

Namibia

## Child Care and Protection Act, 2015

Act 3 of 2015

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# Child Care and Protection Act, 2015

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Republic of Namibia  
**Annotated Statutes**

## **Child Care and Protection Act, 2015**

**Act 3 of 2015**

Published in Government Gazette 5744 on 29 May 2015

**Assented to on 22 April 2015**

**Commenced on 30 January 2019 by Commencement of Child Care and Protection Act, 2015**

**[This is the version of this document as it was from 29 May 2015 to 13 November 2019.]**

### **ACT**

To give effect to the rights of children as contained in the Namibian Constitution and international agreements binding on Namibia; to set out principles relating to the best interests of children; to set the age of majority at 18 years; to provide for the establishment of a National Advisory Council on Children; to provide for the appointment of a Children's Advocate; to provide for the establishment of a Children's Fund; to provide for appointment and designation of social workers, social auxiliary workers, community child care workers and probation officers; to provide for designation of private social workers and child protection organisations for certain purposes; to make provisions relating to children's courts, court procedures and court orders; to provide for residential child care facilities, places of care and shelters; to provide for the status and matters relating to certain children; to provide for proof of parentage and parental responsibilities and rights in respect of children born outside marriage and children of divorced parents; to provide for custody and guardianship of children on the death of the person having custody or guardianship; to provide for parental responsibilities and rights, parenting plans and their formalisation; to provide for kinship care of children; 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 adoption and inter-country adoption of children; to combat the trafficking of children; to provide for additional measures for the protection of children; to provide for provisions relating to persons unfit to work with children; to provide for grants payable in respect of certain children; to create new offences relating to children; to repeal certain laws, including the Children's Act, 1960, Children's Status Act, 2006 and the Age of Majority Act, 1957; to amend the Combating of Domestic Violence Act, 2003, the Combating of Immoral Practices Act, 1980, the Liquor Act, 1998, the Administration of Estates Act, 1965, the Marriage Act, 1961 and the Criminal Procedure Act, 1977; to give effect to 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 on Namibia; and to provide for incidental matters.

BE IT ENACTED as passed by the Parliament, and assented to by the President, of the Republic of Namibia as follows:

## Chapter 1 DEFINITIONS

### 1. Definitions

In this Act, unless the context indicates otherwise -

**“abandoned”**, in relation to a child, means a child -

- (a) who has obviously been deserted by the parent, guardian or care-giver;
- (b) who has for no apparent reason, had no contact with the parent, guardian or care-giver for a period of at least three months;
- (c) who has been left at any of the premises contemplated in section 227(1)(a) and not been claimed after the expiry of the period referred to in section 227(6); or
- (d) in respect of whom the whereabouts of the parents are unknown or the parents cannot be traced;

**“abuse”**, in relation to a child, means any form of harm or ill-treatment deliberately inflicted on a child, including -

- (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 6; or
- (g) exposing or subjecting a child to a social, cultural or religious practice which is detrimental to his or her well-being;

**“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 177;

**“Adoption Register”** means a register referred to in section 183;

**“African Charter on the Rights and Welfare of the Child”** means the African Charter on the Rights and Welfare of the Child, a copy of the English text of which is set out in Schedule 2;

**“age of majority”** means the age of majority referred to in section 10;

**“alternative care”** means care of a child, 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 child detention centre.

**[The full stop at the end of paragraph (c) should be a semicolon.]**

**“board”** means a board of management of a children’s home or a child detention 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 while the child is in a place of safety;
- (e) the person who is the head of a facility where a child has been placed; and
- (f) the child who is the head of a child-headed household;

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

**“child detention centre”** means a facility referred to in section 69, and a reference in any other law to a “place of detention” or a “reform school” for juvenile offenders is deemed to be a reference to a child detention centre;

**“child-headed household”** means a household recognised as such in terms of section 225;

**“cluster foster care”** means a service, operated and managed by a non-profit organisation registered in terms of this Act, and providing support, mentoring, supervision and advice to foster parents;

**“Children’s Advocate”** means the Children’s Advocate appointed in terms of section 25;

**“Children’s Act”** means the Children’s Act, 1960 (Act [No. 33 of 1960](#));

**“children’s commissioner”** means a magistrate contemplated in section 38;

**“children’s court assistant”** means a children’s court assistant referred to in section 38(10) and (11)(b);

**“children’s court”** means the children’s court referred to in section 38(1);

**“Children’s Fund”** means the Children’s Fund established in terms of section 26;

**“children’s home”** means a facility referred to in section 68;

**“child protection hearing”** means a hearing, contemplated in section 141, which is held to determine whether a child is in need of protective services;

**“community child care worker”** means a community child care worker contemplated in section 34;

**“contribution order”** means an order referred to in section 160(2), and includes a provisional contribution order referred to in section 161(2);

**“Convention”** means the Hague Convention on Protection of Children and Co-operation in respect of Inter-country Adoption, the text of which is set out in Schedule 5;

**“Council”** means the National Advisory Council on Children established in terms of section 11;

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

**“debt bondage”** means the involuntary status or condition that arises from a pledge by a person of -

- (a) his or her personal services; or
- (b) the personal services of another person under his or her control,

as security for a debt owed, or claimed to be owed, including any debt incurred or claimed to be incurred after the pledge is given;

**“designated child protection organisation”** means a child protection organisation designated by the Minister in terms of section 33;

**“designated social worker”** means a social worker in the employment of the State or a social worker in private practice appointed or designated by the Minister in terms of section 33(1)(a) or (b) for a specific purpose or purposes or a social worker in the employment of a child protection organisation designated by the Minister in terms of section 33(1)(c) for a specific purpose or purposes;

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

**“early childhood development centre”** means a facility referred to in section 66;

**“early intervention services”** means services referred to in section 130(2);

**“family meeting”**, for purposes of sections 36(1)(b), 44(1)(b), 126(a) and 130(4)(h) 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 set out 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, step-parent, 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 or family member or extended family member of the child, in terms of an order of the children’s court as contemplated in section 145(3)(f)(i);

**“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 2 of Chapter 13;

**“in need of protective services”**, in relation to a child, means a child who is in a situation contemplated in section 131(1);

**“kinship care”** means care of a child by a member of the child’s family or extended family as contemplated in section 123;

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

**“legal practitioner”** 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](#));

**“Magistrates’ Courts Act”** means the Magistrates’ Courts Act, 1944 (Act [No. 32 of 1944](#));

**“magistrate’s court”** means a magistrate’s court as defined in the Magistrates’ Courts Act;

**“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, where such a marriage is recognised as a marriage under 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](#)), and a member of a municipal police service contemplated in section 43C of the Police Act, 1990 (Act [No. 19 of 1990](#));

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

**“Minister”** means the Minister responsible for protection of children;

**“Ministry”** means the Ministry responsible for protection of children;

**“neglect”**, in relation to a child, means a failure by a person who is taking care of a child to provide for the child’s basic physical, intellectual, emotional or social needs;

**“order”** includes -

- (a) a refusal to make any order;
- (b) a variation or withdrawal of any order made in terms of this Act; and
- (c) a certificate of guardianship issued in terms of section 101 or a refusal to issue such a certificate.

**“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 Namibian Constitution; 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 Part 2 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 conferred on a person at common law, including those referred to in sections 6(2), 7 and 118;

**“parenting plan”** means a plan referred to in section 119;

**“permanent alternative care”** means alternative care which is expected to last until the child reaches the age of majority;

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

**“place of care”** means a place of care referred to in section 65;

**“place of safety”** means a home or facility referred to in section 64;

**“prevention services”** means services referred to in section 130(1);

**“prescribed”** means prescribed by regulation made under this Act;

**“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 appointed or designated by the Minister as a probation officer in terms of section 35 or a person who is considered to be a probation officer in terms of section 35;

**“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;

**“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;

**“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 a child detention 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](#));

**“secure care”** means the care of a child which involves the physical containment of children who require such containment to prevent potential harm to themselves or others, including the physical containment of children awaiting trial or sentence;

**“shelter”** means a facility referred to in section 67;

**“slavery”** means 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;

**“social auxiliary worker”** means a person, contemplated in section 34, 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](#));

**“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](#));

**“this Act”** includes regulations and a notice made or issued in terms of this Act;

**[The definition of “this Act” should be placed after the definition of “temporary safe care” for correct alphabetical order.]**

**“temporary safe care”**, in relation to a child, means care of a child in a residential child care facility or by a person approved as a foster parent in terms of section 155 or by a family member of the child 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;

**“unaccompanied foreign child”** means a child who is not a citizen or resident of Namibia, including a refugee or migrant child, who has been separated from both parents or other adult family members and is not being cared for by an adult who, by law or custom, is responsible for doing so;

**“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 4;



**“United Nations Convention on the Rights of the Child”** means the Convention on the Rights of the Child adopted by the General Assembly of the United Nations on 20 November 1989, a copy of the English text of which is set out in Schedule 3;

**“victim of child trafficking”** includes a child who is suspected on reasonable grounds to have been trafficked.

## Chapter 2

### OBJECTS OF ACT, GENERAL PRINCIPLES AND AGE OF MAJORITY

#### 2. Objects of Act

- (1) The objects 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 Namibian Constitution;
  - (c) give effect to Namibia’s obligations concerning the well-being, development and protection of children 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 on 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 a child does not suffer 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 objects referred to in subsection (1) must be given due consideration in the interpretation and application of any provision of this Act.

