and rights.

(iv) if a child is removed from the care of that registered person as contemplated in Chapter 11; or
(vi) if the registered person is convicted of an offence referred to in section 232(2).

(7) Only the Minister and officials in the Ministry designated by the Minister have access to the register.

This register will provide a mechanism for checking to see if there are appropriate local options for an adoptable child before intercountry adoption is considered.
Consent to adoption

168. (1) The children’s court may only make an adoption order, if consent for the adoption has been given by –

(a) each parent of the child regardless of whether the parents are married or not, and regardless of whether the parent is a major or a minor;

(b) any other person who holds guardianship in respect of the child to be adopted, excluding the guardian of a minor parent contemplated in paragraph (a); and

(c) the child, if the child is over the age of ten years, or under the age of ten years but nevertheless of a sufficient age, maturity and stage of development to understand the effect of giving consent.

(2) Subsection (1) does not include a parent or a person referred to in subsection (11) or (12), and a child may be adopted without the consent of such parent or person.

(3) Before consent for the adoption of the child is granted in terms of subsection (1), the designated social worker facilitating the adoption of the child must counsel the parents of the child and, depending on the child’s age, maturity and stage of development, the child on the decision to make the child available for adoption.

(4) If the parent of a child wishes the child to be adopted by a particular person the parent must state the name of that person in the consent: Provided that such person is eligible in terms of section 166(2) and that the children’s commissioner is satisfied that such naming did not involve any undue pressure or inducement.

(5) If a person named in terms of subsection (4) is not resident in Namibia, any requirements relating to inter-country adoption as set out in Part II of this Chapter must be complied with.

(6) Consent to the adoption of a child may not be given before the birth of such child.

(7) Consent referred to in subsection (1) and given –
(a) inside Namibia, must be in writing and –
   (i) signed by the person consenting in the presence of a children’s commissioner;
   (ii) verified by a children’s commissioner in the prescribed manner; and
   (iii) filed by the clerk of the children’s court pending an application for the adoption of the child; or

(b) outside Namibia, must be in writing and –
   (i) signed by the person consenting in the presence of the prescribed person;
   (ii) verified in the prescribed manner and by the prescribed person; and
   (iii) submitted to and filed by a clerk of the children’s court pending an application for the adoption of the child.

(8) The consent mentioned in subsection (1) must set out the names of the prospective adoptive parents, unless the person giving the consent chooses not to be informed of the identity of the prospective adoptive parents, in which case that choice must be indicated on the consent form.

(9) The court may on good cause shown condone any deficiency in the provision of a consent given outside Namibia in that the consent –
   (a) was not signed in the presence of the prescribed person; or
   (b) was not verified in the prescribed manner or by the prescribed person.

(10) A person referred to in subsection (1) who has consented to the adoption of the child may withdraw the consent within 60 days after having signed the consent, after which the consent is final.

(11) The consent of a parent or guardian to a child’s adoption is not required –
   (a) if that parent or guardian –
       (i) is incompetent to give consent due to mental incapacity;
       (ii) has abandoned the child,
       (iii) cannot be found or identified by means of the prescribed procedure and period;
       (iv) has abused or deliberately neglected the child, or has allowed the child to be abused or deliberately neglected;
(v) has consistently failed to fulfil his or her parental responsibilities towards the child during the last 12 months;
(vi) has been divested by an order of court of the right to consent to the adoption of the child; or
(vii) has been convicted of any offence committed in relation to the child to be adopted referred to in section 232(2); or

(b) if the child is an orphan and has no guardian or care-giver who is willing and able to adopt the child and the court is provided with certified copies of the child's parent's or guardian's death certificate or such other documentation as may be required by the court.

(12) If the parent referred to in subsection (1) is the biological father of the child, the consent of that parent to the adoption is not necessary if –

(a) that biological father is not married to the child's mother or was not married to her at the time of conception or at any time thereafter, and has not acknowledged paternity in a manner set out in subsection (13) that he is the biological father of the child;
(b) the child was conceived from an incestuous relationship between that biological father and the mother; or
(c) the court, following an allegation by the mother of the child, finds on a balance of probabilities that the child was conceived as a result of the rape of the mother, provided that such finding does not constitute a conviction for the crime of rape.

(13) A person referred to in subsection (12)(a) may, for the purposes of that subsection, acknowledge that he is the biological father of a child –

(a) by giving a written acknowledgment that he is the biological father of the child either to the mother or the clerk of the children's court at any time prior to the birth of the child or after the birth of the child but before the child reaches the age of six months;
(b) by voluntarily paying or offering to pay maintenance in respect of the child;
(c) by paying damages in respect of the pregnancy in terms of customary law; or
(d) by causing particulars of himself to be entered in the registration of birth of the child in terms of the Births, Marriages and Deaths Registration Act, 1963 (Act 81 of 1963).
A children's court may on a balance of probabilities make a finding as to the existence of a ground on which a parent or person is excluded in terms of this section from giving consent to the adoption of a child.

**Unreasonable withholding of consent**

169. (1) If a parent or person referred to in section 168(1) withholds consent for the adoption of a child a children’s court may, despite the absence of such consent, grant an order for the adoption of the child if the court finds that –

(a) consent has unreasonably been withheld; and

(b) the adoption is in the best interests of the child.

(2) In determining whether consent is being withheld unreasonably, the court must take into account all relevant factors, including –

(a) the nature of the relationship during the last two years between the child and the person withholding consent and any findings by a court in this respect; and

(b) the prospects of a sound relationship developing between the child and the person withholding consent in the immediate future.

**Adoption plans**

170. (1) Before the making of an adoption order, the parties to the adoption may agree on an adoption plan.

(2) An adoption plan is a plan agreed to by two or more of the parties to the adoption of a child that includes –

(a) the making of arrangements for the exchange of information between the parties in relation to any one or more of the following:

(i) the child’s medical background or condition,

(ii) the child’s development and important events in the child’s life; or

(iii) the means and nature of contact between the parties and the child, and

(b) any other matter relating to the adoption of the child.
(3) Without limiting the matters for which an adoption plan may be made, an adoption plan may state the ways in which the child is to be assisted to develop a healthy and positive cultural identity and to foster links with that heritage.

(4) An adoption plan –
(a) must be in writing;
(b) takes effect only if made an order of court;
(c) may be amended or terminated only by an order of court on application –
   (i) by a party to the agreement; or
   (ii) by the adopted child; and
(d) must contain the prescribed particulars.

(5) An agreement contemplated in subsection (1) may not be entered into without due consideration of the views of the child if the child is of an age, maturity and stage of development to understand the implications of such an agreement.

(6) The designated social worker facilitating the adoption of the child must assist the parties in preparing an adoption plan and counsel them on the implications of such an agreement.

(7) A court may, when granting an application for the adoption of the child, confirm an adoption plan which is in the best interests of the child.

Application for adoption

171. (1) An application for the adoption of a child must –
(a) be made in the prescribed manner to a children’s court in the district in which the child normally resides;
(b) be accompanied by a report, in the prescribed format, by a designated social worker containing –
   (i) information on whether the child is adoptable;
   (ii) information on whether the adoption is in the best interests of the child; and
   (iii) prescribed medical information in relation to the child.
(c) be accompanied by an assessment referred to in section 166(4);
(d) be accompanied by an adoption plan referred to in section 170, if any; and
(e) contain such particulars as may be prescribed.

(2) An applicant does not have access to any document lodged with the court by other parties except with the permission of the court.

Notice of application to parties

172. (1) The children’s court may not make an adoption order unless 30 days notice of the application for the adoption order has been given to –
   (a) each person whose consent to the adoption is required in terms of section 168; and
   (b) the Ministry.

   The inclusion of the Ministry as a party who must be notified of an adoption application is based on a proposal made by government social workers. It is intended to provide an additional safeguard for adoption processes, and to facilitate a closer working relationship between the Ministry and the children’s court.

(2) An adoption order may be granted provisionally before the expiry of the period referred to in section 168(10) if the children’s court considers it to be in the best interests of the child concerned to do so, and may, irrespective of whether a provisional order has been granted, be made final upon the expiry of the period referred to in that subsection.

(3) The notice referred to in subsection (1) must –
   (a) inform the person whose consent is sought and the Ministry of the proposed adoption of the child; and
   (b) request the person contemplated in paragraph (a) to consent or withhold consent for the adoption.

(4) If a person on whom a notice in terms of subsection (1) has been served fails to comply with a request contained in the notice within 30 days, that person must be regarded as having consented to the adoption.
(5) The court may direct that notice of an application for an adoption order be given to any specified person, if it appears to the court that this is necessary in the interests of justice.

Consideration of adoption application

173. (1) When considering an application for the adoption of a child, the court must take into account all relevant factors, including the following:
   (a) the best interests of the child;
   (b) the desirability of identifying and preserving the child’s identity, language, culture and religious ties, and for this purpose the court must have regard to the designated social worker’s assessment in terms of section 166(4);
   (c) the need to allow a child who is able to form his or her own views on a matter concerning his or her adoption to express those views freely, which views are to be given due weight in accordance with the developmental capacity of the child and the circumstances;
   (d) any reasonable preferences expressed by a parent and stated in the consent;
   (e) the report contemplated in section 171(1)(b); and
   (f) an adoption plan, if any.

   (2) A children's court considering an application may not make an order for the adoption of a child unless –
      (a) consent for the adoption has been given in terms of section 168, and the court is satisfied that the parent or guardian of the child understands that the effect of the adoption order will mean permanent deprivation of parental rights; and
      (b) consent has not been withdrawn in terms of section 168(10).

   (3) Where an application for an adoption order is filed and all the applicable requirements of this Act have been complied with, a children’s court may, having regard to all the circumstances of the case, make an order for the adoption of a child and may give such directions regarding the monitoring of the well-being of the adopted child by a designated social worker or other suitably qualified person as the court deems fit.

Effect of adoption order
174. (1) Except when provided otherwise in the order or in an adoption plan confirmed by the court, an adoption order terminates –
   (a) all parental responsibilities and rights any person had in respect of the child immediately before the adoption;
   (b) all claims to contact with the child by any family member of a person referred to in paragraph (a);
   (c) all rights and responsibilities the child had in respect of a person referred to in paragraph (a) or (b) immediately before the adoption; and
   (d) any previous order made in respect of the placement of the child.

(2) An adoption order –
   (a) confers full parental responsibilities and rights in respect of the adopted child on the adoptive parent;
   (b) confers the surname of the adoptive parent, or such other surname as may be decided upon by the adoptive parent, on the adopted child, except when otherwise provided in the order;
   (c) does not permit any marriage or sexual intercourse between the child and any other person which would have been prohibited had the child not been adopted; and
   (d) does not affect any rights to property acquired by the child before the adoption.

(3) An adopted child must for all purposes be regarded as the child of the adoptive parent and an adoptive parent must for all purposes be regarded as the parent of the adopted child.

Rescission of adoption order

175. (1) A children’s court may rescind an adoption order on application by –
   (a) the adopted child;
   (b) a parent of the adopted child or other person who had guardianship in respect of the child immediately before the adoption; or
   (c) the adoptive parent of the child.
(2) An application in terms of subsection (1) must be lodged within a reasonable time but not exceeding one year from the date of the adoption.

(3) An adoption order may be rescinded only if rescission of the order is in the best interests of the child and –

(a) the applicant is a parent of the child whose consent was required for the adoption order to be made, but whose consent was not obtained; or

(b) at the time of making the adoption order the adoptive parent did not qualify as such in terms of section 166.

(4) Notice of an application for rescission of an adoption order must be given to –

(a) the adoptive parent of that child, if any other person brings the application;

(b) all persons who have consented to the adoption in terms of section 168 or who have withheld consent to the adoption, if the child or the adoptive parent brings the application;

(c) the competent authority in the case of an inter-country adoption; and

(d) any other person whom the court finds has a sufficient interest in the matter.

Effect of rescission

176. (1) As from the date on which the rescission of an adoption order takes effect –

(a) the effects of the adoption order as set out in section 174(2) and (3) no longer applies in respect of the child concerned; and

(b) all responsibilities, rights and other matters terminated by section 174(1) in respect of the child are restored.

(2) When rescinding an adoption order the court may –

(a) make an appropriate placement order in terms of section 141(3) in respect of the child concerned; or

(b) order that the child be kept in a place of safety until an appropriate placement order can be made.
Recording of adoption in births register

177. (1) After an adoption order has been made by a children's court in respect of a child whose birth has been registered in Namibia, the clerk of the children’s court must transmit the adoption order to the minister responsible for home affairs to record the adoption and any change of surname of the child in the births register.

(2) An application in terms of subsection (1) must be accompanied by –
(a) the relevant adoption order as registered by the adoption registrar contemplated in section 179;
(b) the birth certificate of the child, if any;
(c) the prescribed birth registration form; and
(d) a fee prescribed in terms of any applicable law, if any.

Registration of birth and recording of adoption of child born outside Namibia

178. (1) After an adoption order has been made by a children's court in respect of a child whose birth has been registered outside Namibia but whose parents are resident in Namibia, the clerk of the children’s court must transmit the adoption order to the minister responsible for home affairs to register the birth of the child and to record the adoption of the child in the birth register.

(2) An application in terms of subsection (1) must be accompanied by –
(a) the relevant adoption order as registered by the adoption registrar contemplated in section 179;
(b) the birth certificate of the adopted child or, if the birth certificate is not available –
   (i) other documentary evidence relating to the date of birth of the child; or
   (ii) a certificate signed by a children’s commissioner specifying the age or estimated age of the child;
(c) the prescribed birth registration form, completed as far as possible and signed by the adoptive parent; and
(d) a fee prescribed in terms of any applicable law, if any.
Adoption Register

179. (1) A person designated by the Minister as the adoption registrar must, in the prescribed manner, record information pertaining to and keep a register, to be known as the Adoption Register, of—

(a) the registration numbers allocated to records of adoption cases;
(b) the personal details and medical history of adopted children and of their biological parents;
(c) particulars of successful appeals against and rescissions of adoption orders; and
(d) all other prescribed information in connection with adoptions.

(2) The clerk of the children's court must—

(a) keep a record of all adoption cases by a children's court, including all adoption orders issued by the court, in the prescribed manner;
(b) as soon as is practicable after an adoption order has been issued, forward the adoption order, a copy of the record of the adoption inquiry and other prescribed documents relating to the adoption to the adoption registrar; and
(c) in the case of an inter-country adoption, forward copies of the documents referred to in paragraph (b) to the Minister.

Access to Adoption Register

180. (1) The information contained in the Adoption Register may not be disclosed to any person, except—

(a) to an adopted child after the child has reached the age of 18 years;
(b) to the adoptive parent of an adopted child after the child has reached the age of 18 years;
(c) to the biological parent or a previous adoptive parent of an adopted child after the child has reached the age of 18 years, but only if the current adoptive parent and the adopted child give their consent in writing;
(d) for any official purposes subject to conditions determined by the Minister;
(e) by an order of court, if the court finds that such disclosure is in the best interests of the adopted child; or
(f) for purposes of research, but information that would reveal the identity of an adoptive child or his or her adoptive or biological parent may not be revealed.

(2) The Minister may require a person to receive counselling before disclosing any information contained in the Adoption Register to that person in terms of subsection (1) (a), (b), (c) or (e).

(3) Despite subsection (1), an adopted child or an adoptive parent is entitled to have access to any medical information concerning –
   (a) the adopted child; or
   (b) the biological parents of the adopted child, if such information relates directly to the health of the adopted child.

(4) Despite subsection (1), parties to an adoption plan contemplated in section 170 are entitled to have access to such information about the child as has been stipulated in the agreement.

**Offences in respect of adoption**

181. (1) No person may render adoption services in terms of this Chapter or facilitate an adoption other than a social worker who is designated to render such services or to facilitate an adoption.

(2) A person may not –
   (a) give or receive, or agree to give or receive, any consideration, in cash or in kind, for the adoption of a child in terms of this Part or Part II; or
   (b) induce a person to give up a child for adoption in terms of this Part or Part II.

(3) Subsection (2) does not apply to –
   (a) the care-giver or biological parent of a child receiving compensation for –
       (i) reasonable medical expenses incurred in connection with pregnancy, birth of the child and follow-up treatment;
       (ii) medical attention required by the child to be adopted prior to the conclusion of the adoption;
(iii) reasonable expenses incurred for counselling; or
(iv) any other prescribed expenses;
(b) a legal representative, psychologist or other professional person receiving fees
and expenses for services provided in connection with an adoption;
(c) an organ of state; or
(d) any other prescribed persons.

(4) The payment of expenses referred to in subsection (3)(a) must be arranged
through a designated social worker, or in the case of medical expenses or payment for
counselling, must be paid directly to the medical institution or other service provider in
question.

(5) No expense incurred in terms of subsection (3) is refundable if the adoption,
due to the death of the child or for any other reason based on good faith, fails to be
concluded.

(5) Any person who contravenes a provision of subsection (1) or (2) commits an
offence and is liable on conviction to a fine not exceeding N$20 000 or to imprisonment for a
period not exceeding five years, or to such imprisonment without the option of a fine or to both
such fine and such imprisonment.

Advertising

182. (1) A person may not publish or cause to be published in any form or by
any means an advertisement dealing with the placement or adoption of a specific child or
calling upon any person to be a surrogate mother of a child.

(2) Subsection (1) does not apply in respect of—
(a) the publication of a notice in terms of this Act or a court order;
(b) an advertisement by the Ministry for purposes of recruiting prospective
adoptive parents for inclusion in the Register of Prospective Adoptive Parents
contemplated in section 167; or
(c) other forms of advertisements specified by regulation.
(3) Any person who contravenes a provision of subsection (1) commits an offence and is liable on conviction to a fine not exceeding N$20 000 or to imprisonment for a period not exceeding five years, or to such imprisonment without the option of a fine or to both such fine and such imprisonment.

Regulations

183. The Minister may make regulations –
(a) prescribing procedures for determining whether a child has been abandoned by a parent or other person who has parental responsibilities and rights in respect of the child;
(b) determining procedures to be followed to locate persons whose whereabouts are unknown for obtaining their consent to adoptions;
(c) prescribing procedures for determining the age of a child;
(d) determining procedures for payment for adoption services undertaken by persons or organisations to prevent conflict of interests from arising;
(e) prescribing the requirements that a social worker has to comply with to provide adoption services or inter-country adoption services;
(f) prescribing the procedure and form of an application to be provided with a certificate to render adoption services;
(g) prescribing advertising guidelines for recruitment purposes;
(h) prescribing guidelines for the training of prospective adoptive parents; and
(i) regarding any other ancillary or incidental administrative or procedural matter that may be necessary to be prescribed to facilitate the proper implementation or administration of this Chapter.
PART II
INTER-COUNTRY ADOPTION: IMPLEMENTATION OF
HAGUE CONVENTION OF 1993

General provisions

184.  (1) The purpose of this Part is to give practical effect to the provisions
relating to inter-country adoption set out in the United Nations Convention on the Rights of

(2) The provisions of this Part apply as from the date of the entry into force in
Namibia, as contemplated in section 237, of the Hague Convention on Protection of Children
and Co-operation in Respect of Inter-country Adoption (“the Convention”) signed at the
Hague on 29 May 1993 which is set out in Schedule 3 to this Act.

(3)  The provisions of Part I apply to the making of an adoption order under the
Convention to the extent that such provisions are not inconsistent with the Convention and
subject to any additional safeguards and procedures set out in the Convention.

(4)  In relation to an inter-country adoption involving another state which is not a
party to the Convention, the authorities must, as far as is possible and practicable, apply the
same procedures and safeguards as apply to adoption under the Convention.

Unlawful taking or sending of child out of Namibia

185.  (1) Notwithstanding section 208(1)(b)(i), a person other than a child’s
parent who is not ordinarily resident in Namibia and who has obtained custody or
guardianship of a child who is ordinarily resident in Namibia by a court order or through any
other means may not take or send such child out of Namibia without concluding an inter-
country adoption in terms of this Part.

(2) A person who acts in contravention of the provisions of subsection (1)
commits an offence and is liable on conviction to a fine not exceeding N$50 000 or to
imprisonment for a period not exceeding ten years or to both the fine and imprisonment.
Central Authority

186. The Minister is the Central Authority designated under Article 6(1) of the Convention.

Competent authority

187. The competent authority to certify under Article 23 that an adoption has been made in accordance with the Convention is a children’s court designated by the Minister for this purpose after consultation with the Magistrate’s Commission.

Regulations

188. The Minister may make such regulations as are necessary to give practical effect to the provisions of the Convention and the Minister may in particular make regulations concerning—

(a) the accreditation of bodies in accordance with Articles 10 and 11 of the Convention;
(b) the authorisation of an accredited body from another contracting state to act in Namibia in accordance with Article 12 of the Convention;
(c) the procedures governing the giving of consent in accordance with Article 4(c) of the Convention;
(d) the procedure for determining, in accordance with Article 4(b) of the Convention, after possibilities for the placement of the child within Namibia have been given due consideration, that an intercountry adoption is in the child’s best interests; and
(e) such additional safeguards as are necessary to ensure that the fundamental rights of the child are respected in the adoption process.
“Child trafficking” means involvement in moving children from one place to another for purposes such as sexual exploitation or forced labour. It can involve moving children between different countries, or from place to place within one country.

 Trafficking is a growing problem in the world because of factors like poverty, conflict, natural disasters, crime and social violence – any of which can make children and their families desperate and vulnerable to trafficking.

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

- the International Labour Organisation (ILO) Convention on the Elimination of the Worst Forms of Child Labour;
- the UN Convention against Transnational Organised Crime and its Protocol on Trafficking in Persons, especially Women and Children; and

The inclusion of a chapter in this Bill on child trafficking should be considered to be temporary in nature, as more comprehensive legislation on trafficking – applicable to both children and adults – appears to be the more appropriate course of action based on recommendations from the Chief of Lower Courts and international experts. If such a comprehensive law is enacted in future, provisions on child trafficking in this Act and provisions on adult trafficking in the Prevention of Organised Crime Act 29 of 2004 could be repealed and re-enacted in the new comprehensive law. However, given the forthcoming World Cup, it is best not to delay provisions on child trafficking.

The provisions in this chapter are based partly on provisions in the SA Prevention and Combating of Trafficking in Persons Bill 2009, and on advice from an international expert in trafficking law.

**Meaning of trafficking and exploitation**

189. (1) For the purpose of this Chapter, “trafficking” in relation to a child means the recruitment, transportation, transfer, harbouring, adoption or receipt of a child for the purpose of exploitation within or across the borders of Namibia, and “exploitation” includes, but is not limited to –

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

(2) The term “adoption” as used in subsection (1) includes adoption facilitated or secured through legal or illegal means.

(3) A reference in subsection (1) to –

“forced labour or services” means labour or services obtained or maintained through threats, the use of force, intimidation or other forms of coercion, or physical restraint;

“forced marriage” means a marriage which is without the free and full consent of both spouses or is in contravention of any of the laws on civil and customary marriages in Namibia;

“prohibited child labour” means any labour which is in contravention of this Act or the Labour Act, 2007 (Act No. 11 of 2007);

“removal of body parts” means the removal or trade in any organ or other body part from a living person or the deceased body of a person who has been killed for the sole purpose of removing the organ or other body part;

“servitude” means a condition in which the labour or services of a person are provided or obtained through threats of harm to that person or another person, or through any scheme, plan or pattern intended to cause the person to believe that, if the person does not perform the labour or services in question, that person or another person would suffer harm;

“sexual exploitation” means the commission of any offence of a sexual nature in terms of any Namibian law against a victim of trafficking; and

“slavery” means, other than to the extent permitted by law, reducing a person by any means to a state of submitting to the control of another person as if that other person were the owner of that person.

(4) The purposes of this Chapter are –

(a) to give effect to the United Nations Protocol to Prevent Trafficking in Persons as defined in section 1; and

(b) generally to combat trafficking in children as contemplated in subsection (1).

Trafficking in children prohibited
190.  (1) No natural or juristic person or a partnership may be involved in the trafficking of a child or allow a child to be trafficked.

(2) It is no defence to a charge of contravening subsection (1) that –
(a) a child who is a victim of trafficking or a person having control over that child has consented to –
   (i) the intended exploitation; or
   (ii) the adoption of the child facilitated or secured through illegal means;
   or
(b) the intended exploitation or adoption of a child referred to in paragraph (a) did not occur.

(3) In order to establish the liability, in terms of subsection (1), of an employer or principal, the conduct of an employee or agent of or any other person acting on behalf of the employer or principal may be attributed to the employer or principal if that person is acting –
   (a) within the scope of his or her employment;
   (b) within the scope of his or her actual or apparent authority; or
   (c) with the express or implied consent of a director, member or partner of the employer or principal.

(4) A finding by a court that an employer or principal has contravened subsection (1) serves as a ground for revoking the licence or registration of the employer or principal to operate.

(5) A person or partnership who acts in contravention of subsection (1) commits an offence and is liable on conviction to a fine not exceeding N$1 000 000 or to imprisonment for a period not exceeding twenty years, or to such imprisonment without the option of a fine or to both such fine and such imprisonment.

Behaviour facilitating trafficking in children prohibited

191.  (1) No natural or juristic person or a partnership may –
(a) knowingly lease or sublease or allow any room, house, building or establishment to be used for the purpose of harbouring a child who is a victim of trafficking; and

(b) advertise, publish, print, broadcast, distribute or cause the advertisement, publication, printing, broadcast or distribution of information that suggests or alludes to trafficking by any means, including the use of the Internet or other information technology.

(2) Every Internet service provider operating in Namibia must report to the Namibia Police Force any site on its server that contains information in contravention of subsection (1).

(3) A person or partnership who acts in contravention of subsection (1) or an Internet service provider who fails to make a report as contemplated in subsection (2) while conscious of the existence of a site on its server as contemplated in that subsection, commits an offence and is liable on conviction to a fine not exceeding N$1 000 000 or to imprisonment for a period not exceeding twenty years, or to such imprisonment without the option of a fine or to both such fine and such imprisonment.

Assistance to any child who is victim of trafficking

192. (1) The Minister may appoint or designate a person or organisation to render support services in respect of a child who is the victim of trafficking.

(2) A person or organisation appointed or designated in terms of subsection (1) must –

(a) ensure that the child is placed in appropriate accommodation with access to food, water, clothes and bedding;

(b) arrange for counselling of the child, if required;

(c) ensure that the child is informed of his or her rights in a language which he or she understands;

(d) ensure that the child receives medical or psychological services, if required;

(e) ensure the safety of the child;
(f) assist in finding employment for the child, if such child seeks employment, is of an employable age and is by law allowed to be employed and is likely to remain in Namibia for a period exceeding six months or is allowed to stay in Namibia for the duration of an order of the children’s court in respect of such child if the duration of such order exceeds six months; and

(g) ensure that the child receives educational and training opportunities if he or she is likely to remain in Namibia for a period exceeding six months or is allowed to stay in Namibia for the duration of an order of the children’s court in respect of such child if the duration of such order exceeds six months.

(3) If it is essential in the best interests of a child who has been trafficked, either to or from or within Namibia, the Minister must authorise an adult at state expense to escort the child from the place where the child was found to the place from which the child was trafficked or, if that is not appropriate or safe, to any other suitable place, including a place where the child’s parent or care-giver resides.

(4) The Minister may not act in terms of subsection (3) unless he or she is satisfied that the parent, guardian, care-giver or other person who has parental responsibilities and rights in respect of the child does not have the financial means to travel to the place where the child is in order to escort the child back.

(5) A child who is a victim of trafficking must, pending the completion of an investigation contemplated in section 130(4), be placed in a place of safety, unless the child can be placed in an alternative safe facility or place during such period.

(6) Placement of a child in a place of safety as contemplated in subsection (5) without an order of the children’s court does not disqualify such child from any aid or grant payable in respect of children in a place of safety.

The above provisions are proposed in order to give effect to the requirements of the Protocol on Trafficking, which require comprehensive assistance to child victims of trafficking.

Provision of health care and education services to foreign child
193. A foreign child who is a victim of trafficking is entitled to the same public health care and education services as those to which a citizen of Namibia has access.

**Foreign child who is victim of trafficking found in Namibia**

194. (1) If, after an investigation contemplated in section 130(4), a foreign child who is illegally present in Namibia is brought before the children's court, the court may order that the child be assisted in applying for asylum in terms of the Namibia Refugees (Recognition and Control) Act, 1999 (Act No. 2 of 1999).