#### 3. Best interests of the child

- (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 an organ of state in any matter concerning a child or children in general, the best interests of the child concerned is the paramount 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, sex, 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) 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 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 the child may have;
- (m) any chronic illness from which the child may suffer;
- (n) the need for the 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;
  - (ii) exposing the child to maltreatment, abuse, degradation, ill-treatment, violence 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.

#### 4. Child participation

- (1) Every child that is of an age, maturity and stage of development as to be able to participate in any matter concerning that child in terms of this Act must participate in an appropriate way and the 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 in terms of this Act, but must be given all necessary information and advice to 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), whether or not that child chooses to exercise his or her right to participate:
  - (a) the child must be informed of the circumstances under which she or he will be asked to express her or his views, of the impact of his or views on the outcome of any decision and of services that can potentially be provided to the child;
  - (b) all necessary and reasonable measures must be taken to ensure that the child is not punished or victimised for expressing his or her views;
  - (c) the child must be informed of any decision concerning the child in terms of this Act;
  - (d) the child must be given an opportunity to complain if he or she feels that his or her right to participate is not respected; and
  - (e) the right of child participation must be promoted in respect of any child who may experience barriers to participation for any reason, including disability, language or any form of discrimination.

## 5. General principles

- (1) The principles set out in this section guide -
  - (a) the implementation of this Act; and
  - (b) all proceedings, actions and decisions by an 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 Namibian Constitution, the best interests of the child standard set out in section 3 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 his or her views in any matter concerning the child, if the whereabouts of that 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, if the whereabouts of that person can be reasonably ascertained.

## **6. Children's rights to basic conditions of living**

- (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 immunisation;
  - (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).

## **7. Duties in respect of children**

Every person with parental responsibilities and rights 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 that person's paramount concern at all times;
- (b) guide and direct the child in the exercise of all of that child's 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.

## **8. Children's duties and responsibilities**

In the application of this Act and in any proceedings, actions and decisions by an organ of state concerning any child, there must be due regard 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,

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

## 9. Children with disabilities

- (1) Every person, authority, institution or body must treat a child with disabilities in a manner which respects the child's dignity.
- (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.

## 10. Age of majority

- (1) A person attains the age of majority on attaining the age of 18 years.
- (2) If, on the commencement of this section, a person has already attained the age of 18 years but has not yet attained the age of 21 years, that person is considered to have attained the age of 18 years on the date of commencement of this section.
- (3) The time at which a person attains a particular age expressed in years is on the commencement of the relevant anniversary of the date of his or her birth.
- (4) In the absence of any indication of a contrary intention, subsection (1) applies to the interpretation of the expressions "age of majority", "major", "majority", "full age", "minor" and similar expressions when used in a -
  - (a) statutory provision, whether enacted or made before on or after the commencement of this section; and
  - (b) will, document or other instrument, made on or after the commencement of this section.
- (5) Nothing in this section affects the construction of a document or other instrument executed or made before the commencement of this section or a will of a testator who died before the commencement of this section.
- (6) Nothing in this section affects a reference in a law or document or instrument to an age expressed in years.
- (7) In any order or direction of a court made before the commencement of this section, in the absence of an indication of a contrary intention, a reference to the age of 21 years or to any age between 18 and 21 years or to any of the expressions referred to in subsection (4) and any similar expression must be read as a reference to the age of 18 years.
- (8) If, on the commencement of this section, a person had -
  - (a) attained the age of 18 years but had not attained the age of 21 years, and
  - (b) a right of action in respect of which the period of limitation applicable to the bringing of the action would have commenced to run on the person attaining the age of 21 years had this Act not been enacted,

the period of limitation in respect of that right of action commences to run on the person attaining the age of 21 years.
- (9) This section does not affect the liability of any person to pay maintenance under any agreement or order which is in force before the commencement of this section.

- (10) Despite subsection (1), a person who is under the age of 21 years requires the consent of his or her parents or guardian to enter into a marriage, unless that person has been previously married or emancipated by an order of court.
- (11) This section does not affect the payment of any claim under the Motor Vehicle Accident Fund Act, 2007 (Act [No. 10 of 2007](#)), where such claim arose before the commencement of this section.

## **Chapter 3**

### **ADMINISTRATION**

#### **Part 1 – NATIONAL ADVISORY COUNCIL ON CHILDREN**

##### **11. Establishment of National Advisory Council on Children**

A council to be known as the National Advisory Council on Children is established.

##### **12. Functions of Council**

The functions of the Council are to -

- (a) encourage cross-sectoral cooperation on matters relating to children;
- (b) advise government on matters relating to the protection and care of children under this Act and any other law relating to children;
- (c) advise, where appropriate, an organ of state in the carrying out of its functions under this Act and any other law relating to children;
- (d) advise the Minister and where appropriate an organ of state on the need for law reform on any issue relating to children;
- (e) 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 facilities and services to advance the well-being of children;
- (f) design and recommend 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 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.

##### **13. Access to information**

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 functions in terms of this Act.

##### **14. Composition of Council**

- (1) In this section “stakeholder” means a person or an organisation who or which has an interest in the well-being of children or may be affected by it.
- (2) The Council consists of the following 16 members:
  - (a) the Permanent Secretary of the Ministry who is the chairperson of the Council;

- (b) the Children's Advocate who is the deputy chairperson of the Council;
  - (c) the Permanent Secretaries of the ministries responsible for health, education, youth, justice, labour, home affairs, foreign affairs and safety and security;
  - (d) the Registrar of the Social Work and Psychology Council established under the Social Work and Psychology Act, 2004 (Act [No. 6 of 2004](#));
  - (e) the Executive Chairperson of the National Youth Council established under the National Youth Council Act, 2009 (Act [No. 3 of 2009](#));
  - (f) the Chairperson of the National Disability Council established under the National Disability Council Act, 2004 (Act [No. 26 of 2004](#)); and
  - (g) three persons, appointed by the Minister, of whom -
    - (i) one must be a staff member of the Office of the Prime Minister designated by the Prime Minister; and
    - (ii) two must be persons representing different stakeholders in civil society, including non-governmental organisations, faith-based organisations and the community and who have particular knowledge of and experience in matters relating to functions of the Council.
- (3) If a designation in terms of subsection (2)(g)(i) becomes necessary the Minister must in writing request the Prime Minister to designate within a specified period the person required to be designated in terms of that subsection.
- (4) Before appointing the persons contemplated in subsection (2)(g)(ii), the Minister must invite nominations from stakeholders by -
- (a) publishing the invitation in at least two nationally distributed newspapers;
  - (b) announcing the invitation in such public media as the Minister may consider appropriate; and
  - (c) sending the invitation by way of written notice to such stakeholders as the Minister may consider appropriate.
- (5) If, in terms of subsection (4), no nominations or insufficient nominations are made the Minister may appoint any suitable person to be a member of the Council and a person appointed under this subsection holds office as if he or she was nominated in accordance with that subsection.
- (6) The Minister must make known in the Gazette the names of persons appointed as members of the Council under subsection (2)(g), their term of office and date of appointment.

## 15. Disqualification for appointment

A person does not qualify to be appointed as a member of the Council under section 14(2)(g) if he or she -

- (a) is not a Namibian citizen or permanent resident and domiciled in Namibia;
- (b) is a member of Parliament or a regional council or a local authority council;
- (c) is an unrehabilitated insolvent;
- (d) has been declared mentally ill by a competent court under any law relating to mental health; or
- (e) has been convicted in Namibia or elsewhere of an offence and sentenced to imprisonment without the option of a fine.

## 16. Tenure and vacation of office of members of Council

- (1) Subject to subsection (2), a member of the Council appointed in terms of section 14(2)(g) holds office for a period of three years and may be re-appointed at the end of that period.
- (2) The office of a member of the Council contemplated in subsection (1) 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.
- (3) Before removing a member from office in terms of subsection (2)(d), the Minister must -
  - (a) notify the member, in writing, of the grounds on which the member is to be removed from office;
  - (b) give the 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).
- (4) 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 term for which that member was appointed.

## 17. Allowances

- (1) The Minister must pay members of the Council or members of a committee of the Council who are not in the full-time employment of the State allowances, for their services, as the Minister with the concurrence of the minister responsible for finance may determine.
- (2) 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.

## 18. Committees

The Council may, with the approval of the Minister, establish committees consisting of members of the Council only or consisting of members of the Council and other persons, to perform such functions as the Council may assign to such committee, subject to the Council's directions.

## 19. Meetings

- (1) The Council must meet at least twice every year.
- (2) The first meeting of the Council must be held at a time and place determined by the Minister and after that meeting the Council must meet at times and places determined by the chairperson of the Council.
- (3) The chairperson must, on the request of the Minister or on a written and motivated request of at least four members of the Council, call a special meeting of the Council.
- (4) 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 of the Council must elect a member to preside at the meeting.



- (5) At any meeting of the Council -
  - (a) a quorum is eight members of the Council, but every member of the Council must have been notified of the meeting in advance;
  - (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.
- (6) The Council must determine the procedures to be followed at its meetings.
- (7) 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, but that person does not have a vote.
- (8) A decision taken by the Council or an act performed under the authority of the Council is not 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.
- (9) The Council must cause minutes of the proceedings to be kept at its meetings and the chairperson must provide a copy of the minutes to the Minister as soon as is practicable after each meeting.

## **20. Performance of administrative work of Council**

- (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 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.

## **21. External advisors**

- (1) The Council may, after consultation with the Permanent Secretary and on 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 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.

## **22. Consultation with Council**

The Minister and, where appropriate, an organ of state exercising functions which may affect the well-being of children, may consult with the Council before -

- (a) proposing any repeal or amendment of a provision of this Act or any other law that may affect this Act; and
- (b) making, repealing or amending a regulation made in terms of this Act or affecting the operation of this Act.

## 23. Annual reports by ministries

The Permanent Secretary of each government ministry exercising functions affecting children and identified and notified in writing 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.

## 24. Annual report by Council

- (1) The Council must within 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 23;
  - (c) a report by the Ombudsman referred to in section 25; 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 of the report referred to in subsection (2), 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 2 – CHILDREN’S ADVOCATE

## 25. Establishment of Children’s Advocate in Office of Ombudsman

- (1) There must be a Children’s Advocate in the Office of the Ombudsman, established in terms of Article 89 of the Constitution and regulated by the Ombudsman Act, 1990 (Act [No. 7 of 1990](#)), who must assist the Ombudsman in the performance of its functions relating to children by -
  - (a) receiving and investigating 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 Namibian Constitution or any law, and where appropriate, attempting to resolve such matters through negotiation, conciliation, mediation or other non-adversarial approaches;
  - (b) monitoring the implementation of the United Nations Convention on the Rights of the Child, the African Charter on the Rights and Welfare of the Child and any other international instruments relating to child protection which are binding on Namibia;
  - (c) monitoring the implementation of this Act and any other law pertaining to children;
  - (d) bringing 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; and
  - (e) raising awareness throughout Namibia of the contents of this law and the protection of children generally.
- (2) The Council may request the Ombudsman to provide it with an annual report on the activities of the Children’s Advocate contemplated in subsection (1), 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.

### **Part 3 – CHILDREN'S FUND**

#### **26. Establishment of Children's Fund**

- (1) A fund to be known as the Children's Fund is established.
- (2) The Children's Fund consists of -
  - (a) 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
  - (d) such other moneys or assets as may vest in or accrue to the Council, whether in the course of its operations or otherwise.

#### **27. Use of money in Fund**

The Children's Fund may be used for funding -

- (a) activities of the Council and the Children's Advocate;
- (b) prevention and early intervention programmes;
- (c) early childhood development programmes;
- (d) the training of persons who implement this Act and any other law relating to children, such as the social workers, social auxiliary workers, community child care workers, magistrates, clerks of the courts and the members of the Police;
- (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 21; and
- (g) any other activities relating to the implementation of this Act and other laws relating to children.

#### **28. Administration of Fund**

The Permanent Secretary must administer the Children's Fund with the concurrence of the Minister in accordance with an estimate of revenue and expenditure approved by the Minister and the minister responsible for finance, in respect of every financial year of the Children's Fund, which ends on 31 March of each year.

#### **29. Banking accounts**

- (1) The Permanent Secretary must open a bank account in the name of the Children's Fund with a banking institution or building society registered in terms of the laws governing banking institutions or building societies in Namibia and approved by the Council and into which must be deposited all moneys accruing to the Children's Fund.

- (2) The Council may, with the approval of the Minister, invest moneys of the Children's Fund that are not immediately required for the purposes of the Children's Fund -
  - (a) with a banking institution registered under the Banking Institutions Act, 1998 (Act [No. 2 of 1998](#)) or with a building society registered under the Building Societies Act, 1986 (Act [No. 2 of 1986](#));
  - (b) with the Post Office Savings Bank established by the Posts and Telecommunications Companies Establishment Act, 1992 (Act [No. 17 of 1992](#)); or
  - (c) any other institution approved by the Minister and the minister responsible for finance.
- (3) Any unexpended balance in the Children's Fund at the end of a financial year must be carried forward as a credit to the next financial year.

### **30. Accountability, accounts and audits**

- (1) The Permanent Secretary is the accounting officer of the Children's Fund and charged with the responsibility of accounting for all moneys received by and paid from the Children's Fund.
- (2) The accounting officer referred to in subsection (1) must cause such records of account to be kept as are necessary to represent fairly the state of affairs and business of the Children's Fund and to explain the transactions and financial position of the Children's Fund.
- (3) The Auditor-General must annually audit the books of account, accounting statements and annual financial statements of the Children's Fund and must submit a copy of his or her report on such audit to the Council.

### **31. Annual report and other reports**

- (1) The Council must submit to the Minister an annual report of the Children's Fund's activities within six months of the end of each financial year or such longer period as the Minister may determine, which report must be accompanied by -
  - (a) the audited financial statements of the Fund, referred to in section 30, for that financial year; and
  - (b) the Auditor-General's report referred to in section 30.
- (2) The Minister must, within 28 days of receipt of the report referred to in subsection (1), 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.
- (3) The Council must, if the Minister at any time so requires, provide the Minister with a report and particulars relating to the Children's Fund in relation to any matter as the Minister may require.

### **32. Exemption from payment of tax, duty or other charges**

Despite anything to the contrary in any law, the Children's Fund is not liable to pay -

- (a) tax or charge on its income; or
- (b) transfer duty or stamp duty in any transaction for which such duty is payable.

## **Part 4 – APPOINTMENT OR DESIGNATION OF SOCIAL WORKERS, CHILD PROTECTION ORGANISATIONS, SOCIAL AUXILIARY WORKERS AND PROBATION OFFICERS**

### **33. Appointment or designation of social workers and child protection organisations**

- (1) The Minister must –
- (a) appoint social workers or designate social workers in the Ministry or in the employment of the State with the agreement of the ministry of which such social workers are staff members;
  - (b) designate social workers in private practise; or
  - (c) designate child protection organisations, which meet the prescribed requirements,
- in numbers sufficient to perform the functions assigned to designated social workers and child protection organisations under this Act or any other law and 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) The Minister must provide, a social worker or a child protection organisation appointed or designated in terms of subsection (1) and 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, with a certificate indicating the functions which such social worker or organisation is authorised to perform.
- [The comma after the opening phrase “The Minister must provide” is extraneous.]
- (3) A certificate provided in terms of subsection (2) must be submitted to the Minister for renewal every two years.
- (4) The Minister may, despite subsection (3), at any time alter or revoke a certificate provided in terms of subsection (2) if 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.
- (5) The Minister must inform the Social Work and Psychology Council, if the Minister refuses to renew a certificate in terms of subsection (3) or alters or revokes a certificate in terms of subsection (4).
- (6) A social worker or a child protection organisation contemplated in subsection (1) who is unable to or refuses to produce a certificate as referred to in that subsection on 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 such fine and such imprisonment.
- (7) A social worker who –
- (a) produces a report in compliance with section 47(2)(g) or 139(1); or
  - (b) is requested by the children’s court to submit a report,
- must submit that report, in the prescribed manner and within the prescribed period, to a staff member in the Ministry designated by the Minister to examine such reports 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.

- (8) If a report contemplated in subsection (7) is found to be deficient, the staff member contemplated in that subsection must refer the report in question back to the social worker concerned to rectify such deficiencies within the period stated by that staff member.

### **34. Appointment or designation of social auxiliary workers and community child care workers**

The Minister may appoint a sufficient number of social auxiliary workers or may designate social auxiliary workers in the Ministry or in the employment of the State with the agreement of ministry of which such social auxiliary workers are staff members or may designate community child care workers, to work under the direct supervision of designated social workers and assist with functions assigned to designated social workers under this Act or any other law, but the persons appointed or designated under this section are prohibited from -

- (a) facilitating adoptions in terms of Chapter 13;
- (b) preparing court reports in terms of section 47(2)(g) or 139(1);
- (c) removing children or alleged offenders in terms of section 135 or 136; or
- (d) performing any other functions under this Act as may be prescribed.