(2) A determination in terms of section 141 that a foreign child who is illegally present in Namibia and who is a victim of trafficking is a child in need of protective services serves as authorisation for allowing the child to remain in Namibia for the duration of the children's court order.

**Repatriation of foreign child who is victim of trafficking**

195. The Minister may not return a child who has been trafficked to Namibia to his or her country of origin or the country from where the child has been trafficked without giving due consideration to –

(a) the availability of care arrangements in the country to which the child is to be returned; and

(b) the safety of the child in the country to which the child is to be returned, including the possibility that the child might be trafficked again, harmed or killed.

**Return of child to Namibia**

196. With due regard to the safety of a child and without delay –

(a) the minister responsible for foreign affairs must facilitate the return to Namibia of a child who is a citizen or permanent resident of Namibia and who is a victim of trafficking; and

(b) the minister responsible for home affairs must –
(i) facilitate and accept the return of a child contemplated in paragraph (a);

(ii) issue such travel documents or other authorisations as may be necessary to enable such a child to travel to and enter Namibia;

(iii) at the request of another state that is a party to the United Nations Protocol to Prevent Trafficking in Persons or to an agreement relating to trafficking in children, verify that the child who is a victim of trafficking is a citizen or permanent resident of Namibia; and

(iv) upon the child's entry into Namibia refer the child to a designated social worker who must act in accordance with the provisions of section 130(4) and who may, if required in the circumstances, place the child in a place of safety pending the outcome of the investigation referred to in that section.

Trafficking of child by parent, guardian or other person who has parental responsibilities and rights in respect of child

197. If a court has reason to believe that the parent or guardian of a child or any other person who has parental responsibilities and rights in respect of a child, has trafficked the child or allowed the child to be trafficked, the court must, in addition to imposing a penalty under section 190 or 191 –

(a) suspend all parental responsibilities and rights of that parent, guardian, or other person; and

(b) place that child in temporary safe care, pending an inquiry by a children's court.

Extra-territorial jurisdiction

198. (1) A court of Namibia has jurisdiction in respect of an act committed outside Namibia which would have constituted an offence in terms of this Chapter had it been committed inside Namibia, regardless of whether or not the act constitutes an offence at the place of its commission, if the person to be charged –

(a) is a citizen of Namibia;
(b) is ordinarily resident in Namibia;
(c) has committed the offence against a citizen of Namibia or a person who is ordinarily resident in Namibia;
(d) is, after the commission of the offence, present in the territory of Namibia, or in its territorial waters or on board of a ship or aircraft registered or required to be registered in Namibia;
(e) is, for any reason, not extradited by Namibia or if there is no application to extradite that person; or
(f) is a juristic person or a partnership registered in terms of any law of Namibia.

(2) A person who commits an offence referred to in subsection (1) is liable upon conviction to the penalty prescribed for that offence.

(3) The minister responsible for justice must, in consultation with the Prosecutor General, in writing, designate an appropriate court in which to conduct a prosecution against any person accused of having committed an offence in a country outside Namibia as provided for in subsection (1), provided that only a High Court has jurisdiction in respect of an offence referred to in subsection (1)(d).

(4) No prosecution may be instituted against a person in terms of this section with respect to conduct which formed the basis of an offence under this Chapter in respect of which that person had already been convicted or acquitted by a court of another jurisdiction.

(5) The institution of a prosecution in terms of this section must be authorised in writing by the Prosecutor General.

Extra-territoriality of laws must be distinguished from extradition of persons accused or convicted of the commission (within Namibia or a foreign state) of an extraditable offence. Extradition is mostly dependent on the terms of an extradition agreement and a request for extradition. Extra-territoriality will imbue Namibian courts with inherent jurisdiction.

The provision above, based on the *SA Prevention and Combating of Trafficking in Persons Bill 2009*, contains sufficient detail to give answers to a variety of legal questions and also avoids the notion of double jeopardy. It therefore contributes to legal certainty.

Criminal prosecution against victim of trafficking prohibited
199. No criminal prosecution may be instituted against a child who is found to be a victim of trafficking after an investigation contemplated in section 130(4) for –

(a) entering or remaining in Namibia in contravention of the Immigration Control Act, 1993 (Act 7 of 1993);

(b) assisting another person to enter or remain in Namibia in contravention of the Immigration Control Act, 1993 (Act 7 of 1993);

(c) possessing any fabricated or falsified passport, identity document or other document used for the facilitation of movement across borders; and

(d) being involved in an illegal activity to the extent that he or she has been compelled to do so,

as a direct result of his or her situation as a victim of trafficking.
CHAPTER 16
PROTECTIVE MEASURES IN RESPECT OF CHILDREN

This chapter of the Bill addresses a broad range of protective measures for children.

The first set of measures related to medical treatment of a child:

- **medical interventions and HIV testing:** The Bill sets age 14 as the basic age of consent for medical interventions and HIV testing, if the child also has sufficient maturity. Surgical operations would require the additional consent of a parent until the child reaches 18.

- **access to contraceptives:** The Bill also sets 14 as the age for confidential access to contraceptives.

- **medical emergencies:** The Bill provides procedures for consent to medical intervention or surgery on a child by a hospital superintendent or regional director of a clinic in emergency situations.

- **refusal or inability to consent to medical intervention:** The Bill allows consent for medical interventions to be given by the Minister or a court in situations when the parent or child unreasonably refuses, or when the parent is mentally incapacitated, cannot be found or is deceased.

- **medical examination of abused children:** The Bill provides special rules for consent to the medical examination of abused children, which the parent or guardian might be the culprit.

The Bill also includes a provision which allows the Minister to recognize child-headed households and to allow them to remain intact, under appropriate adult supervision, if this would be in the best interests of all the children concerned.

There is a provision aimed at combating baby-dumping which provides procedures for leaving unwanted babies at safe places, and also seeks to prevent abuses of this mechanism. The issue of baby-dumping has ignited national debate for many months now and the provision in this section meets the calls that have been made to provide legislation to help combat this problem.

There is a provision on corporal punishment which requires that the child’s dignity must be respected at all times, and charges the Minister with establishing programmes to promote appropriate discipline in the home. This is in line with the African Charter on the Rights and Welfare of the Child, which requires states to “take all appropriate measures to ensure that a child who is subjected to school or parental discipline shall be treated with humanity and with respect for the inherent dignity of the child”.

Other provisions cover:

- **offences for unlawfully detaining a child or removing a child from Namibia,** which could be helpful in preventing trafficking;

- **a general prohibition on social, cultural and religious practices which are detrimental to a child’s well-being,** including forced marriage or marriage or engagement, or allowing an underage child to enter into a marriage or engagement;

- **child safety at places of entertainment;**

- **provisions which strengthen the existing laws on underage drinking;**

- **provisions to protect migrant and refugee children,** especially where they are unaccompanied by adults;

- **prohibitions on the worst forms of child labour and the exploitation of children** (to support the ILO Convention on this topic which Namibia has joined) with controlled exceptions to the rules on child labour for activities such as acting, modelling, sport and educational or cultural events.
Consent to medical intervention and surgical operation

200. (1) Despite any law to the contrary –

(a) a child may consent to medical intervention in respect of himself or herself if –
   (i) the child is 14 years of age or older; and
   (ii) the child is of sufficient maturity and has the mental capacity to understand the benefits, risks and implications of the treatment, as determined by a medical practitioner.

(b) a child may consent to the performance of a surgical operation on him or if –
   (i) the child is 14 years of age or older;
   (ii) the child is of sufficient maturity and has the mental capacity to understand the benefits, risks and implications of the surgical operation, as determined by a medical practitioner; and
   (iii) the child is duly assisted by his or her parent, guardian or care-giver.

(2) A child who is competent to consent to medical intervention in respect of himself or herself in terms of subsection (1) is also competent to consent to medical intervention in respect of his or her child, and a child who is competent to consent to a surgical operation on himself or herself with the assistance of a parent or guardian in terms of subsection (1) is also competent to consent with such assistance to a surgical operation on his or her child.

(3) The parent, guardian or care-giver of a child may, subject to section 5, consent to the medical intervention in respect of or surgical operation on the child if such child –

(a) has not attained the age of 14 years; or

(b) is older than the age referred to in paragraph (a) but is of insufficient maturity or is unable to understand the benefits, risks and implications of the treatment.

(4) The superintendent of a hospital or the person in charge of the hospital in the absence of the superintendent, or the regional director of a clinic, may consent to a medical intervention in respect of or a surgical operation on a child if –
(a) the intervention or operation is necessary to preserve the life of the child or to save the child from serious or lasting physical harm or disability; and

(b) the need for the intervention or operation is so urgent that it should not be deferred for the purpose of obtaining consent that would otherwise have been required.

(5) The Minister may, upon the request of any person with an interest in the welfare of a child, consent to the medical intervention in respect of or surgical operation on a child if the parent, guardian or care-giver of the child –

(a) unreasonably refuses to give consent or to assist the child in giving consent;
(b) is incapable of giving consent or of assisting the child in giving consent;
(c) cannot readily be traced; or
(d) is deceased.

(6) The Minister may, upon the request of any person with an interest in the welfare of a child, consent to the medical intervention in respect of or surgical operation on the child if such child unreasonably refuses to give consent.

(7) A children's court may, following failure to obtain consent as contemplated in this section and upon the request of any person with an interest in the welfare of a child, consent to the medical intervention in respect of or a surgical operation on the child in all instances where a person who may give consent in terms of this section refuses or is unable to give such consent.

(8) A parent, guardian or care-giver of a child may not refuse to assist the child in terms of subsection (1)(b)(iii) or withhold consent in terms of subsection (3) to a medical intervention or surgical operation which would be in the best interests of the child by reason only of religious or other beliefs, unless that parent, guardian or care-giver can show that there is a medically accepted alternative choice to the medical intervention or surgical operation concerned.

(9) In any case where a child is not competent to consent to medical intervention or a surgical operation in terms of this section, but is able to demonstrate the capacity to express an
informed view on such intervention or operation, the child’s view should be given due consideration by the relevant decision-maker.

(10) Any child who is of sufficient maturity to understand the benefits, risks and implications of a medical intervention may access confidential medical counselling and advice without parental consent, irrespective of such child’s age, where this would be in the best interests of the child.

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

The UN Convention on the Rights of the Child recognises the rights of children to participate in decisions about their health and health care, as well as in the planning and provision of health services which are relevant to them.

In South Africa the age of consent for medical treatment is 12, although the child must be also be sufficiently mature. The relevant age is 15 in Kenya, 16 in New Zealand and 18 in Zimbabwe.

Public opinion on the correct age for this provision in Namibia differed widely, so a policy choice is required. The “age of 14 PLUS maturity” is proposed as a middle ground which would be in line with concept of children’s evolving capacities under the UN Convention on the Rights of the Child. It would also be helpful to orphans and vulnerable children who may not have a parent or care-giver to make medical decisions for them.

The term “medical intervention” was suggested by a local doctor as a substitute for “medical treatment” so as to include diagnostic tests and other medical actions which might not clearly fall under the meaning of “treatment”.

**HIV-testing**

201. (1) A child may not be tested for HIV except when —

(a) it is in the best interests of the child and consent has been given in terms of subsection (2);

(b) the test is necessary in order to establish whether –

(i) a health worker may have contracted or been exposed to HIV due to contact in the course of a medical procedure with any substance from the child's body that may transmit HIV; or
(ii) any other person may have contracted or been exposed to HIV due to contact with any substance from the child's body that may transmit HIV, provided the test has been authorised by a court; or

(c) the child is pregnant.

(2) Consent for a HIV-test on a child may be given by –

(a) the child, if the child is –

(i) 14 years of age or older; or

(ii) under the age of 14 years and is of sufficient maturity to understand the benefits, risks and social implications of such a test;

(b) the parent, guardian or care-giver, if the child is under the age of 14 years and is not of sufficient maturity to understand the benefits, risks and implications of such a test;

(c) the Minister, if the child is under the age of 14 years and is not of sufficient maturity to understand the benefits, risks and implications of such a test;

(d) the superintendent or person in charge of a hospital or the regional director of a clinic, if –

(i) the child is under the age of 14 years and is not of sufficient maturity to understand the benefits, risks and implications of such a test; and

(ii) the child does not have a parent, guardian or care-giver; or

(e) a children's court, if –

(i) consent in terms of paragraph (a), (b), (c) or (d) is unreasonably withheld; or

(ii) the child or the parent, guardian or care-giver of the child is incapable of giving consent.

Counselling before and after HIV-testing

202. (1) A child may be tested for HIV only after proper counselling is provided by an appropriately trained person to –

(a) the child, unless the person doing the counselling is satisfied that the child’s age and maturity will preclude the child from deriving any benefit from such counselling; and
(a) the child's parent, guardian or care-giver, if the parent, guardian or care-giver has knowledge of the test.

(2) Post-test counselling must be provided by an appropriately trained person to –

(a) the child, if the child is of sufficient maturity to understand the implications of the result; and

(b) the child's parent, guardian or care-giver, if the parent, guardian or care-giver has knowledge of the test.

Confidentiality of information on HIV/AIDS status of children

203. (1) A person may not disclose the fact that a child is HIV-positive without consent given in terms of subsection (2), except –

(a) within the scope of that person's powers and duties in terms of this Act or any other law;

(b) when necessary for the purpose of carrying out the provisions of this Act;

(c) for the purpose of legal proceedings; or

(d) in terms of an order of a court.

(2) Consent to disclose the fact that a child is HIV-positive may be given by –

(a) the child, if the child is –

(i) 14 years of age or older; or

(ii) under the age of 14 years and is of sufficient maturity to understand the benefits, risks and social implications of such a disclosure;

(b) the parent, guardian or care-giver, if the child is under the age of 14 years and is not of sufficient maturity to understand the benefits, risks and social implications of such a disclosure;

(c) the superintendent or person in charge of a hospital, if –

(i) the child is under the age of 14 years and is not of sufficient maturity to understand the benefits, risks and social implications of such a disclosure; and

(ii) the child does not have a parent, guardian or care-giver; or

(d) a children's court, if –
(iii) consent in terms of paragraph (a), (b), or (c) is unreasonably withheld and disclosure is in the best interests of the child; or

(ii) the child or the parent, guardian or care-giver of the child is incapable of giving consent.

(3) A person who acts in contravention with the provisions of subsection (1) commits an offence and is liable on conviction to a fine not exceeding N$20 000 or to imprisonment for a period not exceeding five years or to both the fine and imprisonment.

Currently, the Namibian Guidelines for Voluntary Counselling and Testing allow consent to HIV-testing in Namibia at 16 years, while children who are pregnant or married may get tested at any age without parental consent.

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

The AIDS Rights Alliance for Southern Africa (ARASA) suggested an age of 12 plus sufficient maturity for consent to HIV testing. However, the Bill proposes 14 as the dividing line for all forms of medical consent, for consistency. (It should be noted that 14 is also currently the age at which children are presumed to have sufficient maturity to be held responsible for committing crimes.) The age of consent for HIV testing is 12 in South African and Lesotho, and 16 in Mozambique.

The Bill allows for testing at any age, without consent, when the test is necessary to protect someone else -- such as when a health care worker has received a needle stick injury or when the child is pregnant, to see if measures to prevent mother-to-child-transmission are needed.

Pre-and post-test counselling of the child would be required in every case. The parents would also be counselled if they are aware of the test, but confidentiality must be respected where the child is old enough to consent to the test.

Access to contraceptives

204. (1) No person may refuse –

(a) to sell condoms to a child over the age of 14 years; or

(b) to provide a child over the age of 14 years with condoms on request where such condoms are provided or distributed free of charge.
(2) Contraceptives other than condoms may be provided to a child on request by the child and without the consent of the parent or care-giver of the child if –

(a) the child is at least 14 years of age;
(b) proper medical advice is given to the child; and
(c) a medical examination is carried out on the child to determine whether there are any medical reasons why a specific contraceptive should not be provided to the child.

(3) A child who obtains condoms, contraceptives or contraceptive advice in terms of this Act is entitled to confidentiality, subject to the provisions on the protection of persons reporting the abuse or neglect of a child in need of protective services in terms of section 128.

(4) A person who acts in contravention with the provisions of subsection (1) commits an offence and is liable on conviction to a fine not exceeding N$5 000 or to imprisonment for a period not exceeding one year or to both the fine and imprisonment.

Access to contraceptives in Namibia is currently governed by the general rules on medical treatment. However, because the current law does not explicitly mention contraceptives, the policy on providing youth with contraceptives has been confusing both to children and care providers. The Bill would provide for confidential access to contraceptives from age 14.

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

In Ghana, the policy is that contraceptives are provided to anyone engaging in sexual activity, regardless of age. Tanzania’s Family Planning Guidelines state that all males and females of reproductive age, including adolescents, are entitled to family planning services. 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.

Public opinion in Namibia was sharply divided on this issue.

- Some people thought that allowing access to contraceptives might encourage early sexual behaviour.
- Others thought that children would become sexually active anyway and that denying access to contraceptives will just lead to unprotected sex and teen pregnancies.
- Some children consulted pointed to the possibility that a sexually-abused child without any choice in the matter of sexual activity might seek contraceptives.
- Some social workers suggested that children who come to a clinic to seek contraceptives create an opportunity for health care workers to counsel them on the benefits of abstinence, the dangers of sexually-transmitted infections and the importance of responsible sexual behaviour.
Denying teens confidential access to contraceptives is unlikely to stop them from engaging in sexual activity, but is likely to make their sexual activity more risky.

Children above the age of 14 are considered competent to consent to sexual activity in terms of the Combating of Rape Act. The Combating of Immoral Practices Act refers to age of 16 in connection with sexual contact, but this applies only to a situation where the other party is more than 3 years older and is designed to prevent sexual exploitation where the two sexual partners are very different in age. Thus, no legal problems would be created by providing contraceptives to children over age 14.

Consent for and conditions pertaining to examination or assessment of abused or neglected children

205. (1) Notwithstanding the provisions of section 200, a medical practitioner or health care provider –
   (a) may conduct an assessment or examination of a child who is suspected of having been abused or deliberately neglected for medical or forensic purposes, or both; and
   (b) may provide any reasonable medical interventions required to respond to the suspected abuse or neglect, without the consent of the child’s parent or guardian, regardless of the age of the child: Provided that no general anaesthetic may be administered to the child without an appropriate consent in terms of section 200.

   (2) A medical practitioner or health care provider acting in terms of subsection (1) must obtain the oral or written consent of the child being assessed or examined if such child is of sufficient maturity and has the mental capacity to understand the reasons for the assessment or examination: Provided that an assessment or examination may proceed in the absence of such child’s consent if it is deemed to be in the interests of such child, in which case the reasons for proceeding with the assessment or examination must –
   (a) be recorded in writing; and
   (b) be explained to the child if the child appears to be capable of understanding the explanation, by the person doing the assessment or examination.
(3) The person conducting an assessment or examination in terms of subsection (1) must as far as is possible and practicable –

(a) address the child in a language which he or she can understand;
(b) allow the child to be accompanied by a support person of the child’s choice, unless he or she, if of sufficient maturity and mental capacity to understand the reasons for the assessment or examination, expresses a wish not to be accompanied by such person;
(c) treat the child with empathy, care and understanding, with due regard to the child's right to privacy and confidentiality;
(d) examine or assess the child in a child-friendly environment;
(e) conduct the assessment or examination outside the presence of any other person who is not required to be present; and
(f) respect the child’s dignity.

At present, there is confusion amongst medical practitioners on how to proceed in cases of abuse or sexual abuse involving minors, and on the administration of post-exposure prophylaxis (PEP) to minors in rape cases. Parents may refuse to consent to the medical examination because one of the parents or some family member is the perpetrator, and evidence will be lost if there is a delay. Swift action is also important for PEP to be effective. This section provides a procedure for proceeding with the medical examination and associated medical intervention in such cases without parental consent if necessary, but requires that consent be given in the normal fashion if general anaesthesia is used because of the increased risks entailed.

Social workers, police from the Woman Child Protection Unit and the National Forensic Science Institute pointed to the need for such a provision.

Child-headed household

206. (1) The Minister may recognise a household as a child-headed household if –

(a) the parent or care-giver of the household is chronically or terminally ill, has abandoned the children in the household or has died;
(b) no suitable adult family member is available to provide care for the children in the household;
(c) a child has assumed the role of care-giver in respect of a child in the household; and
(d) it is in the best interests of the children in the household.

(2) A child-headed household must function under the general supervision of an adult designated by –

(a) a children’s court; or

(b) an organ of state or a non-governmental organisation determined by the Minister.

(3) An adult designated under subsection (2) must –

(a) perform the duties as prescribed in relation to the household;

(b) be in possession of a police clearance certificate contemplated in section 232.

(4) The child heading the household or the adult designated under subsection (2) may collect and administer for the child-headed household any grant made in terms of this Act or other grant or assistance to which the household is entitled, subject to, in the case of a designated adult, such requirements regarding accountability as may be prescribed: Provided that, in the case of disagreement between the child and the designated adult regarding the collection or administration of a grant or assistance, an organ of state or a non-governmental organisation contemplated in subsection (2)(b) must collect and administer such grant or assistance.

(5) The adult designated under subsection (2) and the organ of state or non-governmental organisation referred to in subsection (2)(b) may not take any decisions concerning a child-headed household and the children in such household without consulting –

(a) the child at the head of the household; and

(b) given the age, maturity and stage of development of the other children, also those other children.

(6) The child at the head of the household may take all day-to-day decisions relating to the household and the children in the household as if that child is an adult caregiver.
(7) A child-headed household may not be excluded from any aid, relief or other programme for poor households provided by an organ of state solely by reason of the fact that the household is headed by a child.

(8) The child heading the household or, given the age, maturity and stage of development of the other children, such other children, if the child or children are not satisfied with the manner in which the adult is performing his or her duties, may report the adult designated under subsection (2) to a designated social worker, who must report the matter to the clerk of the children’s court, in the case of a designation in terms of subsection (2)(a), or to the organ of state or non-governmental organisation, in the case of a designation in terms of subsection (2)(b).

(9) A person who misappropriates money for which that person is accountable in terms of subsection (4) commits an offence and is liable on conviction to a fine not exceeding N$20 000 or to imprisonment for a period not exceeding five years or to both the fine and imprisonment.

Persons consulted thought that this provision would be of great practical assistance in these times when the number of orphans and vulnerable children are increasing. It can be used to prevent the separation of siblings or the disruption of functioning households.

Unlawful removal or detention of child

207. (1) A person may not without lawful authority or reasonable grounds –
(a) remove a child from the control of a person who has lawful control of the child; or
(b) detain a child with the result that the child is kept out of the control of a person entitled to lawful control of the child.

(2) For the purposes of subsection (1) a person must be regarded as detaining a child if that person –
(a) causes the child to be detained; or
(b) induces the child to remain with him or her or any other person.
(3) A person who acts in contravention of the provisions of subsection (1) commits an offence and is liable on conviction to a fine not exceeding N$50 000 or to imprisonment for a period not exceeding ten years or to both the fine and imprisonment.

Unlawful taking or sending of child out of Namibia

208. (1) A person may not take or send a child out of Namibia –
(a) in contravention of an order of a court prohibiting the removal of the child from Namibia; or
(b) without consent –
   (i) obtained from persons holding relevant parental responsibilities and rights in respect of that child; or
   (ii) of a court.

(2) For the purposes of subsection (1) a person must be regarded as –
(a) taking a child out of Namibia if that person –
   (i) causes the child to be taken, or in any way assists in taking the child, out of Namibia; or
   (ii) causes or induces the child to accompany or to join him or her or any other person when departing from Namibia; or
(b) sending a child out of Namibia if that person causes the child to be sent, or in any way assists in sending the child, out of Namibia.

(3) A person who acts in contravention of the provisions of subsection (1) commits an offence and is liable on conviction to a fine not exceeding N$50 000 or to imprisonment for a period not exceeding ten years or to both the fine and imprisonment.

Harmful social, cultural and religious practices

209. (1) Every child has the right not to be subjected to social, cultural and religious practices which are detrimental to his or her well-being.

(2) No person may give a child out in marriage or engagement if such child does not consent to such marriage or engagement, and a child who is –
(a) below the minimum age for a valid marriage set by any law or custom relating to civil or customary marriages requires the consent of the minister responsible for home affairs for a marriage or engagement; and

(b) a child who is a minor requires the consent of his or her parent, parents or guardian.

(3) A person who acts in contravention of the provisions of subsection (2) commits an offence and is liable on conviction to a fine not exceeding N$50 000 or to imprisonment for a period not exceeding ten years or to both the fine and imprisonment.

(4) The Minister may, after consultation with interested parties, by regulation prohibit any social, cultural or religious practice which, in the Minister’s opinion, may be detrimental to the well-being of children.

(5) A regulation contemplated in subsection (4) may provide that any person who contravenes or fails to comply with a provision thereof, commits an offence and is liable on conviction to –

(a) imprisonment for a period not exceeding two years;
(b) a fine not exceeding N$10 000;
(c) both a fine and imprisonment.

Traditional cultural practices reflect values and beliefs held by members of the community for periods often spanning generations. However, long-standing practices often go unquestioned by the members of the affected communities. It has been reported that some children in Namibia, predominately girl children, are subjected to some harmful traditional practices.

The African Charter on and the Rights and Welfare of Children mandates special protection for children against harmful social and cultural practices in Article 21:

1. States Parties to the present Charter shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular:

   (a) those customs and practices prejudicial to the health or life of the child; and
   (b) those customs and practices discriminatory to the child on the grounds of sex or other status.

2. Child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be 18 years and make registration of all marriages in an official registry compulsory.
Children who were consulted about the Namibian Bill cited the following as cultural practices which might be considered harmful:

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

To ensure that there is sufficient protection for the diverse range of harmful cultural practices that may occur, the Bill is deliberately broad and general. Following on the African Charter, the only specific practice prohibited by the Bill is forced or underage marriage or betrothal. Beyond that, the Bill allows for the future identification of harmful practices in regulations. This should provide sufficient flexibility to protect children without inadvertently restricting any positive cultural practices. This approach also allows opportunity for intensive consultation and research around specific cultural practices which may be harmful.

**Procedure for dealing with abandoned children left with approved authorities**

210. (1) The parent, guardian or care-giver of a child who abandons the child may not be prosecuted under section 236 for such abandonment if the child –

   (a)  is left within the physical control of a person at the premises of a hospital, police station, fire station, school, place of safety, children’s home or any other prescribed place; and

   (b)  shows no signs of abuse, neglect or malnutrition.

(2) Any child who has been abandoned and found must immediately be reported to a member of the police and be handed over to a designated social worker for placement in a place of safety and an investigation in terms of section 130(4), to the extent possible.

(3) A designated social worker who has been notified of the abandonment of a child must cause –

   (a)  an advertisement to be published in at least one national newspaper and at least one local or additional national newspaper circulating in the area where the child has been found; and

   (b)  a radio announcement to be broadcast on at least one national radio station, calling upon any person to claim responsibility for the child.
(4) If the person who abandoned a child seeks to reclaim the child within 60 days of the date on which such child was abandoned, the child must be treated as a child who is in need of protective services in terms of section 127(1) and is subject to an investigation in terms of section 130(4).

(5) An abandoned child may not be made available for adoption unless a period of 60 days has expired since the date of publication of the advertisement referred to in subsection (3) during which period no person has claimed responsibility for the child.

The provision above provides a legal mechanism to combat baby-dumping. A parent who abandons a child will not be prosecuted for abandonment if the child is left at a hospital, police station, fire station, school, place of safety, children’s home or other prescribed place and shows no signs of abuse, neglect or malnutrition.

Anyone finding an abandoned child must immediately report this to the police. The child will be put in a place of safety, and a social worker will investigate the matter if necessary.

The social worker must place an advertisement about the abandoned child on radio and in newspapers as a safeguard against child-stealing. The Minister will make regulations for identifying the child (such as with a wristband like those used in hospitals) in case anyone comes to claim (or reclaim) the child.

If the person who abandoned the child has a change of heart, a social worker must investigate to see if it will be safe to return the child to this person. If no one claims responsibility for the child within 30 days, then the child can be made available for adoption.

Corporal punishment

211. (1) A person who has control of a child, including a person who has parental responsibilities and rights in respect of the child, must respect the child’s right to dignity as conferred by section 8 of the Constitution of the Republic of Namibia.