### **35. Appointment or designation of probation officers**

- (1) The Minister may designate a sufficient number of social workers in the Ministry or in the employment of the State with the agreement of the ministry of which such social workers are staff members and who comply with the prescribed requirements, as probation officers or may appoint sufficient number of social workers complying with such prescribed requirements as probation officers, 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 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 every magistrate's court.
- (3) A person appointed as a probation officer under the Children's Act, 1960 (Act [No. 33 of 1960](#)) is considered to have been appointed as a probation officer under this section.

### **36. Powers and functions of probation officers in relation to certain children**

- (1) The powers and functions 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 to the Office of the Prosecutor-General the desirability or otherwise of prosecution;
    - (iii) providing information to a court on an appropriate sentence; and
    - (iv) rendering assistance to such children 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 in any manner deviate from or fail to comply with 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 hinders or obstructs a probation officer in the exercise of his or her powers or the performance of his or her functions commits an offence and is liable on conviction to a fine not exceeding N\$4 000 or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

## Part 5 – REGULATIONS

### 37. Regulations

- (1) The Minister may make regulations relating to -
- (a) the form of certificates to be issued to designated social workers in terms of section 33;
  - (b) the qualifications and requirements to be complied with by designated social workers who are to perform such functions in terms of this Act or any other law;
  - (c) the procedure to be employed when considering conduct or circumstances that may lead to the refusal to renew a certificate in terms of section 33(3) or alteration or revocation of certificates contemplated in section 33(4);
  - (d) the fees payable to social workers or child protection organisations, except social workers in the employment of the State, designated in terms of section 33(1);
  - (e) the qualifications and requirements to be complied with by social workers appointed or designated as probation officers in terms of section 35 who are to perform functions in terms of this Act or any other law;
  - (f) the procedure for examination of a social worker's report by a staff member in the Ministry contemplated in section 33(7) and the powers of such staff member in relation to such report;
  - (g) the designation of probation officers for different purposes in different categories;
  - (h) any other matter required or permitted to be prescribed under this Chapter; and
  - (i) any other incidental administrative or procedural matter that is necessary to be prescribed for the proper implementation or administration of this Chapter.
- (2) Regulations made under subsection (1) may -
- (a) create an offence for any contravention of a regulation or a failure to comply with a provision of a regulation; and
  - (b) prescribe penalties in respect of an offence contemplated in paragraph (a) not exceeding a fine of N\$4 000 or imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

## **Chapter 4**

### **CHILDREN'S COURTS AND COURT PROCEEDINGS**

#### **Part 1 – CHILDREN'S COURTS AND CHILDREN'S COMMISSIONERS**

##### **38. Children's courts, children's commissioners and children's court assistants**

- (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) The law as applicable to magistrates' courts applies to a children's court when it is exercising jurisdiction in respect of matters it may adjudicate on.
- (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.
- (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 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; and
  - (b) may appoint dedicated children's court assistants for any children's court to assist such court in the manner contemplated in section 58(6).
- (12) The functions of a children's court assistant are as prescribed.

##### **39. Clerks of children's court**

- (1) The minister responsible for justice may, for every children's court, appoint sufficient number of persons or designate staff members of the ministry responsible for matters relating to justice 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 or assigned to them by this Act or any other law; and
  - (b) generally assist that court in performing its functions.
- (2) If a clerk contemplated in subsection (1) is for any reason unable to act as such or if a clerk has not been appointed or designated under that subsection for any children's court, the presiding children's commissioner of that court may assign, after consultation with the Chief Magistrate, a competent staff member in the ministry responsible for 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, under subsection (1), 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 contemplated in subsection (1) receive training regarding the implementation of this Act and in their specific duties and functions.

#### 40. Assessors

- (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, but the minister responsible for justice with the concurrence of 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) is 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 consider 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 assists the court 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) The minister responsible for justice, with the concurrence of the minister responsible for finance, must determine the allowances payable to an assessor who is not in the full time employment of the State 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) An assessor who is in the full time employment of the State is entitled to payment for expenses as he or she may be required to incur in connection with his or her attendance at the trial.
- (11) Section 147 of the Criminal Procedure Act applies with necessary changes if an assessor dies or becomes, in the opinion of the relevant children's commissioner, incapable of continuing to act as an assessor.

**41. Geographical area of jurisdiction of children's court**

- (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) If 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.
- (3) A matter may be transferred from one children's court to another children's court in accordance with the prescribed procedure if such transfer would be in the best interests of the child who is the subject of such matter.

**42. Referral of children by other court for investigation**

- (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 139.
- (2) If in the course of any proceedings before any court relating to matrimonial proceedings, maintenance or domestic violence or in the case of proceedings before the children's court relating to custody, access to a child or guardianship of a child, the 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 139 into 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 well-being 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 must 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 well-being of the child as the first priority;
  - (b) if appropriate, the views of the child in question; and
  - (c) the possible alternative of removing the alleged offender in terms of section 135(1)(b) or 137 from the home or place where the child resides.

**43. Pre-hearing conferences**

- (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 a pre-hearing conference unless the children's court decides otherwise.

- (3) A children's court ordering the holding of a pre-hearing conference, must
  - (a) determine how and by whom the conference must be set up, conducted and by whom it may be attended;
  - (b) determine the manner in which a record is to be kept of any agreement or settlement reached between the parties and of any fact emerging from the 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.

#### **44. Lay-forums**

- (1) The children's court may, subject to subsections (2) and (5), if circumstances permit, refer a matter brought or referred to the court, to a lay-forum proceeding 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; or
  - (c) a referral to a traditional authority in whose area of jurisdiction the child involved in such matter resides and is subject to,in an attempt to settle the matter out of court.
- (2) Lay-forums may 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 children's 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) direct the manner in which a record must be kept of any agreement or settlement reached between the parties and of 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) determine how and by whom the lay-forum proceedings must be set up, conducted and by whom it must 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 it is 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.

#### **45. Settling of matters out of court**

- (1) If a matter is settled out of court in terms of section 44 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 contemplated in subsection (1) 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.

#### **46. Appeals**

- (1) A 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 any order of the court to the High Court.
- (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 2 – CHILDREN'S COURT PROCEEDINGS AND RULES**

#### **47. Children's court proceedings, rules and general orders**

- (1) Except where otherwise provided for in this Act, the Magistrates' Courts Act 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 necessary changes, to the children's court with regard to the -
  - (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 may make in terms of this Act -
  - (a) grant interdicts and auxiliary relief in respect of any matter it may adjudicate on 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 the appointment would, in the opinion of the court, be in the best interests of the child, despite the fact that the child may have legal representation;
  - (g) order a designated social worker, medical practitioner, psychologist, educational practitioner or any other person with appropriate expertise 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; and

- (h) order the ministry responsible for administration of matters relating to home affairs to issue a birth certificate in respect of a particular child despite 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) For the purposes of this Act a children's court may in the prescribed manner estimate the age of a person who appears to be a child.

#### **48. Reports ordered by court**

- (1) A written report ordered by the children's court in terms of section 47(2)(g) must be submitted to the court within five court days after the order was made, unless the court has determined a longer period for purposes of practicality.
- (2) A copy of the report referred to in subsection (1) must, immediately on the submission of the report to the children's court, be served in the prescribed manner on the parties to the hearing, including a person designated in terms of section 143(2).
- (3) The person who compiled the report in terms of section 47(2)(g) 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 47(2)(g) who is not in the full-time employment of the State or a designated child protection organisation, must be compensated for services rendered in connection with the investigation or assessment from State funds in accordance with a tariff determined by the minister responsible for justice with the concurrence of the minister responsible for finance.

#### **49. Status of reports**

- (1) A written report, purported to be compiled and signed by a medical practitioner, psychologist, designated social worker or other professional person, which on the face of it forms 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 the 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.
- (2) A report contemplated in subsection (1) is admissible as evidence even if it contains hearsay or matters which would be hearsay if testified to in court, but a report containing hearsay is not admissible as evidence in any criminal matter on which the report may have a bearing.
- (3) 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;
    - (ii) to question any other person who has made a statement, as contained in the report, which is prejudicial to the person whose rights are affected or prejudiced; or
    - (iii) to refute any statement contained in the report.

## 50. Adjournments

- (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.

## 51. Monitoring of court orders

- (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 by referring the matter to the Prosecutor-General for a decision on a criminal prosecution.
- (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 a report permitted in terms of that subsection, unless the person makes the report or provides information knowing it to be false or misleading.