(2) Any legislative provision and any rule of common or customary law authorising corporal punishment of a child by a court, including the court of a traditional leader, is hereby repealed to the extent that it authorises such punishment.

(3) A person may not administer corporal punishment to a child at any residential child care facility, place of care, shelter, early childhood development centre, school, including a private or government school, or to a child in foster care, prison or any other form of alternative care.
(4) The Minister must take all reasonable steps to ensure that—
(a) education and awareness-raising programmes concerning the effect of subsections (1), (2) and (3) are implemented across the country; and
(b) programmes and materials promoting appropriate discipline at home and in other contexts where children are cared for are available across the country.

This topic is a controversial one in Namibia. The Bill does not outlaw corporal punishment by parents, but it requires that the child’s dignity must be respected in the administration of discipline. This follows the African Charter on the Rights and Welfare of the Child, which requires states to “take all appropriate measures to ensure that a child who is subjected to school or parental discipline shall be treated with humanity and with respect for the inherent dignity of the child”.

No corporal punishment of children would be allowed at all in facilities which care for children apart from their parents.

Subclause (2) merely implements the 1991 holding of the Supreme Court in Ex Parte Attorney-General, Namibia: Re: Corporal Punishment by Organs of the State.

The clause also makes Namibian compliant with the UN Convention on the Rights of the Child; the Committee on the Rights of the Child stated in 2006 that—

Addressing the widespread acceptance or tolerance of corporal punishment of children and eliminating it, in the family, schools and other settings, is not only an obligation of States parties under the Convention. It is also a key strategy for reducing and preventing all forms of violence in societies.

Child safety at place of entertainment

212. (1) A person providing entertainment to children on any premises or in any enclosure, or hosting any performance or event, must comply with subsection (2) if—
(a) the majority of the people attending the entertainment, performance or event are children; and
(b) the number of people, including children, who attend the entertainment, performance or event is expected to exceed 50.

(2) The Minister may designate facilities providing entertainment or recreation to children to comply with subsection (1), notwithstanding the provisions of paragraph (b) of that subsection.
(3) A person providing entertainment to children or hosting a performance or event in the circumstances specified in subsection (1) or the person in control of a designated facility contemplated in subsection (2) must –

(a) determine the number of people, including children, who can safely be accommodated on the premises or in the enclosure and each part of the premises or enclosure;

(b) station a sufficient number of adult attendants to prevent more people, including children, being admitted to the premises or enclosure, or any part of the premises or enclosure, than the number of people determined in terms of paragraph (a);

(c) control the movement of people admitted to the premises or enclosure, or any part of the premises or enclosure, while entering or leaving the premises or enclosure or that part of the premises or enclosure; and

(d) take all reasonable precautions for the safety of the children and other people attending the entertainment.

(4) No alcohol or tobacco products may be sold, served or made available to children below the age of 18 years at places of entertainment.

(5) A member of the police or a person authorised by a local authority, or by a regional council in the case where there is no local authority, in whose area a premises or enclosure is situated where entertainment or recreation described in subsection (1) or (2) is or is to be provided, or on reasonable suspicion that such entertainment is or is to be provided, may enter such enclosure in order to inspect whether subsections (3) and (4) are complied with.

(6) Section 231(3), (4) and (5), read with such changes as the context may require, applies to any inspection in terms of subsection (5).

(7) A person who acts in contravention of subsections (3) or (4) commits an offence and is liable on conviction to a fine not exceeding N$50 000 or to imprisonment for a period not exceeding ten years or to both the fine and imprisonment.

Coercing, allowing, inducing or encouraging children to take liquor or other substances
213. Any adult who—
   (a) coerces any child to drink any liquor or methylated spirits or to take any illegal drug; or
   (b) allows, induces or encourages any child under the age of 16 years to drink any liquor or methylated spirits except as part of a generally-recognised religious sacrament; or
   (c) allows, induces or encourages any child to take any illegal drug

commits an offence and is liable on conviction to a fine not exceeding N$20 000 or imprisonment for a period not exceeding five years, or to both such fine and such imprisonment, and in addition to such punishment, may be required to attend an educational programme on the dangers of underage drinking or drug abuse.

This provision defines certain types of forced or permitted alcohol consumption by children as a form of child abuse by the adults who are involved. This would cover, for example, a situation where parents take young children to shebeens and give them alcohol to keep them quiet. These provisions supplement the Liquor Act 16 of 1998, which does not provide sufficient protection against underage drinking. It similarly applies to coercing, allowing, inducing or encouraging children to take illegal drugs.

Children lacking identification documentation

214. (1) No public health care facility or school may exclude a child, including a child contemplated in section 215, on the basis of nationality, immigration status or lack of identification documentation.

   (2) An order of the children’s court, in the absence of identification documentation, is sufficient basis for access to a state grant.

Refugee and migrant children

215. (1) An asylum-seeker may be recognised as an interim care-giver for an accompanied refugee or migrant child to enable such child to stay within a particular refugee community as far as possible.
(2) No unaccompanied refugee or migrant child may be repatriated without proper arrangements for his or her reception and care in the receiving country and, if such child is the subject of an order of the children’s court, without the court confirming such repatriation.

(3) A social worker must be present when an unaccompanied refugee or migrant child is interviewed by any government authority.

(4) If the age of an unaccompanied refugee or migrant child is uncertain, the child may be referred to a children’s commissioner to estimate the age of the child based on information available, in which case the children’s commissioner may direct that the child be medically examined, unless the child does not consent to such examination.

(6) A refugee or migrant child –
(a) may not be detained, except as a measure of last resort and for the shortest possible period;
(b) may not be detained with adults, unless a family with children are detained, in which case the child may not be separated from his or her family.

(7) A refugee or migrant child may apply for asylum without assistance: Provided that a social worker is present when the child is being interviewed by a government authority.

(8) A person who harbours or renders assistance to an unaccompanied refugee or migrant child does not commit a criminal offence.

**Child labour and exploitation of children**

**216.** (1) No person may –
(a) use, procure or offer a child for slavery or other practices similar to slavery, including debt bondage and servitude, or forced or compulsory labour or provision of services;
(b) recruit, procure, enlist or employ a child in any national, private or foreign armed or security force or cause such child to be used in any armed conflict;
(c) use, procure, offer or employ a child for purposes of commercial sexual exploitation;
(d) induce, encourage, procure, offer, allow or cause a child to be used for purposes of creating child pornography, whether for reward or not;

(e) use, procure, offer or employ a child for purposes of drug production, drug trafficking or the commission of any other crime;

(f) use, procure, employ or force a child to beg;

(g) force a child to perform labour for that person or any other person, whether for reward or not, that –
   (i) by its nature or circumstances is likely to harm the health, safety or morals of a child;
   (ii) is inappropriate for a person of that child’s age; or
   (iii) places the child’s well-being, education, physical or mental health, or spiritual, moral or social development at risk;

(h) force a child to participate in any performance, display, activity, contest or event, whether for reward or not, unless such performance, display, activity, contest or event forms part of a school curriculum or requirement, or unless the participation in question falls within the reasonable exercise of parental authority; or

(i) encourage, induce or allow a child to participate in any labour, performance, display, activity, contest or event, whether for reward or not, that –
   (i) by its nature or circumstances is likely to harm the health, safety or morals of a child;
   (ii) is inappropriate for a person of that child’s age; or
   (iii) places the child’s well-being, education, physical or mental health, or spiritual, moral or social development at risk.

(2) It is not considered employment for the purposes of section 3 of the Labour Act, 2007 (Act No. 11 of 2007) for a person to use, procure, offer, employ, allow, induce or encourage a child to participate in –

   (a) work within the framework of a programme that is designed to promote personal development and vocational training;

   (b) any performance, display, activity, contest or event for advertising, beauty, sport, educational, religious, traditional, cultural or artistic purposes, that is not in any way intended to, used to or does not generate income for any person or organisation unless the income is generated solely for the charitable benefit of
(c) any performance, display, activity, contest or event for advertising, beauty, sport, educational, religious, traditional, cultural or artistic purposes, that is in any way intended to, used to or does generate income for any person or entity other than for the charitable benefit of a registered non-profit organisation, registered welfare organisation, school, religious institution or for other charitable purpose, if –

(i) prior to any child’s participation, a licence is obtained from a children’s commissioner; and

(ii) all regulations and conditions governing such licence are fully complied with,

provided that a parent, guardian or care-giver has provided written consent for the child’s participation.

(3) Subsection (2) does not apply to participation by a child in any performance, display, activity, contest or event that has been prohibited in regulations made by the Minister.

(4) The Minister must take all reasonable steps to assist in ensuring the enforcement of the prohibition on any exploitative forms of child labour prohibited in terms of this section, including steps providing for the confiscation in terms of the Prevention of Organised Crime Act, 1998 (Act No. 29 of 2004), of assets acquired through the use of such child labour.

(5) Any person who becomes aware of a contravention of the provisions of subsection (1) must immediately report such contravention to a member of the police who must, within 24 hours, refer the child concerned to a designated social worker for an investigation in terms of section 130(4).

(6) Any person who contravenes a provision of subsection (1) commits an offence and is liable on conviction to a fine not exceeding N$50 000 or to imprisonment for a period not exceeding ten years or to both the fine and imprisonment.
Any person who is the owner, lessor, manager, tenant or occupier of any premises on which any exploitative form of child labour has occurred commits an offence if that person, on gaining information of that occurrence, fails to take reasonable steps to report the occurrence to a member of the police promptly and is liable on conviction to a fine not exceeding N$20 000 or to imprisonment for a period not exceeding five years or to both the fine and imprisonment.

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.

This provision would complement the Labour Act by providing additional protections against the worse forms of child labour. It also provides limited exceptions (with safeguards) for child actors and children who take part in various other activities, such as concerts and beauty pageants.

### Regulations

217. (1) The Minister may make regulations prescribing—

(a) the form of consent by a child or his or parent, guardian or care-giver to medical intervention, a surgical operation or an HIV-test;

(b) the duties of an adult designated to supervise a child-headed household and the requirements relating to the accountability of such adult in administering money on behalf of such household; and

(c) the manner of identification of abandoned children contemplated in section 175 in order to allow for the possible reclaiming of such children.

(2) The Minister, after consultation with the minister responsible for labour, may make regulations concerning work performed by children in terms of section 216(2) prescribing—
(a) the form of consent by a child’s parent, guardian or care-giver in respect of work to be performed by the child;
(b) reasonable access by a child’s parent, guardian or care-giver to a child during the performance of his or her work;
(c) the number of hours that a child is permitted to work per day, including night work;
(d) the balance between work performed by a child and such child’s schooling;
(e) requirements for rest periods and recreational activities;
(f) requirements for food and refreshment;
(g) permits to be issued in respect of certain categories of work;
(h) guidelines for the financial security of a child earning more than an amount determined by the Minister; and
(i) work conditions and facilities where the child is two years of age or younger.
CHAPTER 17
GRANTS

This chapter adjusts the existing means-tested state maintenance grant, to make it available to a parent, guardian, or kinship caregiver who is looking after a child. There are currently a vast number of cases in Namibia where families need the assistance a grant can provide but are unable to receive it as both parents are alive. A means tested grant will also remove a huge bottleneck in the courts, because family members caring for children will no longer need court-ordered placements to be eligible for grants. This has been accomplished by treating foster care by strangers separately from kinship care by family members. This should produce a considerable savings in administration costs and free up social workers for more proactive work.

State maintenance grant

218. (1) The Minister may, subject to the provisions of this Act and in consultation with the minister responsible for finance, pay state maintenance grants in respect of children in an amount and frequency prescribed by regulation.

(2) Any aid or grant contemplated in subsection (1) must be paid from money as may be appropriated annually by Parliament or from any other source.

(3) Any parent, guardian or care-giver of a child is entitled to apply for and receive a state maintenance grant on behalf of the child in question or, if the care-giver is a child heading a household in terms of section 206, on behalf of the children in such household, including himself or herself, if such parent, guardian or care-giver satisfies the Permanent Secretary in the prescribed manner –

(a) that the child or children normally resides or reside with him or her and that he or she is in fact primarily responsible for the daily, physical care of the child or children;

(b) that the grant will be used for the benefit of the child or children;

(c) that the child or children has or have Namibian citizenship or permanent residency;

(d) that the child or children is or are under the age of 18 years;

(e) that he or she satisfies the prescribed means test; and
(f) that he or she satisfies any other requirements as may be prescribed: Provided that such requirements may not include any limit on the total number of children in a single household who may receive such a grant.

(4) Notwithstanding the provisions of subsection (3), an adult designated to supervise a child-headed household under section 206(2) or an organ of state or a non-governmental organisation contemplated in subsection (2)(b) of that section may apply for and receive a state maintenance grant in respect of the children in such household in terms of subsection (3).

(5) A state maintenance grant in respect of which a successful application has been made is payable to the person in whose care the child concerned is, irrespective of whether such person applied for such grant.

Foster parent grant

219. The foster parent of a child who has been placed in foster care by a court order in terms of Chapter 11 is entitled to such grant as may be prescribed, from money as may be appropriated annually by Parliament or from any other source, in respect of children in foster care, subject to any conditions or requirements as may be prescribed.

Residential child care facility grant

220. A residential child care facility which is approved by the Minister in terms of section 59 or is in possession of a certificate of registration as contemplated in section 68, is entitled to such grant as may be prescribed, from money as may be appropriated annually by Parliament or from any other source, in respect of children placed in any such facility by a court order made in terms of this Act, subject to any conditions or requirements as may be prescribed.

Child disability grant

221. (1) The parent, guardian or care-giver of a child who has a prescribed disability and who complies with the prescribed requirements, is entitled to such grant, in
addition to a state maintenance or other grant, as may be prescribed, from money as may be appropriated annually by Parliament or from any other source, in respect of children with disabilities.

(2) A grant contemplated in subsection (1) is payable until such time as the child concerned qualifies for a disability pension in terms of the National Pensions Act, 1992 (Act No. 10 of 1992).

**Short-term emergency grant or assistance in kind**

222. (1) The Minister may, subject to the provisions of this Act and in consultation with the minister responsible for finance, pay emergency grants or provide assistance in kind, including food aid, in respect of children in circumstances contemplated in subsection (3), in an amount and frequency and for the period prescribed by regulation.

(2) Any grant or assistance contemplated in subsection (1) must be paid from money as may be appropriated annually by Parliament or from any other source.

(3) The circumstances referred to in subsection (1) are emergencies –
(a) caused as a result of the accidental loss by a child of his or her family;
(b) caused as a result of the accidental loss by a child of his or her home or possessions;
(c) caused as a result of natural disasters;
(d) caused as a result of armed conflicts;
(e) caused as a result of illness of the child or his or her financial provider;
(f) as may be prescribed.

**Authority to access grant on behalf of child**

223. (1) A court order contemplated in section 150(1) and a kinship care agreement concluded and registered in terms of section 114(2) serve as authorisation for a foster parent or kinship care-giver who complies with the prescribed requirements to gain immediate access to such aid or grant which a child in foster care or kinship care is entitled to.
(2) The written designation of an adult supervising a child-headed household in terms of section 206(2) serves as authorisation for the children in such household to gain immediate access to a grant contemplated in section 218.

**Automatic exemptions**

**224.** A child in receipt of a state maintenance grant or a child who has been placed in foster care or a residential child care facility by a court order in terms of this Act, is entitled to –

(a) free basic education in state schools, including automatic exemption from contributions to a School Development Fund contemplated in section 25 of the Education Act, 2001 (Act No. 16 of 2001);

(b) subsidised school uniforms, shoes and stationary;

(c) free basic health care; and

(d) exemption from payment of any fees when applying for official documents from any organ of state.

**Suspension, cancellation and administration of grants**

**225.** (1) The Permanent Secretary may, at his or her discretion, suspend payment of any grant paid in terms of this Chapter, from a date determined by the Permanent Secretary, if the recipient of such grant is absent from Namibia for a continuous period exceeding six months: Provided that the Permanent Secretary may resume, for any reason, such suspended payments, with effect from a date determined by the Permanent Secretary, which date may be a date earlier than the date of such determination.

(2) The Permanent Secretary may cancel the payment of any grant paid in terms of this Chapter from a date determined by the Permanent Secretary if –

(a) any child in respect of whom such grant is given has ceased to be a Namibian citizen; or

(b) in the case of a child who is a permanent resident of Namibia, such child has ceased to be ordinarily resident in Namibia; or
(c) if the grant paid in respect of the child has not been collected for a continuous period exceeding six months and no alternative arrangements have been made or reasonable explanation offered for the failure to collect such grant; or

(d) if an investigation conducted in terms of 227(3) indicates that a person received a grant under this Chapter in violation of section 227(1) or (2).

Grants not assignable or executable

226. (1) No grant paid in terms of this Chapter shall be capable of being assigned or transferred or ceded or of being pledged or hypothecated, nor shall it be liable to attachment or any form of execution under any judgment or order of any court of law.

(2) If a person assigns, transfers, cedes, pledges or hypothecates a grant paid in terms of this Chapter, or attempts to do so, payment of such grant may by order of the Permanent Secretary be withheld, suspended or cancelled, and the Permanent Secretary must cause an investigation to be conducted in terms of section 130(4).

Offences relating to false statements and improper receipt or misuse of grants

227. (1) Any person who, for the purpose of procuring or retaining a grant in terms of this Chapter –

(a) makes any statement or representation which he or she knows to be false; or

(b) receives in respect of any such grant payment of any amount of money which he or she is to his or her knowledge not entitled to receive,
commits an offence and is liable on conviction to a fine not exceeding N$4 000 or to imprisonment for a period not exceeding 12 months.

(2) Any person who receives a grant on behalf of a child in terms of this Chapter and fails to use such grant for the benefit of such child commits an offence and is liable on conviction to a fine not exceeding N$4 000 or imprisonment for a period not exceeding 12 months.
(3) The Permanent Secretary must, in respect of any person who is accused of an offence in terms of this section, cause an investigation to be conducted in terms of section 130(4).

(4) Any person, including a child, who has a reasonable suspicion that an offence has been committed in terms of subsection (1) or (2) may report such suspicion to a designated social worker, who must conduct an investigation into the grounds for such suspicion without delay and take appropriate action based on the outcome of such investigation, in which case the provisions of section 128(5) apply with the changes required by the context.

Refund of grants

228. (1) If any person received any amount of money in terms of this Act on behalf of a child which he or she was not entitled to receive, or which was not used for the benefit of such child, he or she or, if he or she dies, his or her estate, is liable to refund that amount to the Minister.

(2) Subsection (1) applies in the case of –

(a) an attempt to assign, transfer, cede, pledge or hypothecate a grant paid in terms of this Chapter; and

(b) the conviction of a person of an offence in terms of section 227.

Appeal to Minister

229. Any decision made or action taken by the Permanent Secretary in the administration of this Chapter is subject to an appeal to the Minister.

Regulations

230. (1) The Minister must, by regulation, –

(a) prescribe the amounts payable during a financial year, and the schedule and method of payment, in respect of any grant contemplated in terms of this Chapter; and
(b) prescribe additional requirements to be complied with by the recipient of any grants contemplated in terms of this Chapter;

(c) prescribe procedures to monitor and prevent possible misuse or mismanagement of aid or a grant contemplated in this Chapter;

(d) prescribe the circumstances in which a grant which has been suspended or cancelled may be reinstated;

(e) adjust the amounts of any grants payable in terms of this Chapter from time to time to keep pace with rising costs.

(2) The Minister may, by regulation, prescribe the circumstances in which a grant payable in terms of this Chapter may be extended to a person until he or she reaches the age of 21 years.
CHAPTER 18
GENERAL PROVISIONS

This Chapter includes some important general provisions.

(1) It provides for inspection of facilities which care for children, regardless of whether they are registered or unregistered, for purposes of monitoring compliance with the law or to investigate complaints.

(2) It requires persons who work directly with children or provide alternative care for children, and prospective adoptive parents or foster parents, to provide police clearance certificates showing that they have not been convicted of any specified crimes. This is needed because child abusers sometimes seek to work with children for purposes of abusing them. This is cost-effective alternative to the idea of a dedicated register of child abusers, which would be expensive to set up and maintain. Although there was some support for a special register, the majority of people consulted felt that obtaining a police clearance certificate was a more appropriate alternative for Namibia as it would utilise existing records and mechanism to serve the same purpose.

(3) It retains a provision similar to that in the existing law for terminating the parental rights and responsibilities of persons who are unfit to care for children, or are harming the children in their care.

(4) It lowers Namibia’s age of majority to age 18, to bring Namibia in line with the definitions of “child” in the UN Convention on the Rights of the Child and the African Charter. The age of majority is already 18 in the most countries in the world, and the few countries which still have 21 as the relevant age are mostly in the process of making a change. For example, South Africa recently lowered its age of majority from 21 to 18, and Lesotho is in the process of doing the same. More information on this issue is included below.

(5) It makes a technical amendment to the Combating of Domestic Violence Act to clarify the provision on temporary custody in the context of protection orders, so that there is no conflict between that law and this one.

(6) It amends one section of the Combating of Immoral Practices Act to give greater protection to children against persons who try to ply children with alcohol or other drugs for purposes of sexual abuse.

(7) In provisions supported by the Self-regulating Alcohol Industry Forum (SAIF) and various other stakeholders who work in this area, the Bill closes some loopholes in the Liquor Act on underage drinking, and provides for improved enforcement mechanisms.

(8) It includes general provisions on delegation of powers, regulations and transitional provisions.

Inspection of facility

231. (1) The Minister or a local or regional authority may authorise any person to enter a registered residential child care facility, place of care, early childhood development centre or shelter, in this section collectively referred to as a “facility”, or any place which is being used as an unregistered facility, in order to –
(a) inspect that facility and its management;
(b) observe or interview any child, or cause a child to be examined or assessed by a medical officer, social worker, psychologist or psychiatrist; or
(c) observe any programme being conducted by or at the facility.

(2) An identity card prescribed by regulation must be issued to each person authorised in terms of subsection (1).

(3) When inspecting a facility, a person authorised in terms of subsection (1) must, on demand, produce an identity card.

(4) A person authorised in terms of subsection (1) may, for the purposes of that subsection –
   (a) determine whether the facility complies with any requirements in terms of this Act or any other structural, safety, health or other requirements as may be required by any law;
   (b) require a person to disclose information, either orally or in writing, and either alone or in the presence of a witness, about any act or omission which, on reasonable suspicion, may constitute an offence in terms of this Act, or a breach of a provision of this Act or of a condition of registration, and require that any disclosure be made under oath or affirmation;
   (c) inspect, or question a person about, any record or document that may be relevant for the purposes of paragraph (b);
   (d) copy any record or document referred to in paragraph (c), or remove such document to make copies or extracts;
   (e) require a person to produce or to deliver to a place specified by the authorised person, any record or document referred to in paragraph (c) for inspection;
   (f) inspect, question a person about and if necessary remove, any article or substance which, on reasonable suspicion, may have been used in the commission of an offence in terms in terms of this Act or in breaching a provision of this Act or of a condition of registration;
   (g) record information by any method, including by taking photographs or making videos; or
   (h) exercise any other power or carry out any other duty that may be prescribed.
(5) A person authorised in terms of subsection (1) must –
(a) provide a receipt for any record, document, article or substance removed in terms of subsection (4)(d) or (f);
(b) return anything removed within a reasonable period unless seized for the purpose of evidence.

(6) A person authorised in terms of subsection (1) must submit a report to the Ministry or local authority, as may be appropriate, on any inspection carried out by that person in terms of this section.

(7) A person who hinders or interferes with a person in the execution of official duties in terms of this section or who fails to comply with a request by such person or who, pursuant to the report contemplated in subsection (6), fails to comply with a request, instruction or recommendation by the Ministry or local or regional authority, commits an offence and is liable on conviction to a fine not exceeding N$20 000 or to imprisonment for a period not exceeding five years or to both the fine and imprisonment.

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

**Police clearance certificates required in respect of certain persons**

232. (1) Any person who –
(a) manages or operates, or participates or assists in managing or operating, an institution providing welfare services to children, including a child protection organisation, residential child care facility, place of care, early childhood development centre, shelter, school, club or association providing services to children;
(b) works with or has direct access to children at an institution providing welfare services to children, including a child protection organisation, residential child care facility, place of care, shelter, early childhood development centre,
school, club or association providing services to children, either as an employee, volunteer or in any other capacity;

(c) is permitted to become the alternative care-giver or adoptive parent of a child;

or

(d) works in any other form of employment or activity as may be prescribed,

must apply for a police clearance certificate stating that such person has no criminal conviction in respect of any of the offences contemplated in subsection (2) –

(i) in the case of a person referred to in paragraph (a), (b) or (d), within three months after the commencement of this Chapter;

(ii) in the case of a person who intends to be employed in any capacity or at any institution contemplated in paragraph (a), (b) or (d) or who intends to manage or operate such an institution, before taking up such employment, management or operation;

(iii) in the case of a person referred to in paragraph (c), before becoming an alternative care-giver or adoptive parent, as the case may be.

(2) The offences committed for purposes of subsection (1) are –

(a) murder;

(b) rape;

(c) culpable homicide involving gross negligence;

(d) indecent assault;

(e) incest;

(f) kidnapping;

(g) any statutory sexual offence;

(h) any offence relating to the manufacture, distribution or possession of child pornography;

(i) any offence relating to the trafficking of children;

(j) abduction, excluding the wrongful removal or retention of a child by a parent with parental responsibilities, whether domestic or as contemplated in the Hague Convention on International Child Abduction;

(k) assault with intent to cause grievous bodily harm;

(l) common assault;

(m) crimen iniuria;

(n) any offence in terms of this Act; or
(o) any attempt to commit any of the offences listed in paragraphs (a) to (n).

(3) A police clearance certificate contemplated in subsection (1) is valid for a period of one year from the date of issue thereof, and must be renewed by the holder of such certificate every year thereafter until such time as the holder ceases to be one of the persons contemplated in subsection (1).

(4) A person contemplated in subsection (1) who cannot or refuses to produce a valid police clearance certificate as referred to in that subsection upon the request of any person who can demonstrate that he or she has a direct interest in being provided with such a certificate, or who fails to renew such certificate as contemplated in subsection (3) within 30 days after a written request to do so, commits an offence and is liable on conviction to a fine not exceeding N$20 000 or to imprisonment for a period not exceeding five years or to both the fine and imprisonment.

(5) An employer who allows a person to work in any capacity contemplated in paragraphs (a), (b) or (d) of subsection (1) without a valid police clearance certificate commits an offence and is liable on conviction to a fine not exceeding N$20 000 or to imprisonment for a period not exceeding five years or to both the fine and imprisonment: Provided that no prosecution may be instituted under this subsection if an application for a police clearance certificate or for the renewal thereof has been made but is pending.

This mechanism has been recommended as an alternative to a new register of child abusers. It would be costly to establish and maintain a new register. In contrast, the police clearance certificate requirement would accomplish essentially the same purpose in a more efficient way, using systems that are already in place.

Application to terminate or suspend parental responsibilities and rights

233. (1) The Minister may apply to a High Court or a children’s court for an order –

(a) suspending for a period, terminating or transferring any or all of the parental responsibilities and rights which a specific person has in respect of a child; or

(b) restricting or circumscribing the exercise by that person of any or all of the parental responsibilities and rights which that person has in respect of a child.
(2) An application in terms of subsection (1) may be brought without the consent of a parent or care-giver of the child.

(3) When considering an application the court must –
   (a) be guided by the principles set out in Chapter 2 to the extent that those principles are applicable to the matter before it; and
   (b) take into account all relevant factors, including –
      (i) the need for the child to be permanently settled, preferably in a family environment, taking into consideration the age and stage of development of the child;
      (ii) the success or otherwise of any attempts that have been made to reunite the child with the person whose parental responsibilities and rights are challenged;
      (iii) the relationship between the child and that person;
      (iv) the degree of commitment that that person has shown towards the child; and
      (v) the probability of arranging for the child to be adopted or placed in another form of alternative care.