## 52. Who may approach children's court

- (1) Except where otherwise provided in this Act, any person listed in subsection (2) 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) any person holding or exercising parental responsibilities and rights in respect of a child;
  - (c) the care-giver of a child;

- (d) any person acting in the interest of a child;
- (e) any person acting on behalf of a child who cannot act in his or her own name;
- (f) any person acting as a member of, or in the interest of, a group or class of children;
- (g) any person acting in the public interest, including the Minister or a staff member of the Ministry who is authorised by the Minister; and
- (h) the Children's Advocate acting on behalf of a child or children generally.

### **53. Parties in children's court proceedings**

- (1) The Minister, a staff member of the Ministry who is authorised by 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.

### **54. Children's court environment**

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 dignity of the court;
- (c) not ordinarily used for the adjudication of criminal trials; and
- (d) accessible to disabled persons and persons with special needs.

### **55. Private nature of proceedings and vulnerable witnesses**

- (1) 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 directed in terms of this Act by the clerk of the children's court to attend the proceedings;
  - (c) the legal practitioner of a party to the proceedings, including the legal practitioner 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.
- (2) Having regard to the vulnerability of a particular child 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 47(2) (e);
  - (b) on the request of any party to the court 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 apply with necessary changes 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 apply with necessary changes 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 apply with necessary changes 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, on 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 this to be in the best interests of the child; or
- (h) apply any of the provisions of paragraphs (a) to (g) in combination.

## 56. Conduct of proceedings

- (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, photograph or 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 practitioner of any person involved in the proceedings.

[The word "practitioner" is misspelt in the Government Gazette, as reproduced above.]

- (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.
- (3) 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.
- (4) The person in whose physical control the child is must ensure that the child attends the proceedings of the children's court unless the clerk of the children's court or the court directs otherwise.
- (5) The children's commissioner presiding at the proceedings of the children's court 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 the 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).
- (7) A person who fails to comply with the written notice referred to in subsection (3) or who contravenes subsection (4) 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 such fine and such imprisonment.

## **57. Recording of non-participation by child**

- (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 children's court -
  - (a) may, at the outset or at any time during the proceedings of the children's court, order that the proceedings or any issue in 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).

## **58. Legal representation**

- (1) A person who is a party in a matter before a children's court, including a child, is entitled to appoint a legal practitioner of his or her own choice and at his or her own expense.
- (2) The children's court must, where the child involved in a matter before the court is not represented by a legal practitioner, order that legal representation be provided to the child in the following instances -
  - (a) if 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) if it is recommended in a report by a social worker;
  - (c) if there is evidence or allegations of sexual, physical or psychological abuse of the child;
  - (d) if any other party besides the child has legal representation; or
  - (e) 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;
  - (b) despite the provisions of the Legal Aid Act, 1990 (Act [No. 29 of 1990](#)), order that legal representation referred to in that Act be provided to that child, if the child's parent, guardian or care-giver is unable to pay the costs of a legal practitioner and if the court is satisfied that substantial injustice would otherwise occur; or

- (c) order that the child be assisted by a children's court assistant for that court or by any other person whom the court considers to be qualified to fulfil the functions of a children's court assistant and who is designated by the court to assist in the proceedings before the court.

[The word "assist" is misspelt in the Government Gazette, as reproduced above.]

- (4) The children's court may order that legal representation referred to 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 practitioner and if the court is satisfied that substantial injustice would otherwise occur.
- (5) A legal practitioner 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) A children's court assistant ordered to assist in terms of subsection (3) (c) or acting in terms of section 38(10) or section 38(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.
- (7) 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.
- (8) The parent, guardian or other person with physical control of the child may not prevent reasonable private access to the child by a legal practitioner or children's court assistant who is representing or assisting the child in terms of this section for purposes of consultation or examination.

## 59. Witnesses

- (1) The clerk of a children's court must summons a person to give evidence or produce any book, document, photographic or 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 practitioner acting on behalf of a 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, apply with necessary changes to a person who has been summonsed in terms of subsection (1) or required by the presiding children's commissioner to give evidence.

## 60. Witness fees and allowances

- (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 pursuant to a request made in terms of section 59(1)(a) and (d) and who complied with that summons.
- (2) A person summonsed in terms of section 59(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.

**61. Prohibition on publication or disclosure of child's identity**

- (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 any image, picture or like material, 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 such fine and such imprisonment.

**62. Confidentiality of records of children's court proceedings**

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 Council.

**Part 3 – REGULATIONS****63. Regulations**

- (1) The minister responsible for justice, after consultation with the Minister, may make regulations relating to -
  - (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 43, procedures regulating such conferences and information that must be submitted to the children's court;
  - (d) the holding and monitoring of lay-forum proceedings in terms of section 44, procedures regulating such proceedings 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 proceedings;
  - (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 circumstances in which the responsibility for the payment of costs to be incurred in order to give effect to an order of the children's court or to ensure the sufficiency of evidence to be placed for such court may fall on the State or any other person, institution or organisation;
  - (j) the establishment of guidelines regulating the relationship between a child involved in any proceedings under this Act and his or her legal practitioner and the experience or accreditation of legal practitioners appointed to represent children in proceedings under this Act;
  - (k) any other matter required or permitted to be prescribed under this Chapter; and
  - (l) any other incidental administrative or procedural matter that is necessary to be prescribed for the proper implementation or administration of this Chapter.
- (2) Regulations made under subsection (1) may -
- (a) create an offence for any contravention of a regulation or a failure to comply with a provision of a regulation; and
  - (b) prescribe penalties in respect of an offence contemplated in paragraph (a) not exceeding a fine of N\$4 000 or imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

## Chapter 5

### RESIDENTIAL CHILD CARE FACILITIES, PLACES OF CARE AND SHELTERS

#### 64. Places of safety

- (1) A place of safety is a facility used for the temporary reception and care of children -
  - (a) removed in terms of section 135 or 136;
  - (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) For the purpose of subsection (1), a prison or a police cell may not be used as a place of safety.
- (3) A residence of a person approved for purposes of foster care may serve as a place of safety.
- (4) The Minister may -
  - (a) with the agreement of the owner or management of a facility, approve the use of a private children's home, a private hospital or any other private facility which the Minister considers suitable, as a place of safety;
  - (b) on application by a 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) no person residing in the home has been convicted of an offence contemplated in section 238;
  - (c) with the concurrence of the minister responsible for education, approve the use of a government school hostel as a place of safety; or
  - (d) with the concurrence of the relevant responsible minister, approve the use of any other appropriate State owned building or place as a place of safety.
- (5) The Minister must, on approving a place of safety as contemplated in subsection (3) or (4), issue a letter of authorisation and such authorisation must be renewed in the manner and frequency and subject to such conditions as may be determined by the Minister.
- (6) The Minister may, out of moneys appropriated by Parliament 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.
- (7) 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 (4).
- (8) A child accommodated in a place of safety and 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.
- (9) 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.

## 65. Places of care

- (1) A place of care is a facility 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 the owner or managers of the place of care 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 or 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 in terms of section 74; and
  - (b) is operated in compliance with the 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.

**66. Early childhood development centres**

- (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 section 74; 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.

**67. Shelters**

- (1) A shelter is a facility used for the purpose of providing basic services, including overnight accommodation, to -
  - (a) abused adults and children;
  - (b) children living or working on the streets; or
  - (c) children who voluntarily 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) A person may establish or operate a shelter if the shelter -
  - (a) is registered in terms of section 74; 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 a law and operated in accordance with a registration certificate from the relevant authority or authorities is from the date of commencement of this section regarded to have been registered in terms of this Act for a period of one year from the date of commencement of this section, but the operator of the shelter must apply for registration in terms of this Act before the expiry of that period in order to continue operating as a shelter.

**68. Children's homes**

- (1) A children's home is a facility, other than the child's family home, used for -
  - (a) the reception and provision of residential care of children who -
    - (i) have been abandoned or orphaned;
    - (ii) for any reason cannot be placed in kinship care or foster care;
    - (iii) are awaiting trial or sentence;
    - (iv) are placed in such home in terms of an order under the Criminal Procedure Act; or
  - (b) 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 (a)(iii) and (iv) 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 74.
- (5) A facility, other than one maintained and controlled by the State, may only be used as a children's home if it is -
  - (a) registered as such in terms of section 74; and
  - (b) managed and maintained in accordance with any conditions subject to which the children's home is registered.
- (6) A children's home -
  - (a) established and maintained under section 41(3)(a) of the Children's Act, 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; or

**[Paragraph (a) refers to children's homes established and maintained under section 41(3)(a) of the Children's Act 33 of 1960. However, that section was repealed by the South African Educational Services Act 41 of 1967 before the Children's Act was made applicable to South West Africa. This cross-reference was probably intended to refer to section 39(3)(a) of the Children's Act 33 of 1960, which covered the establishment of government children's homes.]**
  - (b) registered or deemed to have been registered under section 42 of the Children's Act, 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.

## 69. Child detention centres

- (1) A child detention centre is a facility 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 a child detention centre;
  - (c) transferred to such centre in terms of section 82;
  - (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, may, from money appropriated by Parliament or from the Children's Fund, establish and operate child detention centres for the reception, care and training of children contemplated in subsection (1).
- (3) A child detention 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.
- (4) The minister responsible for education must administer all matters relating to learning activities at child detention centres registered under this Act.

- (5) A non-profit organisation may establish or operate a child detention centre, if the centre -
  - (a) is registered in terms of section 74;
  - (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.
- (6) A school of industries or a reform school established and maintained under section 39 of the Children's Act, and which is in existence at the date of commencement of this Act, is from that date regarded to be a child detention centre approved under this Act.

**70. Existing places of safety, places of care, children's homes, places of detention, schools of industries or reform schools**

- (1) Existing State-operated places of safety, places of care, children's homes, schools of industries or reform schools which were established in terms of the Children's Act must be registered under this Act as places of safety, places of care, children's homes or child detention centres, respectively, within one year from the date of commencement of this Part.
- (2) Existing privately-operated places of safety, places of care, children's homes, schools of industries or reform schools which were registered in terms of the Children's Act must be registered under this Act as places of safety, places of care, children's homes or child detention centres, respectively, within one year from the date of commencement of this Part.

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

- (1) 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 residential child care facility, place of care, early childhood development centre or shelter contemplated in subsection (1) and who is not subject to secure care must, for all purposes and at all times, be kept separate from children in that facility who are subject to secure care.
- (3) All residential child care facilities, places of care, early childhood development centres and shelters must -
  - (a) provide relevant information to children accommodated at such facilities;
  - (b) provide an opportunity for children accommodated at such facilities to express their views in all decision making processes affecting them, according to their age, maturity, stage of development and experience; and
  - (c) ensure that the views of children accommodated at such facilities about matters affecting them receive due consideration.



- (4) The Minister may, after consultation with the minister responsible for health and social services, prescribe additional standards with which residential child care facilities, places of care, early childhood development centres or shelters contemplated in subsection (1) must comply.
- (5) In determining how to interpret minimum standards for the purpose of subsection (1) the standards of the surrounding community must be considered.
- (6) The Minister may, by notice in the Gazette, determine a period of time, from the date of commencement of this Act, within which facilities, places, centres or shelters contemplated in subsection (1) in rural areas or in informal settlements must comply with subsection (1), (3) or (4).

## **72. Management boards for children's homes and child detention centres**

- (1) Every children's home and child detention centre must have a management board consisting of not less than five and not more than nine members.
- (2) The members of a management board must be appointed -
  - (a) by the Minister, in the case of a children's home or a child detention centre established by the Minister; and
  - (b) in the case of a privately operated children's home or child detention centre, by the holder of the certificate of registration in accordance with the prescribed procedures.
- (3) When appointing members of the management board, the Minister or the holder of a certificate of registration must ensure fair representation of all stakeholders including the community in which in the children's home or child detention centre is situated.
- (4) A person who is unsuitable to work with children as contemplated in section 238 may not be appointed as a board member of the management board contemplated in subsection (1).
- (5) The management board contemplated in subsection (1) may exercise powers and perform duties conferred on it in terms of this Act.

## **73. Application for registration of places of care, early childhood development centres, shelters, children's homes and child detention centres**

- (1) A person or an organisation who or which intends to register a place of care, early childhood development centre, shelter, children's home or a child detention 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 a child detention centre;
  - (c) provide information relating to the applicant's current and prospective financial position; and
  - (c) provide any information which is relevant to the application.

[There are two paragraphs labelled (c) in subsection (2), and no paragraph labelled (b).]

## **74. Registration of places of care, early childhood development centres, shelters, children's homes and child detention centres**

- (1) The Minister -
  - (a) must register a place of care, early childhood development centre, shelter, children's home or a child detention 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;

- (b) may refuse to register a place of care, early childhood development centre, shelter, children's home or a child detention centre, but the Minister must provide reasons for the refusal;
  - (c) may, in the granting of an application for registration, impose such conditions as he or she considers appropriate to promote the best interests of the child; and
  - (d) must issue a certificate of registration in respect of the facility registered under paragraph (a) which 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)(d) 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 child detention centre if appropriate to promote or protect the best interests of children who are or may be accommodated there.
- (3) The holder of a certificate of registration referred to in subsection (1)(d) 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 of care, early childhood development centre, shelter, children's home or child detention 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 immediately 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 annually publish a notice in the Gazette stating the registrations of all facilities under this section and any renewals or cancellations of registrations.

## **75. Eligibility of registered facilities for State funding and contributions in kind**

- (1) A residential child care facility, place of care, early childhood development centre or shelter established by an organ of state or a non-profit organisation which is registered as contemplated in this Chapter and which complies with the requirements of this Act and any prescribed standards for such facility, place, centre or shelter may apply for funding from such money as may be appropriated by Parliament or from the Children's Fund for -
- (a) upgrading or equipping the residential child care facility, place of care, early childhood development centre or shelter;
  - (b) training of staff or volunteers at the residential child care facility, place of care, early childhood development centre or shelter;
  - (c) programmes for children at the residential child care facility, place of care, early childhood development centre or shelter; and
  - (d) other expenses reasonably related to the residential child care facility, place of care, early childhood development 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) may receive donations in kind from the State, including but not limited to equipment, toys and food supplements for children.

## **76. Reporting by children's homes, shelters and child detention centres**

Every children's home, shelter or child detention centre registered as contemplated in this Chapter must submit an annual report to the Ministry containing information on -

- (a) the number, age and sex of children accommodated at the home, shelter or centre;

- (b) in the case of a home, shelter or centre that is not operated by the State, the financial position of the home, shelter or centre; and
- (c) any other prescribed information.

## 77. Inspection of facilities

- (1) Subject to subsection (3), the Minister or a local authority council or regional council may authorise a person to enter a residential child care facility, place of care, early childhood development centre or shelter registered as contemplated in this Chapter or an unregistered facility used as a residential child care facility, place of care, early childhood development centre or shelter (in this section referred to as a “facility”) without giving notice, 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) Despite subsection (1), a social worker authorised by the Minister must at least once a year and without giving notice to the facility concerned enter and inspect a facility.
- (3) A search of a building or structure used as a residence, may not be carried out without a search warrant, unless -
  - (a) the owner or occupier of the residence has consented to the search; or
  - (b) the person authorised under subsection (1) or (2) on reasonable grounds believes -
    - (i) that a search warrant will be granted if applied for; and
    - (ii) that the delay in obtaining such warrant would defeat the objects of the search.
- (4) The Minister, the local authority council or the regional council must issue a prescribed identity card to each person authorised in terms of subsection (1) or (2).
- (5) When inspecting a facility, a person authorised in terms of subsection (1) or (2) must, on demand, produce the identity card contemplated in subsection (3).
- (6) A person authorised in terms of subsection (1) or (2) may, for the purposes of the subsection concerned -
  - (a) determine whether the facility concerned complies with the minimum standards contemplated in section 71;
  - (b) determine whether the facility complies with any requirements of this Act or any other structural, safety, health or other requirements as may be required by any law;
  - (c) require a person to disclose information orally or in writing and 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;
  - (d) inspect or question a person about, any record or document that may be relevant for the purposes of paragraph (c);
  - (e) copy any record or document referred to in paragraph (d) or remove such document to make copies or extracts;
  - (f) require a person to produce or to deliver to a place specified by the person authorised in terms of subsection (1) or (2), any record or document referred to in paragraph (d) for inspection;

- (g) 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 of this Act or in breaching a provision of this Act or of a condition of registration;
  - (h) record information by any method, including by taking photographs or making videos; or
  - (i) exercise any other power or perform any other duty that may be prescribed.
- (7) A person authorised in terms of subsection (1) or (2) must -
  - (a) provide a receipt for any record, document, article or substance removed in terms of subsection (6)(e) or (g);
  - (b) return anything removed within a reasonable period unless seized for the purpose of evidence.
- (8) A person authorised in terms of subsection (1) or (2) must submit a report to the Minister, local authority council or regional council on any inspection carried out by that person in terms of this section.
- (9) A person commits an offence, if that person -
  - (a) hinders or interferes with a person authorised in terms of subsection (1) or (2) in the execution of that person's duties in terms of this section;
  - (b) fails to comply with a request by a person authorised in terms of subsection (1) or (2) in the execution of that person's duties in terms of this section; or
  - (c) falsely professes to be a person authorised in terms of subsection (1) or (2),and is liable on conviction to a fine not exceeding N\$4 000 or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.
- (10) 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 Namibian Constitution, this section is enacted on the authority of Sub-Article (2) of that Article.