Rules regarding children in state custody

234. (1) In the absence of a court order to the contrary, a child in state custody must be –
   (a) detained separately from adults, with the following exceptions:
      (i) children may eat or exercise in the same room as adults provided that there is proper supervision by a member of the police or other state official; and
      (ii) children may be detained with a parent or care-giver in circumstances where this would be in the best interests of the child;
   (b) permitted visits with parents, guardians, legal representatives, social workers, probation officers, health workers, religious counsellors and any other person who in terms of any law is entitled to visit the child, provided that such visit is in the best interests of the child;
(c) detained in conditions that take into account the particular vulnerability of a child and reduce the risk of harm to the child in question;

(d) detained with children who are at the same stage of criminal prosecution, so that children who are accused of a crime are detained separately from children who have been convicted of a crime or children who are awaiting sentencing.

(2) (a) If any complaint is received from a child or any other person concerning the conditions of state custody, or if a member of the police or other state official observes that a child has been injured or is severely traumatised while in custody, that complaint or any observation of the injury or trauma must, in the prescribed manner, be recorded and reported to the Permanent Secretary, who must direct a social worker to investigate the circumstances of such child and to submit a report on such investigation to him or her without delay.

(b) The Permanent Secretary must arrange for the child to be provided with immediate and appropriate medical treatment if:

(i) there is evidence of injury or severe psychological trauma;

(ii) the child appears to be in pain as the result of an injury;

(iii) there is evidence that a sexual offence has been committed against the child; or

(iv) there are other circumstances that warrant medical treatment.

(c) In the event of a report on the injury, trauma or an observation of injury or trauma being made as referred to in paragraph (a), a copy of that report, including a copy of the report of the social worker into the circumstances of the child concerned, must be submitted to the Children’s Advocate as soon as is reasonably practicable.

(3) Each police station and prison must keep a register in which the detention of any child is detailed and recorded in a way that clearly distinguishes the detention of children from adults, and such registers may be examined by any person, under conditions as may be prescribed.

Age of majority

235. (1) A child, whether male or female, becomes a major upon reaching the age of 18 years.
(2) Notwithstanding subsection (1), any document, including an agreement, an order of a court, a testamentary disposition and a trust document which refers to –

(a) a person’s age, must be construed as the age of that person as reflected in the document; and

(b) a person’s age of majority, must be construed as meaning the age of majority as it was at the date upon which such document was signed.

(3) A reference in this law or any other law to –

(a) the age of majority of a person must be construed as meaning the age of majority as contemplated in this section;

(b) a minor person must be construed as meaning a person below the age of 18 years; or

(c) a major person must be construed as meaning a person who has attained the age of 18 years.

Most countries in the world set the age of majority at 18. The current age of majority in Namibia is 21, in terms of the Age of Majority Act 57 of 1972 inherited from South Africa.

The UN Convention on the Rights of the Child and the African Charter both define children as persons under 18. The Committee which monitors the UN Convention encourages countries to harmonise the definition of “child” and the age of majority if they are not already the same.

Public opinion was almost evenly split on this issue. The Bill proposes lowering the age of majority to 18 for the following reasons:

- This will bring Namibia in line with international practice and agreements. (Most countries in the world which have higher ages of majority are in the process of lowering them, including other African countries such as South Africa and Lesotho.)

- Many Namibian laws already define a child as a person under 18. This leaves a difficult period between ages 18 and 21 where minors lack the protections afforded to children under age 18 without having the full privileges of adulthood.

- 18-year-olds are already treated like adults for most key purposes such as driving, voting, buying alcohol and cigarettes, gambling, consenting to sexual activity, operating a bank account and being tried and sentenced for crimes. This means that the change in the age of majority would not have a dramatic impact.

- Most of the concerns cited about lowering the age of majority can be addressed by means of the transitional provisions provided here, or by the extension of certain protections to age 21. For example, the Maintenance Act 9 of 2003 already provides that maintenance orders normally end at age 18 but can be extended to age 21. This
Bill provides that placements in foster care and residential child care facilities can be similarly extended to age 21.

- Statistics from the Ministry of Education indicate that about two thirds of Namibian children between the ages of 18 and 21 are no longer in school, meaning that many of them will be in situations where they are expected to find work.

Offences relating to abuse, neglect, abandonment and maintenance

236. (1) Subject to the provisions of section 210(1), a parent, guardian, other person who has parental responsibilities and rights in respect of a child, care-giver or person who has no parental responsibilities and rights in respect of a child but who voluntarily cares for the child either indefinitely or temporarily, commits an offence if that parent or care-giver or other person –

(a) abuses or deliberately neglects the child; or

(b) abandons the child,

and is liable on conviction to a fine not exceeding N$50 000 or to imprisonment for a period not exceeding ten years or to both the fine and imprisonment.

(2) A person who is legally liable to maintain a child commits an offence if that person, while able to do so, fails to provide the child with adequate food, clothing, lodging and medical assistance and is liable on conviction to a fine not exceeding N$50 000 or to imprisonment for a period not exceeding ten years or to both the fine and imprisonment.

Conventions to have force of law

237. (1) The following Conventions are in force and their provisions are law in Namibia as from the date of the entry into force in Namibia of each Convention:

(a) The Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption, 1993;

(b) The Hague Convention on the Civil Aspects of International Child Abduction, 1980;

(c) The Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children, 1996; and

(2) The ordinary law of Namibia applies to any matter in respect of which a Convention referred to in subsection (1) applies, but where there is a conflict between the ordinary law of Namibia and any such Convention, the Convention prevails.

(3) The Minister may, after consultation with the Office of the Attorney-General and the ministers responsible for justice and foreign affairs, identify such Central Authorities as may be required by a Convention contemplated in subsection (1), save for the Convention contemplated in subsection (1)(a), and make such regulations as are necessary to give practical effect to the provisions of any such Convention.

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The Hague Convention on the Protection of Children and Co-operation in Respect of Inter-country Adoption has already been dealt with in Chapter 11. This provision anticipates the ratification of three other Hague Conventions which are designed to facilitate international cooperation in protecting children:

1. Hague Convention on the Civil Aspects of International Child Abduction, 1980: This treaty seeks to combat parental child abduction. If a child is removed from the country of habitual residence by one parent in breach of the other parent’s custody or access rights, the child must be returned and the dispute resolved in the original country. This is relevant to Namibia as cases where one parent removes a child to another country without the consent of the other parent are on the increase. There are provisions aimed at this problem in the Married Persons Equality Act 1 of 1996 (section 14(2)) and the Children’s Status Act 6 of 2006 (section 13(7)), but they have proved insufficient in practice to address the issue.

2. Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children, 1996: This treaty provides a structure for effective international co-operation in child protection matters. For example, the Convention could be relevant where there is a runaway teenager who has crossed international borders, a question about jurisdiction in respect of refugee children or a need to place a child in foster or institutional care in a country other than the one where the child habitually resides. It would also enhance international cooperation in child trafficking cases.

3. Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, 2007: This new Convention is designed to offer children and other dependants a simpler, swifter, more cost-effective international system for the recovery of maintenance where the child’s parents reside in different countries. Namibia has already attempted to address this problem through the Reciprocal Enforcement of Maintenance Orders Act 3 of 1995, but has agreements for reciprocal enforcement in place only with South Africa. Adopting the Hague Convention would facilitate the international application of this domestic law.
Because this Convention is a new one, accession to it now would show Namibia to be a leader in the area of child protection.

**Delegation of powers and duties by Minister**

238. (1) The Minister may delegate any power conferred on or assign any duty imposed on the Minister in terms of this Act, to –

(a) a staff member in the Ministry;

(b) any organ of state, by agreement with that organ of state.

(2) A delegation in terms of subsection (1) –

(a) is subject to any limitations, conditions and directions which the Minister may impose;

(b) must be in writing;

(c) may include the power to sub-delegate; and

(d) does not divest the Minister of the responsibility concerning the exercise of the power or the performance of the duty.

(3) The Minister may confirm, vary or revoke any decision taken in consequence of a delegation or sub-delegation in terms of this section, subject to any rights that may have accrued to a person as a result of the decision.

(4) The Minister may –

(a) not delegate a power or duty –

(i) to make regulations; or

(ii) to publish notices in the Gazette;

(b) at any time withdraw a delegation.

**Regulations**

239. (1) The Minister may make regulations prescribing –

(a) the form, after consultation with the minister responsible for safety and security, of a police clearance certificate contemplated in section 232; and
(b) forms and methods for the collection of statistics pertaining to the implementation of this Act.

(2) In addition to the powers granted to the Minister to make regulations elsewhere in this Act, the Minister may make regulations regarding any other ancillary or incidental administrative or procedural matter that is necessary to be prescribed for the proper implementation or administration of this Act.

Repeal and amendment of laws

240. (1) The laws specified in Schedule 1 to this Act are repealed to the extent set out in the third column of that Schedule.

(2) Section 14 of the Combating of Domestic Violence Act, 2003 (Act No. 4 of 2003) is hereby amended by the substitution for paragraph (i) of subsection (2) of the following paragraph:

“(i) a provision granting temporary sole custody –
   (i) of a child of the complainant to any appropriate custodian other than the respondent; or
   (ii) of any child of the complainant or any child in the care of a complainant to the complainant or to another appropriate custodian,
if the court is satisfied that [this is reasonably necessary for the safety of] there is serious and imminent danger to the child in question, in which case the court must refer the matter to a designated social worker, as defined in section 1 of the Child Care and Protection Act, 2010 (Act No. X of 2010), for an investigation to be completed within the period specified by the court, upon which the court may, notwithstanding the absence of a party to the proceedings, make a final order regarding sole custody;”

Legal practitioners have reported that some parents are abusing the Combating of Domestic Violence Act as a channel to seek custody of children when there is no real violence. This amendment is designed to prevent such misuse of the law.

(3) The Combating of Immoral Practices Act, 1980 (Act No. 21 of 1980) is hereby amended by the substitution for section 16 of the following section:
“16. Any person who applies, administers to, forces or causes [to be taken by] any or person who has not attained the age of 18 years to take any drug, intoxicating liquor, matter or [thing] substance or administers such drug, liquor, matter or substance to such a female or person with intent to stupefy or overpower [her] that female or person [so as thereby] to enable him or her or a third party to [have unlawful carnal intercourse with her] engage in sexual conduct with that female or person, shall be guilty of an offence and liable on conviction to imprisonment for a period not exceeding [five] ten years.”

This amendment expands section 16 of the Combating of Immoral Practices Act to cover (a) both boy and girl children and (b) situations where an adult gives a child alcohol or other substances to enable someone else to abuse the child sexually. (The current law covers only females and only situations where the person who provides the alcohol or drugs is also the sex abuser.)

(4) The Liquor Act, 1998 (Act No. 6 of 1998), is hereby amended by –

(a) the substitution for section 56 of the following section:

“Provision of liquor to persons under the age of 18 years, establishing the age of such persons and offences by such persons

56. (1) (a) No person shall sell or supply any liquor to a person under the age of 18 years.

(b) A person intending to sell or supply liquor to another person shall take reasonable measures to determine the age of that other person.

(2) Notwithstanding the provisions of this section, it is permissible for a person –

(a) who is 16 years of age or older to consume a moderate quantity of liquor in the presence and under the supervision of his or her parent, guardian or care-giver; and

(b) to consume a small quantity of liquor as part of a religious sacrament in the presence of the person responsible for administering the religious sacrament.
(3)  (a) No person, including a licensee, or manager or employer of such licensee, shall allow a person under the age of 18 years to be present in a licensed shebeen, night club or dance hall unless accompanied by his or her parent, guardian or care-giver.
   
   (b) A licensee, or manager or employee of such licensee, shall take reasonable measures to determine –
   
   (i) the age of a person suspected to be under the age of 18 years; and
   
   (ii) whether an adult accompanying such person is in fact the parent, guardian or care-giver of that person before admitting such adult and such person to a licensed shebeen, night club or dance hall.
   
   (c) No person, including a licensee, or manager or employer of such licensee, shall sell or provide liquor to the accompanying parent, guardian or care-giver of a person under the age of 18 years if such parent, guardian or care-giver reasonably appears to be intoxicated or in circumstances where there is concern about the health, safety or well-being of the person under the age of 18 years.
   
   (4)  (a) No person under the age of 18 years shall falsely represent himself or herself, or any other person, to have attained the age of 18 years for the purpose of obtaining liquor in violation of this section, or for the purpose of entering into premises where the presence of persons under the age of 18 years is restricted.
   
   (b) No person shall –
   
   (i) make a false document;
   
   (ii) sell or supply a false document to another person; or
   
   (iii) wilfully deface or alter any document;

   with knowledge or a reasonable suspicion that the document may be used under false pretences in order to circumvent the provisions of this section.
   
   (c) No person shall provide a document that is evidence of the age of that person to another person if there is a reasonable suspicion that such document may be used to circumvent any of the provisions of this section.
   
   (d) A licensee, or manager or employee of such licensee who has a reasonable suspicion that a document is being presented in violation of any of the provisions of this section must seize and confiscate that document and submit it to a member of the police or a municipal police force within 48 hours for purposes of an investigation.
(5) (a) No person under the age of 18 years shall –

(i) consume liquor other than as provided in subsection (2);
(ii) produce liquor;
(iii) possess liquor;
(iv) import liquor; or
(v) supply liquor to any other person.

(b) A member of the police or a municipal police force who finds liquor, whether in an opened or unopened container, in the possession of a person who cannot provide reasonable evidence that he or she has attained the age of 18 years may immediately confiscate such liquor without a warrant.

(6) The provisions of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) relating to seizure and forfeiture apply with such changes as may be required by the context to any documents or liquor seized in terms of this section.”

(b) the repeal of paragraph (h) of section 70;

(c) the repeal of repeal of paragraph (s) of subsection (1) of section 71; and

(d) the addition after subsection (2) of section 72 of the following subsection:

“(2A) (a) A person under the age of 18 years who acts in contravention of any of the provisions of section 56 shall be guilty of an offence and shall on conviction be liable to a fine not exceeding N$300, which may be dealt with in terms of section 57 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), and in lieu of, or in addition to, such fine, may be required to attend an educational programme on the dangers of underage drinking upon conviction or admission of guilt.

(b) A person, other than a person under the age of 18 years, who acts in contravention of any of the provisions of section 56 shall be guilty of an offence and shall on conviction or admission of guilt be liable to a fine not exceeding N$5 000 or to imprisonment for a period not exceeding one year and in addition to such fine or such imprisonment, may be required to attend an educational programme on the dangers of underage drinking.
(c) On the second or subsequent conviction of a licensee or other person for a contravention of any of the provisions of subsections (1)(a) or (3) of section 56, the Court may, in lieu of, or in addition to, any penalty which it may impose –

(i) cancel the licence held by such licensee;
(ii) declare such licensee or other person so convicted a disqualified person for the purpose of obtaining a licence or acting as a manager.”

Underage drinking is a 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 Bill includes amendments to the Liquor Act to make the current provisions clearer and to expand them to cover areas which are currently neglected:

- Requiring alcohol sellers to confirm the age of the buyer by checking identification and strengthening offences and penalties for the presentation of fake IDs.
- Clarifying situations where alcohol can be supplied to persons under age 18 in small amounts as part of religious sacraments, or where children over age 16 consume moderate amounts of alcohol under parental supervision (such as having a glass of wine or beer at a family dinner).
- Prohibiting children under the age of 18 from being in certain types of drinking establishments except when accompanied by a parent or guardian.
- Prohibiting the manufacture of homebrew by children under age 18 (to fill a legal loophole on this point).

(5) Section 72 of the Administration of Estates Act, 1965 (Act No. 66 of 1965) is hereby amended by the substitution for subsection (1) of the following subsection:

(1) The Master shall, subject to the provisions of subsection (3) and to any applicable provision of section 4 of the Matrimonial Affairs Ordinance, 1955 (Ordinance 25 of 1955), or any order of court made under any such provision, on the written application of any person-

(a) who has been nominated by will or written instrument-

(i) by the parent to sole guardianship of minor has been granted under subsection (1) of said section 4 [or on whom the exclusive right to exercise parental powers in regard to a minor has been conferred under section 60 of the Children's Act, 1960 (Act 33 of 1960)]; or
(ii) by the mother of an illegitimate minor who has not been so deprived of the guardianship of such minor or of her parental powers over him or her, to administer the property of such minor and to take care of his person as tutor, or to take care of or administer his property as curator; or

(b) who has been nominated by will or written instrument by any parent of a minor to administer as curator any property which the minor has inherited from such parent; or

(c) who has been nominated by will or written instrument by any deceased person who has given or bequeathed any property to any other person, to administer that property as curator; or

(d) who has been appointed by the Court or a judge to administer the property of any minor or other person as tutor or curator and to take care of his person or, as the case may be, to perform any act in respect of such property or to take care thereof or to administer it; [and] or

(e) who has been appointed as guardian of a minor by the children’s court under section 96 or 110 of the Child Care and Protection Act, 2010 (Act No. X of 2010); and

[(e)](f) who is not incapacitated from being the tutor or curator of the minor or other person concerned or of his property, as the case may be, and has complied with the provisions of this Act, and, in the case of a person contemplated in paragraph (e), with the provisions of the Child Care and Protection Act, 2010 (Act No. X of 2010), grant letters of tutorship or curatorship, as the case may be, to such person.

This Bill, like the Children’s Status Act which it repeals and re-enacts (with some technical improvements), empowers the children’s court to appoint a guardian. A new provision added after consultation with the Master of the High Court is that a legal guardian appointed by the children’s court for a child whose guardian has died may not administer property unless the Master has issued letters of tutorship.

Section 72(1)(d) of the Administration of Estates Act 1965 authorises the Master to issue letter of tutorship to a person who has been appointed by the High Court or a judge to administer the property of a minor and to take care of his person as a tutor. This aspect of the Administration of Estates Act can remain as it stands, because the power given to the children’s court in respect of guardianship does not affect the High Court’s inherent jurisdiction to appoint a guardian or tutor. These two avenues of providing a guardian for a child can co-exist.

However, one problem is that section 72(1) of the Administration of Estates Act 1965 contains a closed list of instances where letters of tutorship may be granted by the Master. This closed list needs to be expanded to allow the Master to issue letters of tutorship to a guardian appointed under section 96 or 109-110 of this Act. The idea is that the letters of tutorship in such an instance should be issued by the Master and not by the children’s court if the guardian appointed by the children’s court
is to administer property on behalf of the child. This amendment to section 72 provides for this circumstance.

Transitional provisions

241. (1) Anything done in terms of a law repealed in terms of section 240(1) which can be done in terms of a provision of this Act, must be regarded as having been done in terms of that provision of this Act.

(2) Any regulation, appointment, order, leave of absence, agreement, notice or certificate made, granted, entered into, or issued and any other action taken under any provision of a law repealed by section 240(1) and which could be made, granted, entered into, issued or taken under any provision of this Act, must be deemed to have been made, granted, entered into or taken under the corresponding provision of this Act, and if this Act does not contain any such corresponding provision, must be proceeded with, disposed of and given effect to in so far as the Minister has not provided otherwise.

Short title and commencement

242. (1) This Act is called the Child Care and Protection Act, 2010, and commences on a date to be determined by the Minister by notice in the Gazette.

(2) Different dates may be determined under subsection (1) in respect of different provisions of this Act.
SCHEDULE 1

Laws repealed by section 240(1)

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SCHEDULE 2

TEXT OF THE UNITED NATIONS PROTOCOL TO PREVENT TRAFFICKING IN PERSONS


Preamble

The States Parties to this Protocol,

Declaring that effective action to prevent and combat trafficking in persons, especially women and children, requires a comprehensive international approach in the countries of origin, transit and destination that includes measures to prevent such trafficking, to punish the traffickers and to protect the victims of such trafficking, including by protecting their internationally recognized human rights,

Taking into account the fact that, despite the existence of a variety of international instruments containing rules and practical measures to combat the exploitation of persons, especially women and children, there is no universal instrument that addresses all aspects of trafficking in persons,

Concerned that, in the absence of such an instrument, persons who are vulnerable to trafficking will not be sufficiently protected,

Recalling General Assembly resolution 53/111 of 9 December 1998, in which the Assembly decided to establish an open-ended intergovernmental ad hoc committee for the purpose of elaborating a comprehensive international convention against transnational organized crime and of discussing the elaboration of, inter alia, an international instrument addressing trafficking in women and children,

Convinced that supplementing the United Nations Convention against Transnational Organized Crime with an international instrument for the prevention, suppression and
punishment of trafficking in persons, especially women and children, will be useful in preventing and combating that crime,

Have agreed as follows:

I

GENERAL PROVISIONS (Articles 1-5)

Article 1

Relation with the United Nations Convention against Transnational Organized Crime

(1) This Protocol supplements the United Nations Convention against Transnational Organized Crime. It shall be interpreted together with the Convention.

(2) The provisions of the Convention shall apply, mutatis mutandis, to this Protocol unless otherwise provided herein.

(3) The offences established in accordance with Article 5 of this Protocol shall be regarded as offences established in accordance with the Convention.

Article 2

Statement of purpose

The purposes of this Protocol are:

(a) To prevent and combat trafficking in persons, paying particular attention to women and children;

(b) to protect and assist the victims of such trafficking, with full respect for their human rights; and

(c) to promote cooperation among States Parties in order to meet those objectives.

Article 3

Use of terms
For the purposes of this Protocol:

(a) 'Trafficking in persons' shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

(b) the consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;

(c) the recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered 'trafficking in persons' even if this does not involve any of the means set forth in subparagraph (a) of this article;

(d) 'child' shall mean any person under eighteen years of age.

Article 4

Scope of application

This Protocol shall apply, except as otherwise stated herein, to the prevention, investigation and prosecution of the offences established in accordance with Article 5 of this Protocol, where those offences are transnational in nature and involve an organized criminal group, as well as to the protection of victims of such offences.

Article 5

Criminalization

(1) Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in Article 3 of this Protocol, when committed intentionally.
(2) Each State Party shall also adopt such legislative and other measures as may be necessary to establish as criminal offences:

(a) Subject to the basic concepts of its legal system, attempting to commit an offence established in accordance with paragraph (1) of this article;

(b) participating as an accomplice in an offence established in accordance with paragraph (1) of this article; and

(c) organizing or directing other persons to commit an offence established in accordance with paragraph (1) of this article.

II

PROTECTION OF VICTIMS OF TRAFFICKING IN PERSONS (Articles 6-8)

Article 6

Assistance to and protection of victims of trafficking in persons

(1) In appropriate cases and to the extent possible under its domestic law, each State Party shall protect the privacy and identity of victims of trafficking in persons, including, inter alia, by making legal proceedings relating to such trafficking confidential.

(2) Each State Party shall ensure that its domestic legal or administrative system contains measures that provide to victims of trafficking in persons, in appropriate cases:

(a) Information on relevant court and administrative proceedings; and

(b) assistance to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings against offenders, in a manner not prejudicial to the rights of the defence.

(3) Each State Party shall consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons, including, in appropriate cases, in cooperation with non-governmental organizations, other relevant organizations and other elements of civil society, and, in particular, the provision of:
(a) Appropriate housing;

(b) counselling and information, in particular as regards their legal rights, in a language that the victims of trafficking in persons can understand;

(c) medical, psychological and material assistance; and

(d) employment, educational and training opportunities.

(4) Each State Party shall take into account, in applying the provisions of this article, the age, gender and special needs of victims of trafficking in persons, in particular the special needs of children, including appropriate housing, education and care.

(5) Each State Party shall endeavour to provide for the physical safety of victims of trafficking in persons while they are within its territory.

(6) Each State Party shall ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered.

Article 7

Status of victims of trafficking in persons in receiving States

(1) In addition to taking measures pursuant to Article 6 of this Protocol, each State Party shall consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases.

(2) In implementing the provision contained in paragraph (1) of this article, each State Party shall give appropriate consideration to humanitarian and compassionate factors.

Article 8

Repatriation of victims of trafficking in persons

(1) The State Party of which a victim of trafficking in persons is a national or in which the person had the right of permanent residence at the time of entry into the territory of
the receiving State Party shall facilitate and accept, with due regard for the safety of that person, the return of that person without undue or unreasonable delay.

(2) When a State Party returns a victim of trafficking in persons to a State Party of which that person is a national or in which he or she had, at the time of entry into the territory of the receiving State Party, the right of permanent residence, such return shall be with due regard for the safety of that person and for the status of any legal proceedings related to the fact that the person is a victim of trafficking and shall preferably be voluntary.

(3) At the request of a receiving State Party, a requested State Party shall, without undue or unreasonable delay, verify whether a person who is a victim of trafficking in persons is its national or had the right of permanent residence in its territory at the time of entry into the territory of the receiving State Party.

(4) In order to facilitate the return of a victim of trafficking in persons who is without proper documentation, the State Party of which that person is a national or in which he or she had the right of permanent residence at the time of entry into the territory of the receiving State Party shall agree to issue, at the request of the receiving State Party, such travel documents or other authorization as may be necessary to enable the person to travel to and re-enter its territory.

(5) This article shall be without prejudice to any right afforded to victims of trafficking in persons by any domestic law of the receiving State Party.

(6) This article shall be without prejudice to any applicable bilateral or multilateral agreement or arrangement that governs, in whole or in part, the return of victims of trafficking in persons.

III

PREVENTION, COOPERATION AND OTHER MEASURES (Articles 9-13)

Article 9

Prevention of trafficking in persons
(1) States Parties shall establish comprehensive policies, programmes and other measures:

(a) To prevent and combat trafficking in persons; and

(b) to protect victims of trafficking in persons, especially women and children, from revictimization.

(2) States Parties shall endeavour to undertake measures such as research, information and mass media campaigns and social and economic initiatives to prevent and combat trafficking in persons.

(3) Policies, programmes and other measures established in accordance with this article shall, as appropriate, include cooperation with non-governmental organizations, other relevant organizations and other elements of civil society.

(4) States Parties shall take or strengthen measures, including through bilateral or multilateral cooperation, to alleviate the factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity.

(5) States Parties shall adopt or strengthen legislative or other measures, such as educational, social or cultural measures, including through bilateral and multilateral cooperation, to discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking.

**Article 10**

**Information exchange and training**

(1) Law enforcement, immigration or other relevant authorities of States Parties shall, as appropriate, cooperate with one another by exchanging information, in accordance with their domestic law, to enable them to determine:

(a) Whether individuals crossing or attempting to cross an international border with travel documents belonging to other persons or without travel documents are perpetrators or victims of trafficking in persons;
(b) the types of travel document that individuals have used or attempted to use to cross an international border for the purpose of trafficking in persons; and

(c) the means and methods used by organized criminal groups for the purpose of trafficking in persons, including the recruitment and transportation of victims, routes and links between and among individuals and groups engaged in such trafficking, and possible measures for detecting them.

(2) States Parties shall provide or strengthen training for law enforcement, immigration and other relevant officials in the prevention of trafficking in persons. The training should focus on methods used in preventing such trafficking, prosecuting the traffickers and protecting the rights of the victims, including protecting the victims from the traffickers. The training should also take into account the need to consider human rights and child- and gender-sensitive issues and it should encourage cooperation with non-governmental organizations, other relevant organizations and other elements of civil society.

(3) A State Party that receives information shall comply with any request by the State Party that transmitted the information that places restrictions on its use.

Article 11

Border measures

(1) Without prejudice to international commitments in relation to the free movement of people, States Parties shall strengthen, to the extent possible, such border controls as may be necessary to prevent and detect trafficking in persons.

(2) Each State Party shall adopt legislative or other appropriate measures to prevent, to the extent possible, means of transport operated by commercial carriers from being used in the commission of offences established in accordance with Article 5 of this Protocol.

(3) Where appropriate, and without prejudice to applicable international conventions, such measures shall include establishing the obligation of commercial carriers, including any transportation company or the owner or operator of any means of transport, to
ascertain that all passengers are in possession of the travel documents required for entry into the receiving State.

(4) Each State Party shall take the necessary measures, in accordance with its domestic law, to provide for sanctions in cases of violation of the obligation set forth in paragraph (3) of this article.

(5) Each State Party shall consider taking measures that permit, in accordance with its domestic law, the denial of entry or revocation of visas of persons implicated in the commission of offences established in accordance with this Protocol.

(6) Without prejudice to Article 27 of the Convention, States Parties shall consider strengthening cooperation among border control agencies by, inter alia, establishing and maintaining direct channels of communication.

Article 12

Security and control of documents

Each State Party shall take such measures as may be necessary, within available means:

(a) To ensure that travel or identity documents issued by it are of such quality that they cannot easily be misused and cannot readily be falsified or unlawfully altered, replicated or issued; and

(b) to ensure the integrity and security of travel or identity documents issued by or on behalf of the State Party and to prevent their unlawful creation, issuance and use.