## 78. Notice of enforcement

- (1) The Minister may by written notice instruct -
  - (a) a person operating or managing an unregistered facility used as a place of care, early childhood development centre, shelter, children's home or a child detention 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 place of care, early childhood development centre, shelter, children's home or child detention centre registered in terms of section 74 in contravention of 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.
- (4) A person who fails to comply with a written notice contemplated in subsection (1) commits an offence and is liable on conviction to a fine of N\$100 for each day on which the facility contemplated in that subsection (1) continues to operate.

**79. Cancellation of certificate of registration**

- (1) The Minister may at any time, after giving a written notice to the holder of a registration certificate contemplated in section 74(1)(d), cancel the certificate -
  - (a) if the facility registered in terms of section 74 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 takes effect, but the effective date of cancellation may not be earlier than three months from the date of the notice, unless the Minister and the person operating or managing the facility registered in terms of section 74 agree to an earlier date.
- (4) The holder of the certificate of registration contemplated in subsection (1) 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.

**80. Voluntary closure of a place of care, early childhood development centre, shelter, children's home or a child detention centre**

The holder of a certificate of registration contemplated in section 74(1)(d), 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.

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

- (1) For the purpose of this section and section 82, the expression "child" includes a person who is between the age of 18 and 21 years.
- (2) If a children's home or a child detention centre is closed due to cancellation in terms of section 79 or voluntary closure in terms of section 80, every child placed in that facility must be transferred in accordance with section 82.

**82. Transfer of child in foster care or from residential child care facility**

- (1) The Minister may, subject to subsections (3) and (4), in writing direct, the transfer of a child -
  - (a) from a particular foster care to another foster care or to kinship care; or
  - (b) from a particular residential child care facility to another residential child care facility of the same or less secure type or to foster care or kinship care.
- (2) The Minister may, subject to subsections (3) to (5), in writing direct, the transfer of any child -
  - (a) from court-ordered kinship care to foster care;
  - (b) from foster care or court-ordered kinship care to a place of safety, a children's home or child detention centre; or

- (c) from a residential child care facility to a more secure residential child care facility, but, the transfer must be ratified by a children's court in the prescribed manner.
- (3) Before the Minister issues a directive in terms under 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) A directive issued 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 in terms of this section 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) A directive issued in terms of subsection (1) to transfer a child does not have the effect of extending the original placement order made by the court in terms of section 145 unless the original placement order has been extended in terms of section 151.
- (7) A directive issued in terms of subsection (1) or (2) is considered proof of eligibility for a state maintenance grant, foster parent grant, residential child care facility grant or a child disability grant contemplated in Chapter 16, whichever is applicable.

### **83. Conditional discharge of child**

- (1) The Minister may, subject to subsections (2) to (4), in writing direct the conditional discharge of a child from a placement in alternative care in terms of section 145 and transfer such child to the care of the child's parents, guardian or former care-giver.
- (2) A directive issued in terms of subsection (1) must specify the conditions, if any, with which the child and the parent, guardian or care-giver must comply.
- (3) Before the Minister issues a directive 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 court order contemplated in that subsection.

- (4) A directive issued 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 parents, guardian or former care-giver;
  - (b) the Minister may at any time revoke the conditional discharge and return the child to the place where the child was before the conditional discharge or place the child in other alternative care 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 condition 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 145.

#### **84. Discharge of child**

- (1) The Minister may, subject to subsections (2) and (3), in writing direct 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 directive 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 directive issued 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 83.
- (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.

#### **85. Appeal and review**

- (1) A child, a person or an organisation 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, and the children's court must decide on the appeal within 90 days of receipt of the appeal.
- (2) A child, a person or an organisation who or which 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 98(3) and (4) apply with necessary changes.

**86. Death of a child in foster care or registered facility**

If -

- (a) a child who has been placed by a court order or a written directive from the Minister in foster care, a residential child care facility or a place of care, dies while in such care; or
- (b) a child dies on the premises of a facility registered in terms of this Chapter or if a child dies from injuries received at such facility,

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

**87. Leave of absence from foster care or residential child care facility**

- (1) Leave of absence may, subject to subsection (2) and such limitations and conditions as may be prescribed, be granted to a child in alternative care by the -
  - (a) management of a residential child care facility in whose care the child has been placed or by the foster parent or other person in whose care the child has been placed; and
  - (b) Minister in the case of a child placed in a residential child care facility, a shelter or temporary safe care 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, in which case the leave of absence may be given as provided in paragraph (a).
- (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, the person, the Minister or the designated social worker referred to in subsection (1) or (2) may at any time cancel any leave of absence granted or approved by them in terms of subsection (1) or (2).
- (4) In the case of a foster care placement, the supervising designated social worker may at any time cancel any leave of absence granted in terms of subsection (1).
- (5) If a child's leave of absence is cancelled in terms of this section, the management, the person, the Minister or the designated social worker referred to in subsection (1) or (2) must take all reasonable steps to ensure that the child is returned to the person or facility in whose care such child is.

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

- (1) A child in foster care or a residential child care facility may not leave Namibia without the permission of the Minister.
- (2) In granting the approval in terms of subsection (1) the Minister may impose terms and conditions to protect the child's best interest.

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

- (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 87 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 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 search of a home in terms subsection (2), may not be carried out without a search warrant, unless -
  - (a) the owner or occupier of the home has consented to the search; or
  - (b) the designated social or member of the police concerned on reasonable grounds believes -
    - (i) that a search warrant will be granted if applied for; and
    - (ii) that the delay in obtaining such warrant would defeat the objects of the search.
- (4) A member of the police 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, but 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.
- (5) 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.
- (6) 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 (5), 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.
- (7) During an enquiry under subsection (5) 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.
- (8) A children's commissioner may, after an enquiry under subsection (5), make an order in the best interests of the child, requiring that the -
  - (a) 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) 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.
- (9) A person commits an offence if that person -
  - (a) 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 facility or place of care or placement, unless such person is acting in good faith or in the best interests of the child, or

- (b) prevents the child from returning to the care of the person from whom or the residential child care facility from which he or she was absent, after the order under subsection (8)(a) has been made,

and is liable on conviction to a fine not exceeding N\$4 000 or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

## 90. Delegation

- (1) The Minister may, by agreement with a local authority council or regional council, delegate the performance of some or all of the powers or functions contemplated in sections 73, 74, 77, 78, 79 and 80 to a local authority council or regional council if the Minister is satisfied that the local authority council or regional council has the capacity to perform the functions concerned.
- (2) The local authority council or regional council referred to in subsection (1) may delegate any power or function conferred or duty assigned to it in terms of this section to its staff members.
- (3) A delegation of powers and functions in terms of subsection (1) or (2) -
  - (a) is subject to any limitations, conditions and directions which the delegating authority may impose;
  - (b) must be in writing; and
  - (c) does not divest the delegating authority of the responsibility concerning the exercise of the power or the performance of the function.
- (4) The delegating authority 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 made in terms of this section.
- (5) A person aggrieved by a decision of a local authority council or regional council with regard to matters referred to in sections 73, 74, 77, 78, 79 and 80 may lodge an appeal, with the appeal body designated by the local authority council or regional council, against that decision.

## 91. Regulations

- (1) The Minister may make regulations relating to -
  - (a) the procedure to be followed in connection with the lodging and consideration of -
    - (i) applications for registration of places of care, early childhood development centres, shelters, children's homes or child detention 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 form 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 child detention centres;
  - (f) the rights of children in places of care, early childhood development centres, shelters, children's homes or child detention centres;

- (g) management, disciplinary and other practices in places of care, early childhood development centres, shelters, children's homes or child detention centres;
  - (h) the keeping of records of children in places of care, early childhood development centres, shelters, children's homes or child detention centres;
  - (i) the provision of programmes at places of care, early childhood development centres, shelters, children's homes or child detention centres to meet the developmental, therapeutic and recreational needs of children;
  - (j) any other matter required or permitted to be prescribed under this Chapter; and
  - (k) any other incidental administrative or procedural matter that is necessary to be prescribed for the proper implementation or administration of this Chapter.
- (2) Regulations made under subsection (1) may -
- (a) create an offence for any contravention of a regulation or a failure to comply with a provision of a regulation; and
  - (a) prescribe penalties in respect of an offence contemplated in paragraph (a), not exceeding a fine of N\$4 000 or imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

[There are two paragraphs labelled (a) in subsection (2), and no paragraph labelled (b).]

## Chapter 6

### MATTERS RELATING TO STATUS OF CERTAIN CHILDREN

#### Part 1 – APPLICATION OF CHAPTER

##### 92. Application of 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.
- (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.

#### Part 2 – PROOF OF PARENTAGE AND PRESUMPTION OF PATERNITY

##### 93. Procedure for proof of parentage

- (1) For the purpose of this section -
  - “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;
  - “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; and
  - “putative child” means a person, including an adult who claims or is alleged to be the child of an identified parent or parents.