Article 13

Legitimacy and validity of documents

At the request of another State Party, a State Party shall, in accordance with its domestic law, verify within a reasonable time the legitimacy and validity of travel or identity
documents issued or purported to have been issued in its name and suspected of being used for trafficking in persons.

IV

FINAL PROVISIONS (Articles 14-20)

Article 14

Saving clause

(1) Nothing in this Protocol shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.

(2) The measures set forth in this Protocol shall be interpreted and applied in a way that is not discriminatory to persons on the ground that they are victims of trafficking in persons. The interpretation and application of those measures shall be consistent with internationally recognized principles of non-discrimination.

Article 15

Settlement of disputes

(1) State Parties shall endeavour to settle disputes concerning the interpretation or application of this Protocol through negotiation.

(2) Any dispute between two or more States Parties concerning the interpretation or application of this Protocol that cannot be settled through negotiation within a reasonable time shall, at the request of one of those States Parties, be submitted to arbitration. If, six months after the date of the request for arbitration, those States Parties are unable to agree on the organization of the arbitration, any one of those States Parties may refer the dispute to the International Court of Justice by request in accordance with the Statute of the Court.
(3) Each State Party may, at the time of signature, ratification, acceptance or approval of or accession to this Protocol, declare that it does not consider itself bound by paragraph (2) of this article. The other States Parties shall not be bound by paragraph (2) of this article with respect to any State Party that has made such a reservation.

(4) Any State Party that has made a reservation in accordance with paragraph (3) of this article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

Article 16

Signature, ratification, acceptance, approval and accession

(1) This Protocol shall be open to all States for signature from 12 to 15 December 2000 in Palermo, Italy, and thereafter at United Nations Headquarters in New York until 12 December 2002.

(2) This Protocol shall also be open for signature by regional economic integration organizations provided that at least one member State of such organization has signed this Protocol in accordance with paragraph (1) of this article.

(3) This Protocol is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations. A regional economic integration organization may deposit its instrument of ratification, acceptance or approval if at least one of its member States has done likewise. In that instrument of ratification, acceptance or approval, such organization shall declare the extent of its competence with respect to the matters governed by this Protocol. Such organization shall also inform the depositary of any relevant modification in the extent of its competence.

(4) This Protocol is open for accession by any State or any regional economic integration organization of which at least one member State is a Party to this Protocol. Instruments of accession shall be deposited with the Secretary-General of the United Nations. At the time of its accession, a regional economic integration organization shall declare the extent of its competence with respect to matters governed by this Protocol. Such organization shall also inform the depositary of any relevant modification in the extent of its competence.
Article 17

Entry into force

(1) This Protocol shall enter into force on the ninetieth day after the date of deposit of the fortieth instrument of ratification, acceptance, approval or accession, except that it shall not enter into force before the entry into force of the Convention. For the purpose of this paragraph, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by member States of such organization.

(2) For each State or regional economic integration organization ratifying, accepting, approving or acceding to this Protocol after the deposit of the fortieth instrument of such action, this Protocol shall enter into force on the thirtieth day after the date of deposit by such State or organization of the relevant instrument or on the date this Protocol enters into force pursuant to paragraph (1) of this article, whichever is the later.

Article 18

Amendment

(1) After the expiry of five years from the entry into force of this Protocol, a State Party to the Protocol may propose an amendment and file it with the Secretary-General of the United Nations, who shall thereupon communicate the proposed amendment to the States Parties and to the Conference of the Parties to the Convention for the purpose of considering and deciding on the proposal. The States Parties to this Protocol meeting at the Conference of the Parties shall make every effort to achieve consensus on each amendment. If all efforts at consensus have been exhausted and no agreement has been reached, the amendment shall, as a last resort, require for its adoption a two-thirds majority vote of the States Parties to this Protocol present and voting at the meeting of the Conference of the Parties.

(2) Regional economic integration organizations, in matters within their competence, shall exercise their right to vote under this article with a number of votes equal to the number of their member States that are Parties to this Protocol. Such organizations shall not exercise their right to vote if their member States exercise theirs and vice versa.
(3) An amendment adopted in accordance with paragraph (1) of this article is subject to ratification, acceptance or approval by States Parties.

(4) An amendment adopted in accordance with paragraph (1) of this article shall enter into force in respect of a State Party ninety days after the date of the deposit with the Secretary-General of the United Nations of an instrument of ratification, acceptance or approval of such amendment.

(5) When an amendment enters into force, it shall be binding on those States Parties which have expressed their consent to be bound by it. Other States Parties shall still be bound by the provisions of this Protocol and any earlier amendments that they have ratified, accepted or approved.

Article 19

Denunciation

(1) A State Party may denounce this Protocol by written notification to the Secretary-General of the United Nations. Such denunciation shall become effective one year after the date of receipt of the notification by the Secretary-General.

(2) A regional economic integration organization shall cease to be a Party to this Protocol when all of its member States have denounced it.

Article 20

Depositary and languages

(1) The Secretary-General of the United Nations is designated depositary of this Protocol.

(2) The original of this Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.
IN WITNESS WHEREOF, the undersigned plenipotentiaries, being duly authorized thereto by their respective Governments, have signed this Protocol.
The States signatory to the present Convention,
Recognising that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding,
Recalling that each State should take, as a matter of priority, appropriate measures to enable the child to remain in the care of his or her family of origin,
Recognising that intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of origin,
Convinced of the necessity to take measures to ensure that intercountry adoptions are made in the best interests of the child and with respect for his or her fundamental rights, and to prevent the abduction, the sale of, or traffic in children,
Desiring to establish common provisions to this effect, taking into account the principles set forth in international instruments, in particular the United Nations Convention on the Rights of the Child, of 20 November 1989, and the United Nations Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally (General Assembly Resolution 41/85, of 3 December 1986),

Have agreed upon the following provisions -

Chapter I - Scope of the Convention

Article 1
The objects of the present Convention are -
a) to establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognised in international law;
b) to establish a system of co-operation amongst Contracting States to ensure that those safeguards are respected and thereby prevent the abduction, the sale of, or traffic in children;
c) to secure the recognition in Contracting States of adoptions made in accordance with the Convention.

Article 2
(1) The Convention shall apply where a child habitually resident in one Contracting State ("the State of origin") has been, is being, or is to be moved to another Contracting State ("the receiving State") either after his or her adoption in the State of origin by spouses or a person habitually resident in the receiving State, or for the purposes of such an adoption in the receiving State or in the State of origin.
(2) The Convention covers only adoptions which create a permanent parent-child relationship.

Article 3
The Convention ceases to apply if the agreements mentioned in Article 17, sub-paragraph c, have not been given before the child attains the age of eighteen years.

Chapter II - Requirements for intercountry adoptions

Article 4
An adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin -
a) have established that the child is adoptable;
b) have determined, after possibilities for placement of the child within the State of origin have been given due consideration, that an intercountry adoption is in the child’s best interests;
c) have ensured that -
   (1) the persons, institutions and authorities whose consent is necessary for adoption, have been counselled as may be necessary and duly informed of the effects of their consent, in particular whether or not an adoption will result in the termination of the legal relationship between the child and his or her family of origin,
   (2) such persons, institutions and authorities have given their consent freely, in the required legal form, and expressed or evidenced in writing,
(3) the consents have not been induced by payment or compensation of any kind and have not been withdrawn, and
(4) the consent of the mother, where required, has been given only after the birth of the child; and

d) have ensured, having regard to the age and degree of maturity of the child, that -
(1) he or she has been counselled and duly informed of the effects of the adoption and of his or her consent to the adoption, where such consent is required,
(2) consideration has been given to the child’s wishes and opinions,
(3) the child’s consent to the adoption, where such consent is required, has been given freely, in the required legal form, and expressed or evidenced in writing, and
(4) such consent has not been induced by payment or compensation of any kind.

Article 5
An adoption within the scope of the Convention shall take place only if the competent authorities of the receiving State -
a) have determined that the prospective adoptive parents are eligible and suited to adopt;
b) have ensured that the prospective adoptive parents have been counselled as may be necessary; and
c) have determined that the child is or will be authorised to enter and reside permanently in that State.

Chapter III - Central authorities and accredited bodies

Article 6
(1) A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities.
(2) Federal States, States with more than one system of law or States having autonomous territorial units shall be free to appoint more than one Central Authority and to specify the territorial or personal extent of their functions. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which any communication may be addressed for transmission to the appropriate Central Authority within that State.

Article 7
(1) Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their States to protect children and to achieve the other objects of the Convention.

(2) They shall take directly all appropriate measures to -

a) provide information as to the laws of their States concerning adoption and other general information, such as statistics and standard forms;

b) keep one another informed about the operation of the Convention and, as far as possible, eliminate any obstacles to its application.

**Article 8**
Central Authorities shall take, directly or through public authorities, all appropriate measures to prevent improper financial or other gain in connection with an adoption and to deter all practices contrary to the objects of the Convention.

**Article 9**
Central Authorities shall take, directly or through public authorities or other bodies duly accredited in their State, all appropriate measures, in particular to -

a) collect, preserve and exchange information about the situation of the child and the prospective adoptive parents, so far as is necessary to complete the adoption;

b) facilitate, follow and expedite proceedings with a view to obtaining the adoption;

c) promote the development of adoption counselling and post-adoption services in their States;

d) provide each other with general evaluation reports about experience with intercountry adoption;

e) reply, in so far as is permitted by the law of their State, to justified requests from other Central Authorities or public authorities for information about a particular adoption situation.

**Article 10**
Accreditation shall only be granted to and maintained by bodies demonstrating their competence to carry out properly the tasks with which they may be entrusted.

**Article 11**
An accredited body shall -
a) pursue only non-profit objectives according to such conditions and within such limits as may be established by the competent authorities of the State of accreditation; 
b) be directed and staffed by persons qualified by their ethical standards and by training or experience to work in the field of intercountry adoption; and 
c) be subject to supervision by competent authorities of that State as to its composition, operation and financial situation.

**Article 12**
A body accredited in one Contracting State may act in another Contracting State only if the competent authorities of both States have authorised it to do so.

**Article 13**
The designation of the Central Authorities and, where appropriate, the extent of their functions, as well as the names and addresses of the accredited bodies shall be communicated by each Contracting State to the Permanent Bureau of the Hague Conference on Private International Law.

**Chapter IV - Procedural requirements in intercountry adoption**

**Article 14**
Persons habitually resident in a Contracting State, who wish to adopt a child habitually resident in another Contracting State, shall apply to the Central Authority in the State of their habitual residence.

**Article 15**
(1) If the Central Authority of the receiving State is satisfied that the applicants are eligible and suited to adopt, it shall prepare a report including information about their identity, eligibility and suitability to adopt, background, family and medical history, social environment, reasons for adoption, ability to undertake an intercountry adoption, as well as the characteristics of the children for whom they would be qualified to care. 
(2) It shall transmit the report to the Central Authority of the State of origin.

**Article 16**
(1) If the Central Authority of the State of origin is satisfied that the child is adoptable, it
shall -

a) prepare a report including information about his or her identity, adoptability, background,
social environment, family history, medical history including that of the child’s family, and
any special needs of the child;

b) give due consideration to the child’s upbringing and to his or her ethnic, religious and
cultural background;

c) ensure that consents have been obtained in accordance with Article 4; and

d) determine, on the basis in particular of the reports relating to the child and the prospective
adoptive parents, whether the envisaged placement is in the best interests of the child.

(2) It shall transmit to the Central Authority of the receiving State its report on the child,
proof that the necessary consents have been obtained and the reasons for its determination on
the placement, taking care not to reveal the identity of the mother and the father if, in the
State of origin, these identities may not be disclosed.

**Article 17**

Any decision in the State of origin that a child should be entrusted to prospective adoptive
parents may only be made if -

a) the Central Authority of that State has ensured that the prospective adoptive parents agree;

b) the Central Authority of the receiving State has approved such decision, where such
approval is required by the law of that State or by the Central Authority of the State of origin;

c) the Central Authorities of both States have agreed that the adoption may proceed; and

d) it has been determined, in accordance with Article 5, that the prospective adoptive parents
are eligible and suited to adopt and that the child is or will be authorised to enter and reside
permanently in the receiving State.

**Article 18**

The Central Authorities of both States shall take all necessary steps to obtain permission for
the child to leave the State of origin and to enter and reside permanently in the receiving
State.

**Article 19**

(1) The transfer of the child to the receiving State may only be carried out if the requirements
of Article 17 have been satisfied.
(2) The Central Authorities of both States shall ensure that this transfer takes place in secure and appropriate circumstances and, if possible, in the company of the adoptive or prospective adoptive parents.

(3) If the transfer of the child does not take place, the reports referred to in Articles 15 and 16 are to be sent back to the authorities who forwarded them.

**Article 20**
The Central Authorities shall keep each other informed about the adoption process and the measures taken to complete it, as well as about the progress of the placement if a probationary period is required.

**Article 21**
(1) Where the adoption is to take place after the transfer of the child to the receiving State and it appears to the Central Authority of that State that the continued placement of the child with the prospective adoptive parents is not in the child’s best interests, such Central Authority shall take the measures necessary to protect the child, in particular -

a) to cause the child to be withdrawn from the prospective adoptive parents and to arrange temporary care;

b) in consultation with the Central Authority of the State of origin, to arrange without delay a new placement of the child with a view to adoption or, if this is not appropriate, to arrange alternative long-term care; an adoption shall not take place until the Central Authority of the State of origin has been duly informed concerning the new prospective adoptive parents;

c) as a last resort, to arrange the return of the child, if his or her interests so require.

(2) Having regard in particular to the age and degree of maturity of the child, he or she shall be consulted and, where appropriate, his or her consent obtained in relation to measures to be taken under this Article.

**Article 22**
(1) The functions of a Central Authority under this Chapter may be performed by public authorities or by bodies accredited under Chapter III, to the extent permitted by the law of its State.

(2) Any Contracting State may declare to the depositary of the Convention that the functions of the Central Authority under Articles 15 to 21 may be performed in that State, to the extent
permitted by the law and subject to the supervision of the competent authorities of that State, also by bodies or persons who -

a) meet the requirements of integrity, professional competence, experience and accountability of that State; and

b) are qualified by their ethical standards and by training or experience to work in the field of intercountry adoption.

(3) A Contracting State which makes the declaration provided for in paragraph 2 shall keep the Permanent Bureau of the Hague Conference on Private International Law informed of the names and addresses of these bodies and persons.

(4) Any Contracting State may declare to the depositary of the Convention that adoptions of children habitually resident in its territory may only take place if the functions of the Central Authorities are performed in accordance with paragraph 1.

(5) Notwithstanding any declaration made under paragraph 2, the reports provided for in Articles 15 and 16 shall, in every case, be prepared under the responsibility of the Central Authority or other authorities or bodies in accordance with paragraph 1.

Chapter V - Recognition and effects of the adoption

Article 23

(1) An adoption certified by the competent authority of the State of the adoption as having been made in accordance with the Convention shall be recognised by operation of law in the other Contracting States. The certificate shall specify when and by whom the agreements under Article 17, sub-paragraph c), were given.

(2) Each Contracting State shall, at the time of signature, ratification, acceptance, approval or accession, notify the depositary of the Convention of the identity and the functions of the authority or the authorities which, in that State, are competent to make the certification. It shall also notify the depositary of any modification in the designation of these authorities.

Article 24

The recognition of an adoption may be refused in a Contracting State only if the adoption is manifestly contrary to its public policy, taking into account the best interests of the child.

Article 25
Any Contracting State may declare to the depositary of the Convention that it will not be bound under this Convention to recognise adoptions made in accordance with an agreement concluded by application of Article 39, paragraph 2.

Article 26
(1) The recognition of an adoption includes recognition of -
   a) the legal parent-child relationship between the child and his or her adoptive parents;
   b) parental responsibility of the adoptive parents for the child;
   c) the termination of a pre-existing legal relationship between the child and his or her mother and father, if the adoption has this effect in the Contracting State where it was made.
(2) In the case of an adoption having the effect of terminating a pre-existing legal parent-child relationship, the child shall enjoy in the receiving State, and in any other Contracting State where the adoption is recognised, rights equivalent to those resulting from adoptions having this effect in each such State.
(3) The preceding paragraphs shall not prejudice the application of any provision more favourable for the child, in force in the Contracting State which recognises the adoption.

Article 27
(1) Where an adoption granted in the State of origin does not have the effect of terminating a pre-existing legal parent-child relationship, it may, in the receiving State which recognises the adoption under the Convention, be converted into an adoption having such an effect -
   a) if the law of the receiving State so permits; and
   b) if the consents referred to in Article 4, sub-paragraphs c and d, have been or are given for the purpose of such an adoption.
(2) Article 23 applies to the decision converting the adoption.

Chapter VI - General provisions

Article 28
The Convention does not affect any law of a State of origin which requires that the adoption of a child habitually resident within that State take place in that State or which prohibits the child’s placement in, or transfer to, the receiving State prior to adoption.
Article 29
There shall be no contact between the prospective adoptive parents and the child’s parents or any other person who has care of the child until the requirements of Article 4, sub-paragraphs a) to c), and Article 5, sub-paragraph a), have been met, unless the adoption takes place within a family or unless the contact is in compliance with the conditions established by the competent authority of the State of origin.

Article 30
(1) The competent authorities of a Contracting State shall ensure that information held by them concerning the child’s origin, in particular information concerning the identity of his or her parents, as well as the medical history, is preserved.
(2) They shall ensure that the child or his or her representative has access to such information, under appropriate guidance, in so far as is permitted by the law of that State.

Article 31
Without prejudice to Article 30, personal data gathered or transmitted under the Convention, especially data referred to in Articles 15 and 16, shall be used only for the purposes for which they were gathered or transmitted.

Article 32
(1) No one shall derive improper financial or other gain from an activity related to an intercountry adoption.
(2) Only costs and expenses, including reasonable professional fees of persons involved in the adoption, may be charged or paid.
(3) The directors, administrators and employees of bodies involved in an adoption shall not receive remuneration which is unreasonably high in relation to services rendered.

Article 33
A competent authority which finds that any provision of the Convention has not been respected or that there is a serious risk that it may not be respected, shall immediately inform the Central Authority of its State. This Central Authority shall be responsible for ensuring that appropriate measures are taken.
Article 34
If the competent authority of the State of destination of a document so requests, a translation certified as being in conformity with the original must be furnished. Unless otherwise provided, the costs of such translation are to be borne by the prospective adoptive parents.

Article 35
The competent authorities of the Contracting States shall act expeditiously in the process of adoption.

Article 36
In relation to a State which has two or more systems of law with regard to adoption applicable in different territorial units -

a) any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit of that State;
b) any reference to the law of that State shall be construed as referring to the law in force in the relevant territorial unit;
c) any reference to the competent authorities or to the public authorities of that State shall be construed as referring to those authorised to act in the relevant territorial unit;
d) any reference to the accredited bodies of that State shall be construed as referring to bodies accredited in the relevant territorial unit.

Article 37
In relation to a State which with regard to adoption has two or more systems of law applicable to different categories of persons, any reference to the law of that State shall be construed as referring to the legal system specified by the law of that State.

Article 38
A State within which different territorial units have their own rules of law in respect of adoption shall not be bound to apply the Convention where a State with a unified system of law would not be bound to do so.

Article 39
(1) The Convention does not affect any international instrument to which Contracting States are Parties and which contains provisions on matters governed by the Convention, unless a contrary declaration is made by the States Parties to such instrument.

(2) Any Contracting State may enter into agreements with one or more other Contracting States, with a view to improving the application of the Convention in their mutual relations. These agreements may derogate only from the provisions of Articles 14 to 16 and 18 to 21. The States which have concluded such an agreement shall transmit a copy to the depositary of the Convention.

Article 40
No reservation to the Convention shall be permitted.

Article 41
The Convention shall apply in every case where an application pursuant to Article 14 has been received after the Convention has entered into force in the receiving State and the State of origin.

Article 42
The Secretary General of the Hague Conference on Private International Law shall at regular intervals convene a Special Commission in order to review the practical operation of the Convention.

Chapter VII - Final clauses

Article 43
(1) The Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Seventeenth Session and by the other States which participated in that Session.

(2) It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the Convention.

Article 44
(1) Any other State may accede to the Convention after it has entered into force in accordance with Article 46, paragraph 1.
(2) The instrument of accession shall be deposited with the depositary.
(3) Such accession shall have effect only as regards the relations between the acceding State and those Contracting States which have not raised an objection to its accession in the six months after the receipt of the notification referred to in sub-paragraph b) of Article 48. Such an objection may also be raised by States at the time when they ratify, accept or approve the Convention after an accession. Any such objection shall be notified to the depositary.

**Article 45**
(1) If a State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in the Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.
(2) Any such declaration shall be notified to the depositary and shall state expressly the territorial units to which the Convention applies.
(3) If a State makes no declaration under this Article, the Convention is to extend to all territorial units of that State.

**Article 46**
(1) The Convention shall enter into force on the first day of the month following the expiration of three months after the deposit of the third instrument of ratification, acceptance or approval referred to in Article 43.
(2) Thereafter the Convention shall enter into force -
a) for each State ratifying, accepting or approving it subsequently, or acceding to it, on the first day of the month following the expiration of three months after the deposit of its instrument of ratification, acceptance, approval or accession;
b) for a territorial unit to which the Convention has been extended in conformity with Article 45, on the first day of the month following the expiration of three months after the notification referred to in that Article.

**Article 47**
(1) A State Party to the Convention may denounce it by a notification in writing addressed to the depositary.

(2) The denunciation takes effect on the first day of the month following the expiration of twelve months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.

**Article 48**

The depositary shall notify the States Members of the Hague Conference on Private International Law, the other States which participated in the Seventeenth Session and the States which have acceded in accordance with Article 44, of the following -

a) the signatures, ratifications, acceptances and approvals referred to in Article 43;

b) the accessions and objections raised to accessions referred to in Article 44;

c) the date on which the Convention enters into force in accordance with Article 46;

d) the declarations and designations referred to in Articles 22, 23, 25 and 45;

e) the agreements referred to in Article 39;

f) the denunciations referred to in Article 47.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at The Hague, on the 29th day of May 1993, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the States Members of the Hague Conference on Private International Law at the date of its Seventeenth Session and to each of the other States which participated in that Session.
The States signatory to the present Convention,
Firmly convinced that the interests of children are of paramount importance in matters relating to their custody,
Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,
Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions -

Chapter I - Scope of the Convention

Article 1
The objects of the present Convention are -
a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

Article 2
Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available.

Article 3
The removal or the retention of a child is to be considered wrongful where -
a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

**Article 4**
The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.

**Article 5**
For the purposes of this Convention -

a) "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child’s place of residence;

b) "rights of access" shall include the right to take a child for a limited period of time to a place other than the child’s habitual residence.

**Chapter II - Central Authorities**

**Article 6**
A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities.

Federal States, States with more than one system of law or States having autonomous territorial organisations shall be free to appoint more than one Central Authority and to specify the territorial extent of their powers.

Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which applications may be addressed for transmission to the appropriate Central Authority within that State.

**Article 7**
Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention.
In particular, either directly or through any intermediary, they shall take all appropriate measures -

a) to discover the whereabouts of a child who has been wrongfully removed or retained;

b) to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;

c) to secure the voluntary return of the child or to bring about an amicable resolution of the issues;

d) to exchange, where desirable, information relating to the social background of the child;

e) to provide information of a general character as to the law of their State in connection with the application of the Convention;

f) to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organising or securing the effective exercise of rights of access;

g) where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers;

h) to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;

i) to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application.

Chapter III - Return of children

Article 8

Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child’s habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.

The application shall contain -

a) information concerning the identity of the applicant, of the child and of the person alleged to have removed or retained the child;

b) where available, the date of birth of the child;

c) the grounds on which the applicant’s claim for return of the child is based;

d) all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be.
The application may be accompanied or supplemented by -
e) an authenticated copy of any relevant decision or agreement;
f) a certificate or an affidavit emanating from a Central Authority, or other competent
authority of the State of the child’s habitual residence, or from a qualified person, concerning
the relevant law of that State;
g) any other relevant document.

Article 9
If the Central Authority which receives an application referred to in Article 8 has reason to
believe that the child is in another Contracting State, it shall directly and without delay
transmit the application to the Central Authority of that Contracting State and inform the
requesting Central Authority, or the applicant, as the case may be.

Article 10
The Central Authority of the State where the child is shall take or cause to be taken all
appropriate measures in order to obtain the voluntary return of the child.

Article 11
The judicial or administrative authorities of Contracting States shall act expeditiously in
proceedings for the return of children.
If the judicial or administrative authority concerned has not reached a decision within six
weeks from the date of commencement of the proceedings, the applicant or the Central
Authority of the requested State, on its own initiative or if asked by the Central Authority of
the requesting State, shall have the right to request a statement of the reasons for the delay. If
a reply is received by the Central Authority of the requested State, that Authority shall
transmit the reply to the Central Authority of the requesting State, or to the applicant, as the
case may be.

Article 12
Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date
of the commencement of the proceedings before the judicial or administrative authority of the
Contracting State where the child is, a period of less than one year has elapsed from the date
of the wrongful removal or retention, the authority concerned shall order the return of the
child forthwith.
The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

**Article 13**

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that -

a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child’s habitual residence.

**Article 14**

In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formally recognised or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.

**Article 15**
The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.

Article 16
After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice.

Article 17
The sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested State shall not be a ground for refusing to return a child under this Convention, but the judicial or administrative authorities of the requested State may take account of the reasons for that decision in applying this Convention.

Article 18
The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time.

Article 19
A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.

Article 20
The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.
Chapter IV - Rights of access

Article 21
An application to make arrangements for organising or securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child. The Central Authorities are bound by the obligations of co-operation which are set forth in Article 7 to promote the peaceful enjoyment of access rights and the fulfilment of any conditions to which the exercise of those rights may be subject. The Central Authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights. The Central Authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organising or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject.

Chapter V - General provisions

Article 22
No security, bond or deposit, however described, shall be required to guarantee the payment of costs and expenses in the judicial or administrative proceedings falling within the scope of this Convention.

Article 23
No legalisation or similar formality may be required in the context of this Convention.

Article 24
Any application, communication or other document sent to the Central Authority of the requested State shall be in the original language, and shall be accompanied by a translation into the official language or one of the official languages of the requested State or, where that is not feasible, a translation into French or English. However, a Contracting State may, by making a reservation in accordance with Article 42, object to the use of either French or English, but not both, in any application, communication or other document sent to its Central Authority.
Article 25
Nationals of the Contracting States and persons who are habitually resident within those States shall be entitled in matters concerned with the application of this Convention to legal aid and advice in any other Contracting State on the same conditions as if they themselves were nationals of and habitually resident in that State.

Article 26
Each Central Authority shall bear its own costs in applying this Convention. Central Authorities and other public services of Contracting States shall not impose any charges in relation to applications submitted under this Convention. In particular, they may not require any payment from the applicant towards the costs and expenses of the proceedings or, where applicable, those arising from the participation of legal counsel or advisers. However, they may require the payment of the expenses incurred or to be incurred in implementing the return of the child.

However, a Contracting State may, by making a reservation in accordance with Article 42, declare that it shall not be bound to assume any costs referred to in the preceding paragraph resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice.

Upon ordering the return of a child or issuing an order concerning rights of access under this Convention, the judicial or administrative authorities may, where appropriate, direct the person who removed or retained the child, or who prevented the exercise of rights of access, to pay necessary expenses incurred by or on behalf of the applicant, including travel expenses, any costs incurred or payments made for locating the child, the costs of legal representation of the applicant, and those of returning the child.

Article 27
When it is manifest that the requirements of this Convention are not fulfilled or that the application is otherwise not well founded, a Central Authority is not bound to accept the application. In that case, the Central Authority shall forthwith inform the applicant or the Central Authority through which the application was submitted, as the case may be, of its reasons.

Article 28
A Central Authority may require that the application be accompanied by a written authorisation empowering it to act on behalf of the applicant, or to designate a representative so to act.

Article 29
This Convention shall not preclude any person, institution or body who claims that there has been a breach of custody or access rights within the meaning of Article 3 or 21 from applying directly to the judicial or administrative authorities of a Contracting State, whether or not under the provisions of this Convention.

Article 30
Any application submitted to the Central Authorities or directly to the judicial or administrative authorities of a Contracting State in accordance with the terms of this Convention, together with documents and any other information appended thereto or provided by a Central Authority, shall be admissible in the courts or administrative authorities of the Contracting States.

Article 31
In relation to a State which in matters of custody of children has two or more systems of law applicable in different territorial units -

a) any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit of that State;

b) any reference to the law of the State of habitual residence shall be construed as referring to the law of the territorial unit in that State where the child habitually resides.

Article 32
In relation to a State which in matters of custody of children has two or more systems of law applicable to different categories of persons, any reference to the law of that State shall be construed as referring to the legal system specified by the law of that State.

Article 33
A State within which different territorial units have their own rules of law in respect of custody of children shall not be bound to apply this Convention where a State with a unified system of law would not be bound to do so.
**Article 34**
This Convention shall take priority in matters within its scope over the Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors, as between Parties to both Conventions. Otherwise the present Convention shall not restrict the application of an international instrument in force between the State of origin and the State addressed or other law of the State addressed for the purposes of obtaining the return of a child who has been wrongfully removed or retained or of organising access rights.

**Article 35**
This Convention shall apply as between Contracting States only to wrongful removals or retentions occurring after its entry into force in those States.
Where a declaration has been made under Article 39 or 40, the reference in the preceding paragraph to a Contracting State shall be taken to refer to the territorial unit or units in relation to which this Convention applies.

**Article 36**
Nothing in this Convention shall prevent two or more Contracting States, in order to limit the restrictions to which the return of the child may be subject, from agreeing among themselves to derogate from any provisions of this Convention which may imply such a restriction.

**Chapter VI - Final clauses**

**Article 37**
The Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Fourteenth Session.
It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

**Article 38**
Any other State may accede to the Convention.
The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.
The Convention shall enter into force for a State acceding to it on the first day of the third calendar month after the deposit of its instrument of accession.

The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession. Such declaration shall be deposited at the Ministry of Foreign Affairs of the Kingdom of the Netherlands; this Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States.

The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the first day of the third calendar month after the deposit of the declaration of acceptance.

Article 39
Any State may, at the time of signature, ratification, acceptance, approval or accession, declare that the Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect at the time the Convention enters into force for that State.

Such declaration, as well as any subsequent extension, shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 40
If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.

Any such declaration shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands and shall state expressly the territorial units to which the Convention applies.

Article 41
Where a Contracting State has a system of government under which executive, judicial and legislative powers are distributed between central and other authorities within that State, its signature or ratification, acceptance or approval of, or accession to this Convention, or its
making of any declaration in terms of Article 40 shall carry no implication as to the internal
distribution of powers within that State.

Article 42
Any State may, not later than the time of ratification, acceptance, approval or accession, or at
the time of making a declaration in terms of Article 39 or 40, make one or both of the
reservations provided for in Article 24 and Article 26, third paragraph. No other reservation
shall be permitted.
Any State may at any time withdraw a reservation it has made. The withdrawal shall be
notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.
The reservation shall cease to have effect on the first day of the third calendar month after the
notification referred to in the preceding paragraph.

Article 43
The Convention shall enter into force on the first day of the third calendar month after the
deposit of the third instrument of ratification, acceptance, approval or accession referred to in
Articles 37 and 38.
Thereafter the Convention shall enter into force -
(1) for each State ratifying, accepting, approving or acceding to it subsequently, on the first
day of the third calendar month after the deposit of its instrument of ratification, acceptance,
approval or accession;
(2) for any territory or territorial unit to which the Convention has been extended in
conformity with Article 39 or 40, on the first day of the third calendar month after the
notification referred to in that Article.

Article 44
The Convention shall remain in force for five years from the date of its entry into force in
accordance with the first paragraph of Article 43 even for States which subsequently have
ratified, accepted, approved it or acceded to it.
If there has been no denunciation, it shall be renewed tacitly every five years.
Any denunciation shall be notified to the Ministry of Foreign Affairs of the Kingdom of the
Netherlands at least six months before the expiry of the five year period. It may be limited to
certain of the territories or territorial units to which the Convention applies.
The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

**Article 45**

The Ministry of Foreign Affairs of the Kingdom of the Netherlands shall notify the States Members of the Conference, and the States which have acceded in accordance with Article 38, of the following -

(1) the signatures and ratifications, acceptances and approvals referred to in Article 37;
(2) the accessions referred to in Article 38;
(3) the date on which the Convention enters into force in accordance with Article 43;
(4) the extensions referred to in Article 39;
(5) the declarations referred to in Articles 38 and 40;
(6) the reservations referred to in Article 24 and Article 26, third paragraph, and the withdrawals referred to in Article 42;
(7) the denunciations referred to in Article 44.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at The Hague, on the 25th day of October, 1980, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the States Members of the Hague Conference on Private International Law at the date of its Fourteenth Session.
SCHEDULE 5

TEXT OF THE HAGUE CONVENTION ON JURISDICTION, APPLICABLE LAW, RECOGNITION, ENFORCEMENT AND CO-OPERATION IN RESPECT OF PARENTAL RESPONSIBILITY AND MEASURES FOR THE PROTECTION OF CHILDREN

(Concluded 19 October 1996)

(Entered into force 1 January 2002)

The States signatory to the present Convention,
Considering the need to improve the protection of children in international situations,
Wishing to avoid conflicts between their legal systems in respect of jurisdiction, applicable law, recognition and enforcement of measures for the protection of children,
Recalling the importance of international co-operation for the protection of children,
Confirming that the best interests of the child are to be a primary consideration,
Noting that the Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors is in need of revision,
Desiring to establish common provisions to this effect, taking into account the United Nations Convention on the Rights of the Child of 20 November 1989,
Have agreed on the following provisions –

CHAPTER I – SCOPE OF THE CONVENTION

Article 1

1 The objects of the present Convention are –

a to determine the State whose authorities have jurisdiction to take measures directed to the protection of the person or property of the child;
b to determine which law is to be applied by such authorities in exercising their jurisdiction;
c to determine the law applicable to parental responsibility;
d to provide for the recognition and enforcement of such measures of protection in all Contracting States;
e to establish such co-operation between the authorities of the Contracting States as may be necessary in order to achieve the purposes of this Convention.
2 For the purposes of this Convention, the term ‘parental responsibility’ includes parental authority, or any analogous relationship of authority determining the rights, powers and responsibilities of parents, guardians or other legal representatives in relation to the person or the property of the child.

Article 2
The Convention applies to children from the moment of their birth until they reach the age of 18 years.

Article 3
The measures referred to in Article 1 may deal in particular with –

a the attribution, exercise, termination or restriction of parental responsibility, as well as its delegation;

b rights of custody, including rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence, as well as rights of access including the right to take a child for a limited period of time to a place other than the child's habitual residence;

c guardianship, curatorship and analogous institutions;

d the designation and functions of any person or body having charge of the child's person or property, representing or assisting the child;

e the placement of the child in a foster family or in institutional care, or the provision of care by kafala or an analogous institution;

f the supervision by a public authority of the care of a child by any person having charge of the child;

g the administration, conservation or disposal of the child's property.

Article 4
The Convention does not apply to –

a the establishment or contesting of a parent-child relationship;

b decisions on adoption, measures preparatory to adoption, or the annulment or revocation of adoption;

c the name and forenames of the child;

d emancipation;

e maintenance obligations;
f trusts or succession;
g social security;
h public measures of a general nature in matters of education or health;
i measures taken as a result of penal offences committed by children;
j decisions on the right of asylum and on immigration.

CHAPTER II – JURISDICTION

Article 5
1 The judicial or administrative authorities of the Contracting State of the habitual residence of the child have jurisdiction to take measures directed to the protection of the child's person or property.
2 Subject to Article 7, in case of a change of the child's habitual residence to another Contracting State, the authorities of the State of the new habitual residence have jurisdiction.

Article 6
1 For refugee children and children who, due to disturbances occurring in their country, are internationally displaced, the authorities of the Contracting State on the territory of which these children are present as a result of their displacement have the jurisdiction provided for in paragraph 1 of Article 5.
2 The provisions of the preceding paragraph also apply to children whose habitual residence cannot be established.

Article 7
1 In case of wrongful removal or retention of the child, the authorities of the Contracting State in which the child was habitually resident immediately before the removal or retention keep their jurisdiction until the child has acquired a habitual residence in another State, and
   a each person, institution or other body having rights of custody has acquiesced in the removal or retention; or
   b the child has resided in that other State for a period of at least one year after the person, institution or other body having rights of custody has or should have had knowledge of the whereabouts of the child, no request for return lodged within that period is still pending, and the child is settled in his or her new environment.
2 The removal or the retention of a child is to be considered wrongful where –
it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

b at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph a above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

3 So long as the authorities first mentioned in paragraph 1 keep their jurisdiction, the authorities of the Contracting State to which the child has been removed or in which he or she has been retained can take only such urgent measures under Article 11 as are necessary for the protection of the person or property of the child.

Article 8

1 By way of exception, the authority of a Contracting State having jurisdiction under Article 5 or 6, if it considers that the authority of another Contracting State would be better placed in the particular case to assess the best interests of the child, may either

- request that other authority, directly or with the assistance of the Central Authority of its State, to assume jurisdiction to take such measures of protection as it considers to be necessary, or
- suspend consideration of the case and invite the parties to introduce such a request before the authority of that other State.

2 The Contracting States whose authorities may be addressed as provided in the preceding paragraph are

a a State of which the child is a national,

b a State in which property of the child is located,

c a State whose authorities are seised of an application for divorce or legal separation of the child's parents, or for annulment of their marriage,

d a State with which the child has a substantial connection.

3 The authorities concerned may proceed to an exchange of views.

4 The authority addressed as provided in paragraph 1 may assume jurisdiction, in place of the authority having jurisdiction under Article 5 or 6, if it considers that this is in the child's best interests.
**Article 9**

1 If the authorities of a Contracting State referred to in Article 8, paragraph 2, consider that they are better placed in the particular case to assess the child’s best interests, they may either – request the competent authority of the Contracting State of the habitual residence of the child, directly or with the assistance of the Central Authority of that State, that they be authorised to exercise jurisdiction to take the measures of protection which they consider to be necessary, or
– invite the parties to introduce such a request before the authority of the Contracting State of the habitual residence of the child.

2 The authorities concerned may proceed to an exchange of views.

3 The authority initiating the request may exercise jurisdiction in place of the authority of the Contracting State of the habitual residence of the child only if the latter authority has accepted the request.

**Article 10**

1 Without prejudice to Articles 5 to 9, the authorities of a Contracting State exercising jurisdiction to decide upon an application for divorce or legal separation of the parents of a child habitually resident in another Contracting State, or for annulment of their marriage, may, if the law of their State so provides, take measures directed to the protection of the person or property of such child if

   a at the time of commencement of the proceedings, one of his or her parents habitually resides in that State and one of them has parental responsibility in relation to the child, and
   b the jurisdiction of these authorities to take such measures has been accepted by the parents, as well as by any other person who has parental responsibility in relation to the child, and is in the best interests of the child.

2 The jurisdiction provided for by paragraph 1 to take measures for the protection of the child ceases as soon as the decision allowing or refusing the application for divorce, legal separation or annulment of the marriage has become final, or the proceedings have come to an end for another reason.

**Article 11**

1 In all cases of urgency, the authorities of any Contracting State in whose territory the child or property belonging to the child is present have jurisdiction to take any necessary measures of protection.
2 The measures taken under the preceding paragraph with regard to a child habitually resident in a Contracting State shall lapse as soon as the authorities which have jurisdiction under Articles 5 to 10 have taken the measures required by the situation.

3 The measures taken under paragraph 1 with regard to a child who is habitually resident in a non-Contracting State shall lapse in each Contracting State as soon as measures required by the situation and taken by the authorities of another State are recognised in the Contracting State in question.

Article 12

1 Subject to Article 7, the authorities of a Contracting State in whose territory the child or property belonging to the child is present have jurisdiction to take measures of a provisional character for the protection of the person or property of the child which have a territorial effect limited to the State in question, in so far as such measures are not incompatible with measures already taken by authorities which have jurisdiction under Articles 5 to 10.

2 The measures taken under the preceding paragraph with regard to a child habitually resident in a Contracting State shall lapse as soon as the authorities which have jurisdiction under Articles 5 to 10 have taken a decision in respect of the measures of protection which may be required by the situation.

3 The measures taken under paragraph 1 with regard to a child who is habitually resident in a non-Contracting State shall lapse in the Contracting State where the measures were taken as soon as measures required by the situation and taken by the authorities of another State are recognised in the Contracting State in question.

Article 13

1 The authorities of a Contracting State which have jurisdiction under Articles 5 to 10 to take measures for the protection of the person or property of the child must abstain from exercising this jurisdiction if, at the time of the commencement of the proceedings, corresponding measures have been requested from the authorities of another Contracting State having jurisdiction under Articles 5 to 10 at the time of the request and are still under consideration.

2 The provisions of the preceding paragraph shall not apply if the authorities before whom the request for measures was initially introduced have declined jurisdiction.
**Article 14**
The measures taken in application of Articles 5 to 10 remain in force according to their terms, even if a change of circumstances has eliminated the basis upon which jurisdiction was founded, so long as the authorities which have jurisdiction under the Convention have not modified, replaced or terminated such measures.

**CHAPTER III – APPLICABLE LAW**

**Article 15**
1 In exercising their jurisdiction under the provisions of Chapter II, the authorities of the Contracting States shall apply their own law.
2 However, in so far as the protection of the person or the property of the child requires, they may exceptionally apply or take into consideration the law of another State with which the situation has a substantial connection.
3 If the child's habitual residence changes to another Contracting State, the law of that other State governs, from the time of the change, the conditions of application of the measures taken in the State of the former habitual residence.

**Article 16**
1 The attribution or extinction of parental responsibility by operation of law, without the intervention of a judicial or administrative authority, is governed by the law of the State of the habitual residence of the child.
2 The attribution or extinction of parental responsibility by an agreement or a unilateral act, without intervention of a judicial or administrative authority, is governed by the law of the State of the child's habitual residence at the time when the agreement or unilateral act takes effect.
3 Parental responsibility which exists under the law of the State of the child's habitual residence subsists after a change of that habitual residence to another State.
4 If the child's habitual residence changes, the attribution of parental responsibility by operation of law to a person who does not already have such responsibility is governed by the law of the State of the new habitual residence.

**Article 17**
The exercise of parental responsibility is governed by the law of the State of the child's habitual residence. If the child's habitual residence changes, it is governed by the law of the State of the new habitual residence.

Article 18
The parental responsibility referred to in Article 16 may be terminated, or the conditions of its exercise modified, by measures taken under this Convention.

Article 19
1 The validity of a transaction entered into between a third party and another person who would be entitled to act as the child's legal representative under the law of the State where the transaction was concluded cannot be contested, and the third party cannot be held liable, on the sole ground that the other person was not entitled to act as the child's legal representative under the law designated by the provisions of this Chapter, unless the third party knew or should have known that the parental responsibility was governed by the latter law.
2 The preceding paragraph applies only if the transaction was entered into between persons present on the territory of the same State.

Article 20
The provisions of this Chapter apply even if the law designated by them is the law of a non-Contracting State.

Article 21
1 In this Chapter the term "law" means the law in force in a State other than its choice of law rules.
2 However, if the law applicable according to Article 16 is that of a non-Contracting State and if the choice of law rules of that State designate the law of another non-Contracting State which would apply its own law, the law of the latter State applies. If that other non-Contracting State would not apply its own law, the applicable law is that designated by Article 16.

Article 22
The application of the law designated by the provisions of this Chapter can be refused only if this application would be manifestly contrary to public policy, taking into account the best interests of the child.

CHAPTER IV – RECOGNITION AND ENFORCEMENT

Article 23
1 The measures taken by the authorities of a Contracting State shall be recognised by operation of law in all other Contracting States.
2 Recognition may however be refused –
   a if the measure was taken by an authority whose jurisdiction was not based on one of the grounds provided for in Chapter II;
   b if the measure was taken, except in a case of urgency, in the context of a judicial or administrative proceeding, without the child having been provided the opportunity to be heard, in violation of fundamental principles of procedure of the requested State;
   c on the request of any person claiming that the measure infringes his or her parental responsibility, if such measure was taken, except in a case of urgency, without such person having been given an opportunity to be heard;
   d if such recognition is manifestly contrary to public policy of the requested State, taking into account the best interests of the child;
   e if the measure is incompatible with a later measure taken in the non-Contracting State of the habitual residence of the child, where this later measure fulfils the requirements for recognition in the requested State;
   f if the procedure provided in Article 33 has not been complied with.

Article 24
Without prejudice to Article 23, paragraph 1, any interested person may request from the competent authorities of a Contracting State that they decide on the recognition or non-recognition of a measure taken in another Contracting State. The procedure is governed by the law of the requested State.

Article 25
The authority of the requested State is bound by the findings of fact on which the authority of the State where the measure was taken based its jurisdiction.
Article 26
1 If measures taken in one Contracting State and enforceable there require enforcement in another Contracting State, they shall, upon request by an interested party, be declared enforceable or registered for the purpose of enforcement in that other State according to the procedure provided in the law of the latter State.
2 Each Contracting State shall apply to the declaration of enforceability or registration a simple and rapid procedure.
3 The declaration of enforceability or registration may be refused only for one of the reasons set out in Article 23, paragraph 2.

Article 27
Without prejudice to such review as is necessary in the application of the preceding Articles, there shall be no review of the merits of the measure taken.

Article 28
Measures taken in one Contracting State and declared enforceable, or registered for the purpose of enforcement, in another Contracting State shall be enforced in the latter State as if they had been taken by the authorities of that State. Enforcement takes place in accordance with the law of the requested State to the extent provided by such law, taking into consideration the best interests of the child.

CHAPTER V – CO-OPERATION

Article 29
1 A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention on such authorities.
2 Federal States, States with more than one system of law or States having autonomous territorial units shall be free to appoint more than one Central Authority and to specify the territorial or personal extent of their functions.
Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which any communication may be addressed for transmission to the appropriate Central Authority within that State.
Article 30
1 Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their States to achieve the purposes of the Convention.
2 They shall, in connection with the application of the Convention, take appropriate steps to provide information as to the laws of, and services available in, their States relating to the protection of children.

Article 31
The Central Authority of a Contracting State, either directly or through public authorities or other bodies, shall take all appropriate steps to –
\( a \) facilitate the communications and offer the assistance provided for in Articles 8 and 9 and in this Chapter;
\( b \) facilitate, by mediation, conciliation or similar means, agreed solutions for the protection of the person or property of the child in situations to which the Convention applies;
\( c \) provide, on the request of a competent authority of another Contracting State, assistance in discovering the whereabouts of a child where it appears that the child may be present and in need of protection within the territory of the requested State.

Article 32
On a request made with supporting reasons by the Central Authority or other competent authority of any Contracting State with which the child has a substantial connection, the Central Authority of the Contracting State in which the child is habitually resident and present may, directly or through public authorities or other bodies,
\( a \) provide a report on the situation of the child;
\( b \) request the competent authority of its State to consider the need to take measures for the protection of the person or property of the child.

Article 33
1 If an authority having jurisdiction under Articles 5 to 10 contemplates the placement of the child in a foster family or institutional care, or the provision of care by *kafala* or an analogous institution, and if such placement or such provision of care is to take place in another Contracting State, it shall first consult with the Central Authority or other competent authority of the latter State. To that effect it shall transmit a report on the child together with the reasons for the proposed placement or provision of care.
2 The decision on the placement or provision of care may be made in the requesting State only if the Central Authority or other competent authority of the requested State has consented to the placement or provision of care, taking into account the child's best interests.

Article 34
1 Where a measure of protection is contemplated, the competent authorities under the Convention, if the situation of the child so requires, may request any authority of another Contracting State which has information relevant to the protection of the child to communicate such information.
2 A Contracting State may declare that requests under paragraph 1 shall be communicated to its authorities only through its Central Authority.

Article 35
1 The competent authorities of a Contracting State may request the authorities of another Contracting State to assist in the implementation of measures of protection taken under this Convention, especially in securing the effective exercise of rights of access as well as of the right to maintain direct contacts on a regular basis.
2 The authorities of a Contracting State in which the child does not habitually reside may, on the request of a parent residing in that State who is seeking to obtain or to maintain access to the child, gather information or evidence and may make a finding on the suitability of that parent to exercise access and on the conditions under which access is to be exercised. An authority exercising jurisdiction under Articles 5 to 10 to determine an application concerning access to the child, shall admit and consider such information, evidence and finding before reaching its decision.
3 An authority having jurisdiction under Articles 5 to 10 to decide on access may adjourn a proceeding pending the outcome of a request made under paragraph 2, in particular, when it is considering an application to restrict or terminate access rights granted in the State of the child's former habitual residence.
4 Nothing in this Article shall prevent an authority having jurisdiction under Articles 5 to 10 from taking provisional measures pending the outcome of the request made under paragraph 2.

Article 36
In any case where the child is exposed to a serious danger, the competent authorities of the Contracting State where measures for the protection of the child have been taken or are under consideration, if they are informed that the child's residence has changed to, or that the child is present in another State, shall inform the authorities of that other State about the danger involved and the measures taken or under consideration.

**Article 37**

An authority shall not request or transmit any information under this Chapter if to do so would, in its opinion, be likely to place the child's person or property in danger, or constitute a serious threat to the liberty or life of a member of the child's family.

**Article 38**

1 Without prejudice to the possibility of imposing reasonable charges for the provision of services, Central Authorities and other public authorities of Contracting States shall bear their own costs in applying the provisions of this Chapter.

2 Any Contracting State may enter into agreements with one or more other Contracting States concerning the allocation of charges.

**Article 39**

Any Contracting State may enter into agreements with one or more other Contracting States with a view to improving the application of this Chapter in their mutual relations. The States which have concluded such an agreement shall transmit a copy to the depositary of the Convention.

**CHAPTER VI – GENERAL PROVISIONS**

**Article 40**

1 The authorities of the Contracting State of the child's habitual residence, or of the Contracting State where a measure of protection has been taken, may deliver to the person having parental responsibility or to the person entrusted with protection of the child's person or property, at his or her request, a certificate indicating the capacity in which that person is entitled to act and the powers conferred upon him or her.

2 The capacity and powers indicated in the certificate are presumed to be vested in that person, in the absence of proof to the contrary.
3 Each Contracting State shall designate the authorities competent to draw up the certificate.

**Article 41**

Personal data gathered or transmitted under the Convention shall be used only for the purposes for which they were gathered or transmitted.

**Article 42**

The authorities to whom information is transmitted shall ensure its confidentiality, in accordance with the law of their State.

**Article 43**

All documents forwarded or delivered under this Convention shall be exempt from legalisation or any analogous formality.

**Article 44**

Each Contracting State may designate the authorities to which requests under Articles 8, 9 and 33 are to be addressed.

**Article 45**

1 The designations referred to in Articles 29 and 44 shall be communicated to the Permanent Bureau of the Hague Conference on Private International Law.

2 The declaration referred to in Article 34, paragraph 2, shall be made to the depositary of the Convention.

**Article 46**

A Contracting State in which different systems of law or sets of rules of law apply to the protection of the child and his or her property shall not be bound to apply the rules of the Convention to conflicts solely between such different systems or sets of rules of law.

**Article 47**

In relation to a State in which two or more systems of law or sets of rules of law with regard to any matter dealt with in this Convention apply in different territorial units –

1 any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit;
2 any reference to the presence of the child in that State shall be construed as referring to presence in a territorial unit;
3 any reference to the location of property of the child in that State shall be construed as referring to location of property of the child in a territorial unit;
4 any reference to the State of which the child is a national shall be construed as referring to the territorial unit designated by the law of that State or, in the absence of relevant rules, to the territorial unit with which the child has the closest connection;
5 any reference to the State whose authorities are seised of an application for divorce or legal separation of the child's parents, or for annulment of their marriage, shall be construed as referring to the territorial unit whose authorities are seised of such application;
6 any reference to the State with which the child has a substantial connection shall be construed as referring to the territorial unit with which the child has such connection;
7 any reference to the State to which the child has been removed or in which he or she has been retained shall be construed as referring to the relevant territorial unit to which the child has been removed or in which he or she has been retained;
8 any reference to bodies or authorities of that State, other than Central Authorities, shall be construed as referring to those authorised to act in the relevant territorial unit;
9 any reference to the law or procedure or authority of the State in which a measure has been taken shall be construed as referring to the law or procedure or authority of the territorial unit in which such measure was taken;
10 any reference to the law or procedure or authority of the requested State shall be construed as referring to the law or procedure or authority of the territorial unit in which recognition or enforcement is sought.

Article 48
For the purpose of identifying the applicable law under Chapter III, in relation to a State which comprises two or more territorial units each of which has its own system of law or set of rules of law in respect of matters covered by this Convention, the following rules apply –

a if there are rules in force in such a State identifying which territorial unit's law is applicable, the law of that unit applies;

b in the absence of such rules, the law of the relevant territorial unit as defined in Article 47 applies.
**Article 49**

For the purpose of identifying the applicable law under Chapter III, in relation to a State which has two or more systems of law or sets of rules of law applicable to different categories of persons in respect of matters covered by this Convention, the following rules apply—

a if there are rules in force in such a State identifying which among such laws applies, that law applies;

b in the absence of such rules, the law of the system or the set of rules of law with which the child has the closest connection applies.

**Article 50**

This Convention shall not affect the application of the *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, as between Parties to both Conventions. Nothing, however, precludes provisions of this Convention from being invoked for the purposes of obtaining the return of a child who has been wrongfully removed or retained or of organising access rights.

**Article 51**

In relations between the Contracting States this Convention replaces the *Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors*, and the *Convention governing the guardianship of minors*, signed at The Hague 12 June 1902, without prejudice to the recognition of measures taken under the Convention of 5 October 1961 mentioned above.

**Article 52**

1 This Convention does not affect any international instrument to which Contracting States are Parties and which contains provisions on matters governed by the Convention, unless a contrary declaration is made by the States Parties to such instrument.

2 This Convention does not affect the possibility for one or more Contracting States to conclude agreements which contain, in respect of children habitually resident in any of the States Parties to such agreements, provisions on matters governed by this Convention.

3 Agreements to be concluded by one or more Contracting States on matters within the scope of this Convention do not affect, in the relationship of such States with other Contracting States, the application of the provisions of this Convention.
4 The preceding paragraphs also apply to uniform laws based on special ties of a regional or other nature between the States concerned.

Article 53
1 The Convention shall apply to measures only if they are taken in a State after the Convention has entered into force for that State.
2 The Convention shall apply to the recognition and enforcement of measures taken after its entry into force as between the State where the measures have been taken and the requested State.

Article 54
1 Any communication sent to the Central Authority or to another authority of a Contracting State shall be in the original language, and shall be accompanied by a translation into the official language or one of the official languages of the other State or, where that is not feasible, a translation into French or English.
2 However, a Contracting State may, by making a reservation in accordance with Article 60, object to the use of either French or English, but not both.

Article 55
1 A Contracting State may, in accordance with Article 60,
a reserve the jurisdiction of its authorities to take measures directed to the protection of property of a child situated on its territory;
b reserve the right not to recognise any parental responsibility or measure in so far as it is incompatible with any measure taken by its authorities in relation to that property.
2 The reservation may be restricted to certain categories of property.

Article 56
The Secretary General of the Hague Conference on Private International Law shall at regular intervals convoke a Special Commission in order to review the practical operation of the Convention.

CHAPTER VII – FINAL CLAUSES
**Article 57**

1 The Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Eighteenth Session.

2 It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the Convention.

**Article 58**

1 Any other State may accede to the Convention after it has entered into force in accordance with Article 61, paragraph 1.

2 The instrument of accession shall be deposited with the depositary.

3 Such accession shall have effect only as regards the relations between the acceding State and those Contracting States which have not raised an objection to its accession in the six months after the receipt of the notification referred to in sub-paragraph b of Article 63. Such an objection may also be raised by States at the time when they ratify, accept or approve the Convention after an accession. Any such objection shall be notified to the depositary.

**Article 59**

1 If a State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that the Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.

2 Any such declaration shall be notified to the depositary and shall state expressly the territorial units to which the Convention applies.

3 If a State makes no declaration under this Article, the Convention is to extend to all territorial units of that State.

**Article 60**

1 Any State may, not later than the time of ratification, acceptance, approval or accession, or at the time of making a declaration in terms of Article 59, make one or both of the reservations provided for in Articles 54, paragraph 2, and 55. No other reservation shall be permitted.
2 Any State may at any time withdraw a reservation it has made. The withdrawal shall be notified to the depositary.
3 The reservation shall cease to have effect on the first day of the third calendar month after the notification referred to in the preceding paragraph.

Article 61
1 The Convention shall enter into force on the first day of the month following the expiration of three months after the deposit of the third instrument of ratification, acceptance or approval referred to in Article 57.
2 Thereafter the Convention shall enter into force –
   a for each State ratifying, accepting or approving it subsequently, on the first day of the month following the expiration of three months after the deposit of its instrument of ratification, acceptance, approval or accession;
   b for each State acceding, on the first day of the month following the expiration of three months after the expiration of the period of six months provided in Article 58, paragraph 3;
   c for a territorial unit to which the Convention has been extended in conformity with Article 59, on the first day of the month following the expiration of three months after the notification referred to in that Article.

Article 62
1 A State Party to the Convention may denounce it by a notification in writing addressed to the depositary. The denunciation may be limited to certain territorial units to which the Convention applies.
2 The denunciation takes effect on the first day of the month following the expiration of twelve months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation takes effect upon the expiration of such longer period.

Article 63
The depositary shall notify the States Members of the Hague Conference on Private International Law and the States which have acceded in accordance with Article 58 of the following –
   a the signatures, ratifications, acceptances and approvals referred to in Article 57;
   b the accessions and objections raised to accessions referred to in Article 58;
c the date on which the Convention enters into force in accordance with Article 61;
d the declarations referred to in Articles 34, paragraph 2, and 59;
e the agreements referred to in Article 39;
f the reservations referred to in Articles 54, paragraph 2, and 55 and the withdrawals referred to in Article 60, paragraph 2;
g the denunciations referred to in Article 62.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at The Hague, on the 19th day of October 1996, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the States Members of the Hague Conference on Private International Law at the date of its Eighteenth Session.
The States signatory to the present Convention,
Desiring to improve co-operation among States for the international recovery of child support and other forms of family maintenance,
Aware of the need for procedures which produce results and are accessible, prompt, efficient, cost-effective, responsive and fair,
Wishing to build upon the best features of existing Hague Conventions and other international instruments, in particular the United Nations Convention on the Recovery Abroad of Maintenance of 20 June 1956,
Seeking to take advantage of advances in technologies and to create a flexible system which can continue to evolve as needs change and further advances in technology create new opportunities,
Recalling that, in accordance with Articles 3 and 27 of the United Nations Convention on the Rights of the Child of 20 November 1989,
- in all actions concerning children the best interests of the child shall be a primary consideration,
- every child has a right to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development,
- the parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child’s development, and
- States Parties should take all appropriate measures, including the conclusion of international agreements, to secure the recovery of maintenance for the child from the parent(s) or other responsible persons, in particular where such persons live in a State different from that of the child,
Have resolved to conclude this Convention and have agreed upon the following provisions -

Chapter I - Object, scope and definitions

Article 1
Object
The object of the present Convention is to ensure the effective international recovery of child support and other forms of family maintenance, in particular by -
a) establishing a comprehensive system of co-operation between the authorities of the Contracting States;
b) making available applications for the establishment of maintenance decisions;
c) providing for the recognition and enforcement of maintenance decisions; and
d) requiring effective measures for the prompt enforcement of maintenance decisions.

Article 2
Scope
(1) This Convention shall apply -
a) to maintenance obligations arising from a parent-child relationship towards a person under the age of 21 years;
b) to recognition and enforcement or enforcement of a decision for spousal support when the application is made with a claim within the scope of sub-paragraph a); and
c) with the exception of Chapters II and III, to spousal support.
(2) Any Contracting State may reserve, in accordance with Article 62, the right to limit the application of the Convention under sub-paragraph 1 a), to persons who have not attained the age of 18 years. A Contracting State which makes this reservation shall not be entitled to claim the application of the Convention to persons of the age excluded by its reservation.
(3) Any Contracting State may declare in accordance with Article 63 that it will extend the application of the whole or any part of the Convention to any maintenance obligation arising from a family relationship, parentage, marriage or affinity, including in particular obligations in respect of vulnerable persons. Any such declaration shall give rise to obligations between two Contracting States only in so far as their declarations cover the same maintenance obligations and parts of the Convention.
(4) The provisions of this Convention shall apply to children regardless of the marital status of the parents.

Article 3
Definitions
For the purposes of this Convention -
a) "creditor" means an individual to whom maintenance is owed or is alleged to be owed;
b) "debtor" means an individual who owes or who is alleged to owe maintenance;
c) "legal assistance" means the assistance necessary to enable applicants to know and assert their rights and to ensure that applications are fully and effectively dealt with in the requested State. The means of providing such assistance may include as necessary legal advice, assistance in bringing a case before an authority, legal representation and exemption from costs of proceedings;
d) "agreement in writing" means an agreement recorded in any medium, the information contained in which is accessible so as to be usable for subsequent reference;
e) "maintenance arrangement" means an agreement in writing relating to the payment of maintenance which -
i) has been formally drawn up or registered as an authentic instrument by a competent authority; or
ii) has been authenticated by, or concluded, registered or filed with a competent authority, and may be the subject of review and modification by a competent authority;
f) "vulnerable person" means a person who, by reason of an impairment or insufficiency of his or her personal faculties, is not able to support him or herself.

**Chapter II - Administrative co-operation**

**Article 4**

**Designation of Central Authorities**

(1) A Contracting State shall designate a Central Authority to discharge the duties that are imposed by the Convention on such an authority.

(2) Federal States, States with more than one system of law or States having autonomous territorial units shall be free to appoint more than one Central Authority and shall specify the territorial or personal extent of their functions. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which any communication may be addressed for transmission to the appropriate Central Authority within that State.

(3) The designation of the Central Authority or Central Authorities, their contact details, and where appropriate the extent of their functions as specified in paragraph 2, shall be communicated by a Contracting State to the Permanent Bureau of the Hague Conference on Private International Law at the time when the instrument of ratification or accession is deposited or when a declaration is submitted in accordance with Article 61.
Contracting States shall promptly inform the Permanent Bureau of any changes.

**Article 5**

**General functions of Central Authorities**

Central Authorities shall -

a) co-operate with each other and promote co-operation amongst the competent authorities in their States to achieve the purposes of the Convention;

b) seek as far as possible solutions to difficulties which arise in the application of the Convention.

**Article 6**

**Specific functions of Central Authorities**

(1) Central Authorities shall provide assistance in relation to applications under Chapter III. In particular they shall -

a) transmit and receive such applications;

b) initiate or facilitate the institution of proceedings in respect of such applications.

(2) In relation to such applications they shall take all appropriate measures -

a) where the circumstances require, to provide or facilitate the provision of legal assistance;

b) to help locate the debtor or the creditor;

c) to help obtain relevant information concerning the income and, if necessary, other financial circumstances of the debtor or creditor, including the location of assets;

d) to encourage amicable solutions with a view to obtaining voluntary payment of maintenance, where suitable by use of mediation, conciliation or similar processes;

e) to facilitate the ongoing enforcement of maintenance decisions, including any arrears;

f) to facilitate the collection and expeditious transfer of maintenance payments;

g) to facilitate the obtaining of documentary or other evidence;

h) to provide assistance in establishing parentage where necessary for the recovery of maintenance;

i) to initiate or facilitate the institution of proceedings to obtain any necessary provisional measures that are territorial in nature and the purpose of which is to secure the outcome of a pending maintenance application;

j) to facilitate service of documents.

(3) The functions of the Central Authority under this Article may, to the extent permitted under the law of its State, be performed by public bodies, or other bodies subject to the
supervision of the competent authorities of that State. The designation of any such public bodies or other bodies, as well as their contact details and the extent of their functions, shall be communicated by a Contracting State to the Permanent Bureau of the Hague Conference on Private International Law. Contracting States shall promptly inform the Permanent Bureau of any changes.

(4) Nothing in this Article or Article 7 shall be interpreted as imposing an obligation on a Central Authority to exercise powers that can be exercised only by judicial authorities under the law of the requested State.

**Article 7**

**Requests for specific measures**

(1) A Central Authority may make a request, supported by reasons, to another Central Authority to take appropriate specific measures under Article 6(2) b), c), g), h), i) and j) when no application under Article 10 is pending. The requested Central Authority shall take such measures as are appropriate if satisfied that they are necessary to assist a potential applicant in making an application under Article 10 or in determining whether such an application should be initiated.

(2) A Central Authority may also take specific measures on the request of another Central Authority in relation to a case having an international element concerning the recovery of maintenance pending in the requesting State.

**Article 8**

**Central Authority costs**

(1) Each Central Authority shall bear its own costs in applying this Convention.

(2) Central Authorities may not impose any charge on an applicant for the provision of their services under the Convention save for exceptional costs arising from a request for a specific measure under Article 7.

(3) The requested Central Authority may not recover the costs of the services referred to in paragraph 2 without the prior consent of the applicant to the provision of those services at such cost.

**Chapter III - Applications through central authorities**
Article 9
Application through Central Authorities
An application under this Chapter shall be made through the Central Authority of the Contracting State in which the applicant resides to the Central Authority of the requested State. For the purpose of this provision, residence excludes mere presence.

Article 10
Available applications
(1) The following categories of application shall be available to a creditor in a requesting State seeking to recover maintenance under this Convention -
   a) recognition or recognition and enforcement of a decision;
   b) enforcement of a decision made or recognised in the requested State;
   c) establishment of a decision in the requested State where there is no existing decision, including where necessary the establishment of parentage;
   d) establishment of a decision in the requested State where recognition and enforcement of a decision is not possible, or is refused, because of the lack of a basis for recognition and enforcement under Article 20, or on the grounds specified in Article 22 b) or e);
   e) modification of a decision made in the requested State;
   f) modification of a decision made in a State other than the requested State.
(2) The following categories of application shall be available to a debtor in a requesting State against whom there is an existing maintenance decision -
   a) recognition of a decision, or an equivalent procedure leading to the suspension, or limiting the enforcement, of a previous decision in the requested State;
   b) modification of a decision made in the requested State;
   c) modification of a decision made in a State other than the requested State.
(3) Save as otherwise provided in this Convention, the applications in paragraphs 1 and 2 shall be determined under the law of the requested State, and applications in paragraphs 1 c) to f) and 2 b) and c) shall be subject to the jurisdictional rules applicable in the requested State.

Article 11
Application contents
(1) All applications under Article 10 shall as a minimum include -
   a) a statement of the nature of the application or applications;
b) the name and contact details, including the address and date of birth of the applicant;
c) the name and, if known, address and date of birth of the respondent;
d) the name and date of birth of any person for whom maintenance is sought;
e) the grounds upon which the application is based;
f) in an application by a creditor, information concerning where the maintenance payment
should be sent or electronically transmitted;
g) save in an application under Article 10(1) a) and (2) a), any information or document
specified by declaration in accordance with Article 63 by the requested State;
h) the name and contact details of the person or unit from the Central Authority of the
requesting State responsible for processing the application.

(2) As appropriate, and to the extent known, the application shall in addition in particular
include -
a) the financial circumstances of the creditor;
b) the financial circumstances of the debtor, including the name and address of the employer
of the debtor and the nature and location of the assets of the debtor;
c) any other information that may assist with the location of the respondent.

(3) The application shall be accompanied by any necessary supporting information or
documentation including documentation concerning the entitlement of the applicant to free
legal assistance. In the case of applications under Article 10(1) a) and (2) a), the application
shall be accompanied only by the documents listed in Article 25.

(4) An application under Article 10 may be made in the form recommended and published by
the Hague Conference on Private International Law.

Article 12
Transmission, receipt and processing of applications and cases through Central
Authorities

(1) The Central Authority of the requesting State shall assist the applicant in ensuring that the
application is accompanied by all the information and documents known by it to be necessary
for consideration of the application.

(2) The Central Authority of the requesting State shall, when satisfied that the application
complies with the requirements of the Convention, transmit the application on behalf of and
with the consent of the applicant to the Central Authority of the requested State. The
application shall be accompanied by the transmittal form set out in Annex 1. The Central
Authority of the requesting State shall, when requested by the Central Authority of the
requested State, provide a complete copy certified by the competent authority in the State of origin of any document specified under Articles 16(3), 25(1) a), b) and d) and (3) b) and 30(3).

(3) The requested Central Authority shall, within six weeks from the date of receipt of the application, acknowledge receipt in the form set out in Annex 2, and inform the Central Authority of the requesting State what initial steps have been or will be taken to deal with the application, and may request any further necessary documents and information. Within the same six-week period, the requested Central Authority shall provide to the requesting Central Authority the name and contact details of the person or unit responsible for responding to inquiries regarding the progress of the application.

(4) Within three months after the acknowledgement, the requested Central Authority shall inform the requesting Central Authority of the status of the application.

(5) Requesting and requested Central Authorities shall keep each other informed of -
   a) the person or unit responsible for a particular case;
   b) the progress of the case,
and shall provide timely responses to enquiries.

(6) Central Authorities shall process a case as quickly as a proper consideration of the issues will allow.

(7) Central Authorities shall employ the most rapid and efficient means of communication at their disposal.

(8) A requested Central Authority may refuse to process an application only if it is manifest that the requirements of the Convention are not fulfilled. In such case, that Central Authority shall promptly inform the requesting Central Authority of its reasons for refusal.

(9) The requested Central Authority may not reject an application solely on the basis that additional documents or information are needed. However, the requested Central Authority may ask the requesting Central Authority to provide these additional documents or information. If the requesting Central Authority does not do so within three months or a longer period specified by the requested Central Authority, the requested Central Authority may decide that it will no longer process the application. In this case, it shall inform the requesting Central Authority of this decision.

Article 13

Means of communication
Any application made through Central Authorities of the Contracting States in accordance with this Chapter, and any document or information appended thereto or provided by a Central Authority, may not be challenged by the respondent by reason only of the medium or means of communication employed between the Central Authorities concerned.

**Article 14**

**Effective access to procedures**

(1) The requested State shall provide applicants with effective access to procedures, including enforcement and appeal procedures, arising from applications under this Chapter.

(2) To provide such effective access, the requested State shall provide free legal assistance in accordance with Articles 14 to 17 unless paragraph 3 applies.

(3) The requested State shall not be obliged to provide such free legal assistance if and to the extent that the procedures of that State enable the applicant to make the case without the need for such assistance, and the Central Authority provides such services as are necessary free of charge.

(4) Entitlements to free legal assistance shall not be less than those available in equivalent domestic cases.

(5) No security, bond or deposit, however described, shall be required to guarantee the payment of costs and expenses in proceedings under the Convention.

**Article 15**

**Free legal assistance for child support applications**

(1) The requested State shall provide free legal assistance in respect of all applications by a creditor under this Chapter concerning maintenance obligations arising from a parent-child relationship towards a person under the age of 21 years.

(2) Notwithstanding paragraph 1, the requested State may, in relation to applications other than those under Article 10(1) a) and b) and the cases covered by Article 20(4), refuse free legal assistance if it considers that, on the merits, the application or any appeal is manifestly unfounded.

**Article 16**

**Declaration to permit use of child-centred means test**

(1) Notwithstanding Article 15(1), a State may declare, in accordance with Article 63, that it will provide free legal assistance in respect of applications other than under Article 10(1) a)
and b) and the cases covered by Article 20(4), subject to a test based on an assessment of the means of the child.

(2) A State shall, at the time of making such a declaration, provide information to the Permanent Bureau of the Hague Conference on Private International Law concerning the manner in which the assessment of the child’s means will be carried out, including the financial criteria which would need to be met to satisfy the test.

(3) An application referred to in paragraph 1, addressed to a State which has made the declaration referred to in that paragraph, shall include a formal attestation by the applicant stating that the child’s means meet the criteria referred to in paragraph 2. The requested State may only request further evidence of the child’s means if it has reasonable grounds to believe that the information provided by the applicant is inaccurate.

(4) If the most favourable legal assistance provided for by the law of the requested State in respect of applications under this Chapter concerning maintenance obligations arising from a parent-child relationship towards a child is more favourable than that provided for under paragraphs 1 to 3, the most favourable legal assistance shall be provided.

**Article 17**

**Applications not qualifying under Article 15 or Article 16**

In the case of all applications under this Convention other than those under Article 15 or Article 16 -

a) the provision of free legal assistance may be made subject to a means or a merits test;

b) an applicant, who in the State of origin has benefited from free legal assistance, shall be entitled, in any proceedings for recognition or enforcement, to benefit, at least to the same extent, from free legal assistance as provided for by the law of the State addressed under the same circumstances.

**Chapter IV - Restrictions on bringing proceedings**

**Article 18**

**Limit on proceedings**

(1) Where a decision is made in a Contracting State where the creditor is habitually resident, proceedings to modify the decision or to make a new decision cannot be brought by the debtor in any other Contracting State as long as the creditor remains habitually resident in the State where the decision was made.
(2) Paragraph 1 shall not apply -
   a) where, except in disputes relating to maintenance obligations in respect of children, there is
      agreement in writing between the parties to the jurisdiction of that other Contracting State;
   b) where the creditor submits to the jurisdiction of that other Contracting State either
      expressly or by defending on the merits of the case without objecting to the jurisdiction at the
      first available opportunity;
   c) where the competent authority in the State of origin cannot, or refuses to, exercise
      jurisdiction to modify the decision or make a new decision; or
   d) where the decision made in the State of origin cannot be recognised or declared
      enforceable in the Contracting State where proceedings to modify the decision or make a new
      decision are contemplated.

Chapter V - Recognition and enforcement

Article 19
Scope of the Chapter
(1) This Chapter shall apply to a decision rendered by a judicial or administrative authority in
   respect of a maintenance obligation. The term "decision" also includes a settlement or
   agreement concluded before or approved by such an authority. A decision may include
   automatic adjustment by indexation and a requirement to pay arrears, retroactive maintenance
   or interest and a determination of costs or expenses.
   (2) If a decision does not relate solely to a maintenance obligation, the effect of this Chapter
       is limited to the parts of the decision which concern maintenance obligations.
   (3) For the purpose of paragraph 1, "administrative authority" means a public body whose
       decisions, under the law of the State where it is established -
       a) may be made the subject of an appeal to or review by a judicial authority; and
       b) have a similar force and effect to a decision of a judicial authority on the same matter.
   (4) This Chapter also applies to maintenance arrangements in accordance with Article 30.
   (5) The provisions of this Chapter shall apply to a request for recognition and enforcement
       made directly to a competent authority of the State addressed in accordance with Article 37.

Article 20
Bases for recognition and enforcement
(1) A decision made in one Contracting State ("the State of origin") shall be recognised and enforced in other Contracting States if -

a) the respondent was habitually resident in the State of origin at the time proceedings were instituted;

b) the respondent has submitted to the jurisdiction either expressly or by defending on the merits of the case without objecting to the jurisdiction at the first available opportunity;

c) the creditor was habitually resident in the State of origin at the time proceedings were instituted;

d) the child for whom maintenance was ordered was habitually resident in the State of origin at the time proceedings were instituted, provided that the respondent has lived with the child in that State or has resided in that State and provided support for the child there;

e) except in disputes relating to maintenance obligations in respect of children, there has been agreement to the jurisdiction in writing by the parties; or

f) the decision was made by an authority exercising jurisdiction on a matter of personal status or parental responsibility, unless that jurisdiction was based solely on the nationality of one of the parties.

(2) A Contracting State may make a reservation, in accordance with Article 62, in respect of paragraph 1 c), e) or f).

(3) A Contracting State making a reservation under paragraph 2 shall recognise and enforce a decision if its law would in similar factual circumstances confer or would have conferred jurisdiction on its authorities to make such a decision.

(4) A Contracting State shall, if recognition of a decision is not possible as a result of a reservation under paragraph 2, and if the debtor is habitually resident in that State, take all appropriate measures to establish a decision for the benefit of the creditor. The preceding sentence shall not apply to direct requests for recognition and enforcement under Article 19(5) or to claims for support referred to in Article 2(1) b).

(5) A decision in favour of a child under the age of 18 years which cannot be recognised by virtue only of a reservation in respect of paragraph 1 c), e) or f) shall be accepted as establishing the eligibility of that child for maintenance in the State addressed.

(6) A decision shall be recognised only if it has effect in the State of origin, and shall be enforced only if it is enforceable in the State of origin.

Article 21

Severability and partial recognition and enforcement
(1) If the State addressed is unable to recognise or enforce the whole of the decision, it shall recognise or enforce any severable part of the decision which can be so recognised or enforced.

(2) Partial recognition or enforcement of a decision can always be applied for.

**Article 22**

**Grounds for refusing recognition and enforcement**

Recognition and enforcement of a decision may be refused if -

a) recognition and enforcement of the decision is manifestly incompatible with the public policy ("ordre public") of the State addressed;

b) the decision was obtained by fraud in connection with a matter of procedure;

c) proceedings between the same parties and having the same purpose are pending before an authority of the State addressed and those proceedings were the first to be instituted;

d) the decision is incompatible with a decision rendered between the same parties and having the same purpose, either in the State addressed or in another State, provided that this latter decision fulfils the conditions necessary for its recognition and enforcement in the State addressed;

e) in a case where the respondent has neither appeared nor was represented in proceedings in the State of origin -

i) when the law of the State of origin provides for notice of proceedings, the respondent did not have proper notice of the proceedings and an opportunity to be heard; or

ii) when the law of the State of origin does not provide for notice of the proceedings, the respondent did not have proper notice of the decision and an opportunity to challenge or appeal it on fact and law; or

f) the decision was made in violation of Article 18.

**Article 23**

**Procedure on an application for recognition and enforcement**

(1) Subject to the provisions of the Convention, the procedures for recognition and enforcement shall be governed by the law of the State addressed.

(2) Where an application for recognition and enforcement of a decision has been made through Central Authorities in accordance with Chapter III, the requested Central Authority shall promptly either -
a) refer the application to the competent authority which shall without delay declare the decision enforceable or register the decision for enforcement; or
b) if it is the competent authority take such steps itself.

(3) Where the request is made directly to a competent authority in the State addressed in accordance with Article 19(5), that authority shall without delay declare the decision enforceable or register the decision for enforcement.

(4) A declaration or registration may be refused only on the ground set out in Article 22 a). At this stage neither the applicant nor the respondent is entitled to make any submissions.

(5) The applicant and the respondent shall be promptly notified of the declaration or registration, made under paragraphs 2 and 3, or the refusal thereof in accordance with paragraph 4, and may bring a challenge or appeal on fact and on a point of law.

(6) A challenge or an appeal is to be lodged within 30 days of notification under paragraph 5. If the contesting party is not resident in the Contracting State in which the declaration or registration was made or refused, the challenge or appeal shall be lodged within 60 days of notification.

(7) A challenge or appeal may be founded only on the following -
a) the grounds for refusing recognition and enforcement set out in Article 22;
b) the bases for recognition and enforcement under Article 20;
c) the authenticity or integrity of any document transmitted in accordance with Article 25(1) a), b) or d) or (3) b).

(8) A challenge or an appeal by a respondent may also be founded on the fulfilment of the debt to the extent that the recognition and enforcement relates to payments that fell due in the past.

(9) The applicant and the respondent shall be promptly notified of the decision following the challenge or the appeal.

(10) A further appeal, if permitted by the law of the State addressed, shall not have the effect of staying the enforcement of the decision unless there are exceptional circumstances.

(11) In taking any decision on recognition and enforcement, including any appeal, the competent authority shall act expeditiously.

Article 24
Alternative procedure on an application for recognition and enforcement

(1) Notwithstanding Article 23(2) to (11), a State may declare, in accordance with Article 63, that it will apply the procedure for recognition and enforcement set out in this Article.
(2) Where an application for recognition and enforcement of a decision has been made through Central Authorities in accordance with Chapter III, the requested Central Authority shall promptly either-
a) refer the application to the competent authority which shall decide on the application for recognition and enforcement; or
b) if it is the competent authority, take such a decision itself.

(3) A decision on recognition and enforcement shall be given by the competent authority after the respondent has been duly and promptly notified of the proceedings and both parties have been given an adequate opportunity to be heard.

(4) The competent authority may review the grounds for refusing recognition and enforcement set out in Article 22 a), c) and d) of its own motion. It may review any grounds listed in Articles 20, 22 and 23(7) c) if raised by the respondent or if concerns relating to those grounds arise from the face of the documents submitted in accordance with Article 25.

(5) A refusal of recognition and enforcement may also be founded on the fulfilment of the debt to the extent that the recognition and enforcement relates to payments that fell due in the past.

(6) Any appeal, if permitted by the law of the State addressed, shall not have the effect of staying the enforcement of the decision unless there are exceptional circumstances.

(7) In taking any decision on recognition and enforcement, including any appeal, the competent authority shall act expeditiously.

**Article 25**

Documents

(1) An application for recognition and enforcement under Article 23 or Article 24 shall be accompanied by the following -
a) a complete text of the decision;
b) a document stating that the decision is enforceable in the State of origin and, in the case of a decision by an administrative authority, a document stating that the requirements of Article 19(3) are met unless that State has specified in accordance with Article 57 that decisions of its administrative authorities always meet those requirements;
c) if the respondent did not appear and was not represented in the proceedings in the State of origin, a document or documents attesting, as appropriate, either that the respondent had proper notice of the proceedings and an opportunity to be heard, or that the respondent had proper notice of the decision and the opportunity to challenge or appeal it on fact and law;
d) where necessary, a document showing the amount of any arrears and the date such amount was calculated;

e) where necessary, in the case of a decision providing for automatic adjustment by indexation, a document providing the information necessary to make the appropriate calculations;

f) where necessary, documentation showing the extent to which the applicant received free legal assistance in the State of origin.

(2) Upon a challenge or appeal under Article 23(7) c) or upon request by the competent authority in the State addressed, a complete copy of the document concerned, certified by the competent authority in the State of origin, shall be provided promptly -

a) by the Central Authority of the requesting State, where the application has been made in accordance with Chapter III;

b) by the applicant, where the request has been made directly to a competent authority of the State addressed.

(3) A Contracting State may specify in accordance with Article 57 -

a) that a complete copy of the decision certified by the competent authority in the State of origin must accompany the application;

b) circumstances in which it will accept, in lieu of a complete text of the decision, an abstract or extract of the decision drawn up by the competent authority of the State of origin, which may be made in the form recommended and published by the Hague Conference on Private International Law; or

c) that it does not require a document stating that the requirements of Article 19(3) are met.

**Article 26**

**Procedure on an application for recognition**

This Chapter shall apply mutatis mutandis to an application for recognition of a decision, save that the requirement of enforceability is replaced by the requirement that the decision has effect in the State of origin.

**Article 27**

**Findings of fact**

Any competent authority of the State addressed shall be bound by the findings of fact on which the authority of the State of origin based its jurisdiction.
Article 28
No review of the merits
There shall be no review by any competent authority of the State addressed of the merits of a decision.

Article 29
Physical presence of the child or the applicant not required
The physical presence of the child or the applicant shall not be required in any proceedings in the State addressed under this Chapter.

Article 30
Maintenance arrangements
(1) A maintenance arrangement made in a Contracting State shall be entitled to recognition and enforcement as a decision under this Chapter provided that it is enforceable as a decision in the State of origin.
(2) For the purpose of Article 10(1) a) and b) and (2) a), the term "decision" includes a maintenance arrangement.
(3) An application for recognition and enforcement of a maintenance arrangement shall be accompanied by the following -
a) a complete text of the maintenance arrangement; and
b) a document stating that the particular maintenance arrangement is enforceable as a decision in the State of origin.
(4) Recognition and enforcement of a maintenance arrangement may be refused if -
a) the recognition and enforcement is manifestly incompatible with the public policy of the State addressed;
b) the maintenance arrangement was obtained by fraud or falsification;
c) the maintenance arrangement is incompatible with a decision rendered between the same parties and having the same purpose, either in the State addressed or in another State, provided that this latter decision fulfils the conditions necessary for its recognition and enforcement in the State addressed.
(5) The provisions of this Chapter, with the exception of Articles 20, 22, 23(7) and 25(1) and (3), shall apply mutatis mutandis to the recognition and enforcement of a maintenance arrangement save that -
a) a declaration or registration in accordance with Article 23(2) and (3) may be refused only on the ground set out in paragraph 4 a);
b) a challenge or appeal as referred to in Article 23(6) may be founded only on the following-
i) the grounds for refusing recognition and enforcement set out in paragraph 4;  
ii) the authenticity or integrity of any document transmitted in accordance with paragraph 3;  
c) as regards the procedure under Article 24(4), the competent authority may review of its own motion the ground for refusing recognition and enforcement set out in paragraph 4 a) of this Article. It may review all grounds listed in paragraph 4 of this Article and the authenticity or integrity of any document transmitted in accordance with paragraph 3 if raised by the respondent or if concerns relating to those grounds arise from the face of those documents.

(6) Proceedings for recognition and enforcement of a maintenance arrangement shall be suspended if a challenge concerning the arrangement is pending before a competent authority of a Contracting State.

(7) A State may declare, in accordance with Article 63, that applications for recognition and enforcement of a maintenance arrangement shall only be made through Central Authorities.

(8) A Contracting State may, in accordance with Article 62, reserve the right not to recognise and enforce a maintenance arrangement.

**Article 31**

**Decisions produced by the combined effect of provisional and confirmation orders**

Where a decision is produced by the combined effect of a provisional order made in one State and an order by an authority in another State ("the confirming State") confirming the provisional order -

a) each of those States shall be deemed for the purposes of this Chapter to be a State of origin;

b) the requirements of Article 22 e) shall be met if the respondent had proper notice of the proceedings in the confirming State and an opportunity to oppose the confirmation of the provisional order;

c) the requirement of Article 20(6) that a decision be enforceable in the State of origin shall be met if the decision is enforceable in the confirming State; and

d) Article 18 shall not prevent proceedings for the modification of the decision being commenced in either State.
Chapter VI - Enforcement by the state addressed

Article 32
Enforcement under internal law
(1) Subject to the provisions of this Chapter, enforcement shall take place in accordance with the law of the State addressed.
(2) Enforcement shall be prompt.
(3) In the case of applications through Central Authorities, where a decision has been declared enforceable or registered for enforcement under Chapter V, enforcement shall proceed without the need for further action by the applicant.
(4) Effect shall be given to any rules applicable in the State of origin of the decision relating to the duration of the maintenance obligation.
(5) Any limitation on the period for which arrears may be enforced shall be determined either by the law of the State of origin of the decision or by the law of the State addressed, whichever provides for the longer limitation period.

Article 33
Non-discrimination
The State addressed shall provide at least the same range of enforcement methods for cases under the Convention as are available in domestic cases.

Article 34
Enforcement measures
(1) Contracting States shall make available in internal law effective measures to enforce decisions under this Convention.
(2) Such measures may include -
a) wage withholding;
b) garnishment from bank accounts and other sources;
c) deductions from social security payments;
d) lien on or forced sale of property;
e) tax refund withholding;
f) withholding or attachment of pension benefits;
g) credit bureau reporting;
h) denial, suspension or revocation of various licenses (for example, driving licenses);
i) the use of mediation, conciliation or similar processes to bring about voluntary compliance.

**Article 35**  
**Transfer of funds**
(1) Contracting States are encouraged to promote, including by means of international agreements, the use of the most cost-effective and efficient methods available to transfer funds payable as maintenance.
(2) A Contracting State, under whose law the transfer of funds is restricted, shall accord the highest priority to the transfer of funds payable under this Convention.

**Chapter VII - Public bodies**

**Article 36**  
**Public bodies as applicants**
(1) For the purposes of applications for recognition and enforcement under Article 10(1) a) and b) and cases covered by Article 20(4), "creditor" includes a public body acting in place of an individual to whom maintenance is owed or one to which reimbursement is owed for benefits provided in place of maintenance.
(2) The right of a public body to act in place of an individual to whom maintenance is owed or to seek reimbursement of benefits provided to the creditor in place of maintenance shall be governed by the law to which the body is subject.
(3) A public body may seek recognition or claim enforcement of -
   a) a decision rendered against a debtor on the application of a public body which claims payment of benefits provided in place of maintenance;
   b) a decision rendered between a creditor and debtor to the extent of the benefits provided to the creditor in place of maintenance.
(4) The public body seeking recognition or claiming enforcement of a decision shall upon request furnish any document necessary to establish its right under paragraph 2 and that benefits have been provided to the creditor.

**Chapter VIII - General provisions**

**Article 37**  
**Direct requests to competent authorities**
(1) The Convention shall not exclude the possibility of recourse to such procedures as may be available under the internal law of a Contracting State allowing a person (an applicant) to seise directly a competent authority of that State in a matter governed by the Convention including, subject to Article 18, for the purpose of having a maintenance decision established or modified.

(2) Articles 14(5) and 17 b) and the provisions of Chapters V, VI, VII and this Chapter, with the exception of Articles 40(2), 42, 43(3), 44(3), 45 and 55, shall apply in relation to a request for recognition and enforcement made directly to a competent authority in a Contracting State.

(3) For the purpose of paragraph 2, Article 2(1) a) shall apply to a decision granting maintenance to a vulnerable person over the age specified in that sub-paragraph where such decision was rendered before the person reached that age and provided for maintenance beyond that age by reason of the impairment.

**Article 38**

**Protection of personal data**

Personal data gathered or transmitted under the Convention shall be used only for the purposes for which they were gathered or transmitted.

**Article 39**

**Confidentiality**

Any authority processing information shall ensure its confidentiality in accordance with the law of its State.

**Article 40**

**Non-disclosure of information**

(1) An authority shall not disclose or confirm information gathered or transmitted in application of this Convention if it determines that to do so could jeopardise the health, safety or liberty of a person.

(2) A determination to this effect made by one Central Authority shall be taken into account by another Central Authority, in particular in cases of family violence.

(3) Nothing in this Article shall impede the gathering and transmitting of information by and between authorities in so far as necessary to carry out the obligations under the Convention.
Article 41
No legalisation
No legalisation or similar formality may be required in the context of this Convention.

Article 42
Power of attorney
The Central Authority of the requested State may require a power of attorney from the applicant only if it acts on his or her behalf in judicial proceedings or before other authorities, or in order to designate a representative so to act.

Article 43
Recovery of costs
(1) Recovery of any costs incurred in the application of this Convention shall not take precedence over the recovery of maintenance.
(2) A State may recover costs from an unsuccessful party.
(3) For the purposes of an application under Article 10(1) b) to recover costs from an unsuccessful party in accordance with paragraph 2, the term "creditor" in Article 10(1) shall include a State.
(4) This Article shall be without prejudice to Article 8.

Article 44
Language requirements
(1) Any application and related documents shall be in the original language, and shall be accompanied by a translation into an official language of the requested State or another language which the requested State has indicated, by way of declaration in accordance with Article 63, it will accept, unless the competent authority of that State dispenses with translation.
(2) A Contracting State which has more than one official language and cannot, for reasons of internal law, accept for the whole of its territory documents in one of those languages shall, by declaration in accordance with Article 63, specify the language in which such documents or translations thereof shall be drawn up for submission in the specified parts of its territory.
(3) Unless otherwise agreed by the Central Authorities, any other communications between such Authorities shall be in an official language of the requested State or in either English or
French. However, a Contracting State may, by making a reservation in accordance with Article 62, object to the use of either English or French.

**Article 45**

**Means and costs of translation**

(1) In the case of applications under Chapter III, the Central Authorities may agree in an individual case or generally that the translation into an official language of the requested State may be made in the requested State from the original language or from any other agreed language. If there is no agreement and it is not possible for the requesting Central Authority to comply with the requirements of Article 44(1) and (2), then the application and related documents may be transmitted with translation into English or French for further translation into an official language of the requested State.

(2) The cost of translation arising from the application of paragraph 1 shall be borne by the requesting State unless otherwise agreed by Central Authorities of the States concerned.

(3) Notwithstanding Article 8, the requesting Central Authority may charge an applicant for the costs of translation of an application and related documents, except in so far as those costs may be covered by its system of legal assistance.

**Article 46**

**Non-unified legal systems - interpretation**

(1) In relation to a State in which two or more systems of law or sets of rules of law with regard to any matter dealt with in this Convention apply in different territorial units -

a) any reference to the law or procedure of a State shall be construed as referring, where appropriate, to the law or procedure in force in the relevant territorial unit;

b) any reference to a decision established, recognised, recognised and enforced, enforced or modified in that State shall be construed as referring, where appropriate, to a decision established, recognised, recognised and enforced, enforced or modified in the relevant territorial unit;

c) any reference to a judicial or administrative authority in that State shall be construed as referring, where appropriate, to a judicial or administrative authority in the relevant territorial unit;

d) any reference to competent authorities, public bodies, and other bodies of that State, other than Central Authorities, shall be construed as referring, where appropriate, to those authorised to act in the relevant territorial unit;
e) any reference to residence or habitual residence in that State shall be construed as referring, where appropriate, to residence or habitual residence in the relevant territorial unit;

f) any reference to location of assets in that State shall be construed as referring, where appropriate, to the location of assets in the relevant territorial unit;

g) any reference to a reciprocity arrangement in force in a State shall be construed as referring, where appropriate, to a reciprocity arrangement in force in the relevant territorial unit;

h) any reference to free legal assistance in that State shall be construed as referring, where appropriate, to free legal assistance in the relevant territorial unit;

i) any reference to a maintenance arrangement made in a State shall be construed as referring, where appropriate, to a maintenance arrangement made in the relevant territorial unit;

j) any reference to recovery of costs by a State shall be construed as referring, where appropriate, to the recovery of costs by the relevant territorial unit.

(2) This Article shall not apply to a Regional Economic Integration Organisation.

Article 47

Non-unified legal systems - substantive rules

(1) A Contracting State with two or more territorial units in which different systems of law apply shall not be bound to apply this Convention to situations which involve solely such different territorial units.

(2) A competent authority in a territorial unit of a Contracting State with two or more territorial units in which different systems of law apply shall not be bound to recognise or enforce a decision from another Contracting State solely because the decision has been recognised or enforced in another territorial unit of the same Contracting State under this Convention.

(3) This Article shall not apply to a Regional Economic Integration Organisation.

Article 48

Co-ordination with prior Hague Maintenance Conventions

In relations between the Contracting States, this Convention replaces, subject to Article 56(2), the Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations and the Hague Convention of 15 April 1958 concerning the recognition and enforcement of decisions relating to maintenance obligations
towards children in so far as their scope of application as between such States coincides with the scope of application of this Convention.

**Article 49**

Co-ordination with the 1956 New York Convention

In relations between the Contracting States, this Convention replaces the United Nations Convention on the Recovery Abroad of Maintenance of 20 June 1956, in so far as its scope of application as between such States coincides with the scope of application of this Convention.

**Article 50**

Relationship with prior Hague Conventions on service of documents and taking of evidence


**Article 51**

Co-ordination of instruments and supplementary agreements

(1) This Convention does not affect any international instrument concluded before this Convention to which Contracting States are Parties and which contains provisions on matters governed by this Convention.

(2) Any Contracting State may conclude with one or more Contracting States agreements, which contain provisions on matters governed by the Convention, with a view to improving the application of the Convention between or among themselves, provided that such agreements are consistent with the objects and purpose of the Convention and do not affect, in the relationship of such States with other Contracting States, the application of the provisions of the Convention. The States which have concluded such an agreement shall transmit a copy to the depositary of the Convention.

(3) Paragraphs 1 and 2 shall also apply to reciprocity arrangements and to uniform laws based on special ties between the States concerned.

(4) This Convention shall not affect the application of instruments of a Regional Economic Integration Organisation that is a Party to this Convention, adopted after the conclusion of the Convention, on matters governed by the Convention provided that such instruments do not
affect, in the relationship of Member States of the Regional Economic Integration Organisation with other Contracting States, the application of the provisions of the Convention. As concerns the recognition or enforcement of decisions as between Member States of the Regional Economic Integration Organisation, the Convention shall not affect the rules of the Regional Economic Integration Organisation, whether adopted before or after the conclusion of the Convention.

**Article 52**

**Most effective rule**

(1) This Convention shall not prevent the application of an agreement, arrangement or international instrument in force between the requesting State and the requested State, or a reciprocity arrangement in force in the requested State that provides for:

a) broader bases for recognition of maintenance decisions, without prejudice to Article 22 f) of the Convention;

b) simplified, more expeditious procedures on an application for recognition or recognition and enforcement of maintenance decisions;

c) more beneficial legal assistance than that provided for under Articles 14 to 17; or

d) procedures permitting an applicant from a requesting State to make a request directly to the Central Authority of the requested State.

(2) This Convention shall not prevent the application of a law in force in the requested State that provides for more effective rules as referred to in paragraph 1 a) to c). However, as regards simplified, more expeditious procedures referred to in paragraph 1 b), they must be compatible with the protection offered to the parties under Articles 23 and 24, in particular as regards the rights of the parties to be duly notified of the proceedings and be given adequate opportunity to be heard and as regards the effects of any challenge or appeal.

**Article 53**

**Uniform interpretation**

In the interpretation of this Convention, regard shall be had to its international character and to the need to promote uniformity in its application.

**Article 54**

**Review of practical operation of the Convention**
(1) The Secretary General of the Hague Conference on Private International Law shall at regular intervals convene a Special Commission in order to review the practical operation of the Convention and to encourage the development of good practices under the Convention.
(2) For the purpose of such review, Contracting States shall co-operate with the Permanent Bureau of the Hague Conference on Private International Law in the gathering of information, including statistics and case law, concerning the practical operation of the Convention.

**Article 55**

**Amendment of forms**

(1) The forms annexed to this Convention may be amended by a decision of a Special Commission convened by the Secretary General of the Hague Conference on Private International Law to which all Contracting States and all Members shall be invited. Notice of the proposal to amend the forms shall be included in the agenda for the meeting.
(2) Amendments adopted by the Contracting States present at the Special Commission shall come into force for all Contracting States on the first day of the seventh calendar month after the date of their communication by the depositary to all Contracting States.
(3) During the period provided for in paragraph 2 any Contracting State may by notification in writing to the depositary make a reservation, in accordance with Article 62, with respect to the amendment. The State making such reservation shall, until the reservation is withdrawn, be treated as a State not Party to the present Convention with respect to that amendment.

**Article 56**

**Transitional provisions**

(1) The Convention shall apply in every case where -
   a) a request pursuant to Article 7 or an application pursuant to Chapter III has been received by the Central Authority of the requested State after the Convention has entered into force between the requesting State and the requested State;
   b) a direct request for recognition and enforcement has been received by the competent authority of the State addressed after the Convention has entered into force between the State of origin and the State addressed.
(2) With regard to the recognition and enforcement of decisions between Contracting States to this Convention that are also Parties to either of the Hague Maintenance Conventions mentioned in Article 48, if the conditions for the recognition and enforcement under this
Convention prevent the recognition and enforcement of a decision given in the State of origin before the entry into force of this Convention for that State, that would otherwise have been recognised and enforced under the terms of the Convention that was in effect at the time the decision was rendered, the conditions of that Convention shall apply.

(3) The State addressed shall not be bound under this Convention to enforce a decision or a maintenance arrangement, in respect of payments falling due prior to the entry into force of the Convention between the State of origin and the State addressed, except for maintenance obligations arising from a parent-child relationship towards a person under the age of 21 years.

**Article 57**

**Provision of information concerning laws, procedures and services**

(1) A Contracting State, by the time its instrument of ratification or accession is deposited or a declaration is submitted in accordance with Article 61 of the Convention, shall provide the Permanent Bureau of the Hague Conference on Private International Law with:

a) a description of its laws and procedures concerning maintenance obligations;

b) a description of the measures it will take to meet the obligations under Article 6;

c) a description of how it will provide applicants with effective access to procedures, as required under Article 14;

d) a description of its enforcement rules and procedures, including any limitations on enforcement, in particular debtor protection rules and limitation periods;

e) any specification referred to in Article 25(1) b) and (3).

(2) Contracting States may, in fulfilling their obligations under paragraph 1, utilise a country profile form recommended and published by the Hague Conference on Private International Law.

(3) Information shall be kept up to date by the Contracting States.

**Chapter IX - Final provisions**

**Article 58**

**Signature, ratification and accession**

(1) The Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Twenty-First Session and by the other States which participated in that Session.
(2) It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the Convention.

(3) Any other State or Regional Economic Integration Organisation may accede to the Convention after it has entered into force in accordance with Article 60(1).

(4) The instrument of accession shall be deposited with the depositary.

(5) Such accession shall have effect only as regards the relations between the acceding State and those Contracting States which have not raised an objection to its accession in the 12 months after the date of the notification referred to in Article 65. Such an objection may also be raised by States at the time when they ratify, accept or approve the Convention after an accession. Any such objection shall be notified to the depositary.

Article 59
Regional Economic Integration Organisations

(1) A Regional Economic Integration Organisation which is constituted solely by sovereign States and has competence over some or all of the matters governed by this Convention may similarly sign, accept, approve or accede to this Convention. The Regional Economic Integration Organisation shall in that case have the rights and obligations of a Contracting State, to the extent that the Organisation has competence over matters governed by the Convention.

(2) The Regional Economic Integration Organisation shall, at the time of signature, acceptance, approval or accession, notify the depositary in writing of the matters governed by this Convention in respect of which competence has been transferred to that Organisation by its Member States. The Organisation shall promptly notify the depositary in writing of any changes to its competence as specified in the most recent notice given under this paragraph.

(3) At the time of signature, acceptance, approval or accession, a Regional Economic Integration Organisation may declare in accordance with Article 63 that it exercises competence over all the matters governed by this Convention and that the Member States which have transferred competence to the Regional Economic Integration Organisation in respect of the matter in question shall be bound by this Convention by virtue of the signature, acceptance, approval or accession of the Organisation.

(4) For the purposes of the entry into force of this Convention, any instrument deposited by a Regional Economic Integration Organisation shall not be counted unless the Regional Economic Integration Organisation makes a declaration in accordance with paragraph 3.
(5) Any reference to a "Contracting State" or "State" in this Convention shall apply equally to a Regional Economic Integration Organisation that is a Party to it, where appropriate. In the event that a declaration is made by a Regional Economic Integration Organisation in accordance with paragraph 3, any reference to a "Contracting State" or "State" in this Convention shall apply equally to the relevant Member States of the Organisation, where appropriate.

**Article 60**

**Entry into force**

(1) The Convention shall enter into force on the first day of the month following the expiration of three months after the deposit of the second instrument of ratification, acceptance or approval referred to in Article 58.

(2) Thereafter the Convention shall enter into force -

a) for each State or Regional Economic Integration Organisation referred to in Article 59(1) subsequently ratifying, accepting or approving it, on the first day of the month following the expiration of three months after the deposit of its instrument of ratification, acceptance or approval;

b) for each State or Regional Economic Integration Organisation referred to in Article 58(3) on the day after the end of the period during which objections may be raised in accordance with Article 58(5);

c) for a territorial unit to which the Convention has been extended in accordance with Article 61, on the first day of the month following the expiration of three months after the notification referred to in that Article.

**Article 61**

**Declarations with respect to non-unified legal systems**

(1) If a State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in the Convention, it may at the time of signature, ratification, acceptance, approval or accession declare in accordance with Article 63 that this Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.

(2) Any such declaration shall be notified to the depositary and shall state expressly the territorial units to which the Convention applies.
(3) If a State makes no declaration under this Article, the Convention shall extend to all territorial units of that State.

(4) This Article shall not apply to a Regional Economic Integration Organisation.

**Article 62**

**Reservations**

(1) Any Contracting State may, not later than the time of ratification, acceptance, approval or accession, or at the time of making a declaration in terms of Article 61, make one or more of the reservations provided for in Articles 2(2), 20(2), 30(8), 44(3) and 55(3). No other reservation shall be permitted.

(2) Any State may at any time withdraw a reservation it has made. The withdrawal shall be notified to the depositary.

(3) The reservation shall cease to have effect on the first day of the third calendar month after the notification referred to in paragraph 2.

(4) Reservations under this Article shall have no reciprocal effect with the exception of the reservation provided for in Article 2(2).

**Article 63**

**Declarations**

(1) Declarations referred to in Articles 2(3), 11(1) g), 16(1), 24(1), 30(7), 44(1) and (2), 59(3) and 61(1), may be made upon signature, ratification, acceptance, approval or accession or at any time thereafter, and may be modified or withdrawn at any time.

(2) Declarations, modifications and withdrawals shall be notified to the depositary.

(3) A declaration made at the time of signature, ratification, acceptance, approval or accession shall take effect simultaneously with the entry into force of this Convention for the State concerned.

(4) A declaration made at a subsequent time, and any modification or withdrawal of a declaration, shall take effect on the first day of the month following the expiration of three months after the date on which the notification is received by the depositary.

**Article 64**

**Denunciation**
(1) A Contracting State to the Convention may denounce it by a notification in writing addressed to the depositary. The denunciation may be limited to certain territorial units of a multi-unit State to which the Convention applies.

(2) The denunciation shall take effect on the first day of the month following the expiration of 12 months after the date on which the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation shall take effect upon the expiration of such longer period after the date on which the notification is received by the depositary.

Article 65

Notification

The depositary shall notify the Members of the Hague Conference on Private International Law, and other States and Regional Economic Integration Organisations which have signed, ratified, accepted, approved or acceded in accordance with Articles 58 and 59 of the following:

a) the signatures, ratifications, acceptances and approvals referred to in Articles 58 and 59;
b) the accessions and objections raised to accessions referred to in Articles 58(3) and (5) and 59;
c) the date on which the Convention enters into force in accordance with Article 60;
d) the declarations referred to in Articles 2(3), 11(1) g), 16(1), 24(1), 30(7), 44(1) and (2), 59(3) and 61(1);
e) the agreements referred to in Article 51(2);
f) the reservations referred to in Articles 2(2), 20(2), 30(8), 44(3) and 55(3), and the withdrawals referred to in Article 62(2);
g) the denunciations referred to in Article 64.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at The Hague, on the 23rd day of November 2007, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the Members of the Hague Conference on Private International Law at the date of its Twenty-First Session and to each of the other States which have participated in that Session.
ANNEX 1

Transmittal form under Article 12(2)

CONFIDENTIALITY AND PERSONAL DATA PROTECTION NOTICE

Personal data gathered or transmitted under the Convention shall be used only for the purposes for which it was gathered or transmitted. Any authority processing such data shall ensure its confidentiality, in accordance with the law of its State.

An authority shall not disclose or confirm information gathered or transmitted in application of this Convention if it determines that to do so could jeopardise the health, safety or liberty of a person in accordance with Article 40.

A determination of non-disclosure has been made by a Central Authority in accordance with Article 40.

1. Requesting Central Authority
   a. Address
   b. Telephone number
   c. Fax number
   d. E-mail
   e. Reference number

2. Contact person in requesting State
   a. Address (if different)
   b. Telephone number (if different)
   c. Fax number (if different)
   d. E-mail (if different)
   e. Language(s)

3. Requested Central Authority ..................................................................................
   Address ...............................................................................................................
   ...................................................................................................................

4. Particulars of the applicant
   a. Family name(s): ...................................................................................
   b. Given name(s): .......................................................................................
   c. Date of birth: ..............................................................(dd/mm/yyyy)
   or
   d. Name of the public body: .................................................................
   ...................................................................................................................

5. Particulars of the person(s) for whom maintenance is sought or payable
a. The person is the same as the applicant named in point 4
b. i. Family name(s): .................................................................
   Given name(s): ...........................................................................
   Date of birth: ................................................................. (dd/mm/yyyy)
ii. Family name(s): .................................................................
   Given name(s): ...........................................................................
   Date of birth: ................................................................. (dd/mm/yyyy)
iii. Family name(s): .................................................................
   Given name(s): ...........................................................................
   Date of birth: ................................................................. (dd/mm/yyyy)

6. Particulars of the debtor
a. The person is the same as the applicant named in point 4
b. Family name(s): .................................................................
c. Given name(s): ...........................................................................
d. Date of birth: ................................................................. (dd/mm/yyyy)

7. This transmittal form concerns and is accompanied by an application under:
   Article 10(1) a)
   Article 10(1) b)
   Article 10(1) c)
   Article 10(1) d)
   Article 10(1) e)
   Article 10(1) f)
   Article 10(2) a)
   Article 10(2) b)
   Article 10(2) c)

8. The following documents are appended to the application:
a. For the purpose of an application under Article 10(1) a) and:
   In accordance with Article 25:
   Complete text of the decision (Art. 25(1) a))
   Abstract or extract of the decision drawn up by the competent authority of the State of origin
   (Art. 25(3) b)) (if applicable)
   Document stating that the decision is enforceable in the State of origin and, in the case of a decision by an administrative authority, a document stating that the requirements of Article 19(3) are met unless that State has specified in accordance with Article 57 that decisions of
its administrative authorities always meet those requirements (Art. 25(1) b)) or if Article 25(3) c) is applicable.

If the respondent did not appear and was not represented in the proceedings in the State of origin, a document or documents attesting, as appropriate, either that the respondent had proper notice of the proceedings and an opportunity to be heard, or that the respondent had proper notice of the decision and the opportunity to challenge or appeal it on fact and law (Art. 25(1) c))

Where necessary, a document showing the amount of any arrears and the date such amount was calculated (Art. 25(1) d))

Where necessary, a document providing the information necessary to make appropriate calculations in case of a decision providing for automatic adjustment by indexation (Art. 25(1) e))

Where necessary, documentation showing the extent to which the applicant received free legal assistance in the State of origin (Art. 25(1) f))

In accordance with Article 30(3):

Complete text of the maintenance arrangement (Art. 30(3) a))

A document stating that the particular maintenance arrangement is enforceable as a decision in the State of origin (Art. 30(3) b))

Any other documents accompanying the application (e.g., if required, a document for the purpose of Art. 36(4)):

...................................................................................................................................................
...................................................................................................................................................

b. For the purpose of an application under Article 10(1) b), c), d), e), f) and (2) a), b) or c), the following number of supporting documents (excluding the transmittal form and the application itself) in accordance with Article 11(3):

Article 10(1) b) ............
Article 10(1) c) ............
Article 10(1) d) ............
Article 10(1) e) ............
Article 10(1) f) ............
Article 10(2) a) ............
Article 10(2) b) ............
Article 10(2) c) ............
ANEX 2
Acknowledgement form under Article 12(3)

CONFIDENTIALITY AND PERSONAL DATA PROTECTION NOTICE

Personal data gathered or transmitted under the Convention shall be used only for the purposes for which it was gathered or transmitted. Any authority processing such data shall ensure its confidentiality, in accordance with the law of its State.

An authority shall not disclose or confirm information gathered or transmitted in application of this Convention if it determines that to do so could jeopardise the health, safety or liberty of a person in accordance with Article 40.

A determination of non-disclosure has been made by a Central Authority in accordance with Article 40.

1. Requested Central Authority
   a. Address
   b. Telephone number
   c. Fax number
   d. E-mail
   e. Reference number

2. Contact person in requested State
   a. Address (if different)
   b. Telephone number (if different)
   c. Fax number (if different)
   d. E-mail (if different)
   e. Language(s)

3. Requesting Central Authority ..............................................................
   Contact person ..............................................................
   Address ..............................................................
   ..............................................................

4. The requested Central Authority acknowledges receipt on ........................................(dd/mm/yyyy) of the transmittal form from the requesting Central Authority (reference
number ..................; dated ..................... (dd/mm/yyyy)) concerning the following application under:
Article 10(1) a)
Article 10(1) b)
Article 10(1) c)
Article 10(1) d)
Article 10(1) e)
Article 10(1) f)
Article 10(2) a)
Article 10(2) b)
Article 10(2) c)
Family name(s) of applicant: .................................................................................................
Family name(s) of the person(s) for whom maintenance is sought or payable:
................................................................................................................................................
................................................................................................................................................
................................................................................................................................................
Family name(s) of debtor: ........................................................................................................
5. Initial steps taken by the requested Central Authority:
The file is complete and is under consideration
See attached status of application report
Status of application report will follow
Please provide the following additional information and / or documentation:
................................................................................................................................................
................................................................................................................................................
The requested Central Authority refuses to process this application as it is manifest that the requirements of the Convention are not fulfilled (Art. 12(8)). The reasons:
are set out in an attached document
will be set out in a document to follow
The requested Central Authority requests that the requesting Central Authority inform it of any change in the status of the application.
Name: ................................................................. (in block letters)
Date: ......................................................
Authorised representative of the Central Authority (dd/mm/yyyy)