- (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 or the 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).
- (5) A person who wishes to establish parentage, where the putative mother, putative father or putative child of that person is deceased and who has a reasonable belief that the deceased person may be his or her biological parent or child, may petition a competent court to exhume the body of the deceased for the purpose of carrying out scientific tests relating to parentage, unless -
  - (a) no family member, other interested person or heir, if applicable, disputes the claim or parentage;
  - (b) proof of parentage is already available in the form of a conclusive scientific test, a court order based on parentage or any other form of conclusive proof; or
  - (c) it is possible to establish parentage by carrying out scientific tests on any living family member of the deceased person and such family member consents to the tests.

#### **94. Presumption of paternity**

- (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) 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; or
  - (e) both he and the mother acknowledge that he is the father of the person in question.
- (2) Corroboration of evidence led to establish a presumption of paternity referred to in subsection (1) is not required and no special cautionary rules of evidence are applicable to such evidence.

**95. Presumption on refusal to submit to scientific tests**

- (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 physical 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) Despite subsection (1), the High Court as the upper guardian of all children has the power to order that a child, a parent, a putative parent or any potential blood relative of the 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.
- (3) To the extent that this section authorises the interference with any individual's rights to privacy or bodily integrity, it is justified by the right of children to know their parents in terms of Sub-Article (1) of Article 14 of the Namibian Constitution.

**Part 3 – PARENTAL RESPONSIBILITIES AND RIGHTS IN RESPECT OF CHILDREN BORN OUTSIDE MARRIAGE AND OTHER CHILDREN****96. Factors to be considered by children's court in this Part**

- (1) When making any decision pertaining to custody or guardianship of or access to a child born outside marriage, the children's court must, when deciding what is in the best interests of the child as set out in section 3, 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 motive to avoid the payment of maintenance in respect of that child.
- (2) In the interpretation and application of this Part regard must be had to the right of a child to know and be cared for by both parents and the goal of resolving disputes in a non-adversarial manner, if possible.

**97. Procedures for certain orders apply to children of divorced or estranged parents**

The procedures for orders pertaining to custody in section 100, orders pertaining to guardianship in section 101(3) to (7), orders restricting or denying access to a parent not having custody of a child in section 102(5) to (8), orders for other access in section 103 and orders dealing with the unreasonable denial or restriction of access in section 102(12) and (13) apply with necessary changes to children of divorced or estranged parents.

**98. Powers of children's court in respect of certain High Court orders**

- (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 of the High Court 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 of the High Court may -
  - (a) confirm, alter or set aside the decision of the children's court;
  - (b) make any order which the High Court or judge of the High Court 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 of the High Court may consider appropriate.

## 99. Custody

- (1) Both parents of a child born outside marriage have equal rights to custody of the child born outside marriage.
- (2) One parent must have custody of the child born outside and both parents may agree on who must have custody and the agreement -

**[The word "marriage" appears to have been omitted after the phrase "born outside".]**

  - (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 119.
- (3) 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.
- (4) A registered agreement contemplated in subsection (3) constitutes 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.
- (5) If there is no agreement as to who must have custody of a child outside marriage, either of the parents or any of the persons referred to under section 100 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 of the child born outside marriage.

## 100. Procedure for obtaining custody

- (1) The following persons may seek an order pertaining to the sole or joint custody of a child born outside marriage and such proceedings may be 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 legal practitioner.
- (3) An order for the appointment of a person to have custody in terms of this section must 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 an objection made in terms of subsection (3) or if no objection is received the children's 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 report by a designated social worker, to be completed within the period specified by the court, on the matter and may institute any investigation that it considers 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.
- (6) The children's court may vary or withdraw an order made in terms of this section 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), (4) and (5) apply to any application for variation or withdrawal.

## 101. Guardianship

- (1) A person with custody of a child born outside marriage in terms of section 99 is also the sole guardian of that child, unless a competent court, on application made to it, directs otherwise.
- (2) If a parent of a child born outside marriage 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, in respect of a child born outside marriage 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 who can show that he or she is acting in the best interests 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 (2) 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 legal practitioner.
- (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 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.
- (6) On receipt of an objection made in terms of subsection (5) or if no objection is received the children's 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 considers 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 the investigation or appearance.
- (8) Unless the children's court orders otherwise, the written consent of both parents is required for the removal of a child born outside marriage from Namibia.
- (9) Despite subsection (8), consent is not 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.
- (10) 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.
- (11) 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), (6) and (7) apply to any application for variation or withdrawal.

## 102. Access

- (1) Despite anything to the contrary contained in any other law, the biological father 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 on in terms of section 119, unless a competent court, on application made to it, directs otherwise, but the right accrues only where the biological father in question has voluntarily acknowledged parentage of the 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 before 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;
  - (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 [No. 81 of 1963](#)); or
  - (e) in any other prescribed manner.
- (2) The right of access contemplated in subsection (1) does not give the biological father, contemplated in that section, 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 who does not have 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:
  - (a) the parent or other person who has custody of the child;



- (b) the child;
  - (c) anyone, 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; 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 does not have custody of a child outside marriage 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 legal practitioner.
- (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 by a designated social worker as having an interest in the application and that person has or those persons have been given an opportunity to be heard.
- (7) On receipt of an objection made in terms of subsection (6) or if no objection is received the children's 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.
- (8) Before making a final decision on an application referred to in subsection (5), the children's court must order and consider a report by a designated social worker, to be completed within a period specified by the court, on the matter and may institute any investigation that it considers necessary and order any person to appear before it and may order the parent or parents or if the applicant is not a parent, such applicant, to pay the costs of such investigation or appearance.
- (9) 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 who does not have 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.
- (10) A parent who does not have custody and 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.
- (11) The court may make an order applied for in terms of subsection (10) and subsections (3) and (4) apply in respect of a parent not having custody who has been granted the right of access to a child.
- (12) If a person has the right of access to a child 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 right of access may apply to the children's court for an order specifying details of such access.
- (13) Subsections (5), (6), (7) and (8) apply to an application made in terms of subsection (12).
- (14) On application by any of the persons listed in subsection (4), an order restricting or denying access to the parent who does not have custody may be varied or withdrawn by the children's court if the court is satisfied that changed circumstances warrant a variation or withdrawal and subsections (5), (6), (7) and (8) apply with necessary changes to any application for variation or withdrawal.

### 103. Other access

- (1) The court may, on application by a family member of a child, make an order granting access to the child born outside marriage by that family member.

- (2) Subsections (5), (6), (7), (8) and (9) of section 102 apply with necessary changes 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 consider necessary in the best interests of the child concerned.

#### **104. Children born outside marriage as a result of rape**

A perpetrator of a rape which results in the conception of a child outside marriage does not have a right to custody, guardianship or access in terms of this Part, unless a competent court, on application made to it, orders otherwise.

#### **105. Inheritance**

- (1) 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.
- (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) Nothing in this section is to be understood or interpreted as affecting the freedom of testamentary disposition.
- (4) In relation 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 do not have a 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 are considered to be included in the terms “children” or “issue” or any similar term used in a will or other testamentary disposition.

#### **106. Duty to maintain**

- (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 or incest does not have the legal duty to maintain a parent who was convicted of the rape or incest or does not have any legal duty to maintain that parent’s relations, but the person who committed the rape or incest has a duty to maintain the child conceived as a result of that rape or incest.

#### **107. Domicile of children born outside marriage**

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

#### **108. Effect of subsequent marriage of parents**

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.

#### **109. Status of children of void or voidable marriages**

The status of any child conceived or born of a void or voidable marriage is not affected by the annulment of that marriage by a competent court.

### 110. Safeguarding of interests of dependent and minor children of void or voidable marriages

- (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 dependant 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.

**[The word “dependant” should be “dependent”, as it is used as an adjective.]**

- (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).

### 111. Status of children born of artificial insemination or in vitro fertilisation

- (1) For the purposes of this section -

“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;

“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

“gamete” means either of the two generative cells essential for human reproduction.
- (2) If 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, considered to be the biological child of such woman and her husband.
- (3) For the purposes of subsection (2), it must be presumed, until the contrary is proved, that both such woman and her husband have granted the relevant consent.

## **Part 4 – CUSTODY AND GUARDIANSHIP ON DEATH OF PERSON HAVING CUSTODY AND GUARDIANSHIP**

### 112. Custody on death of person having custody

- (1) If the person who has custody of a child born outside marriage 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 100.
- (2) Section 113(5) and (6) also applies, with necessary changes, for the purposes of an application in terms of subsection (1), but 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.

- (3) A parent with sole custody of a child born outside marriage 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.
- (4) If a parent shares joint custody with another parent in terms of any law or agreement or because the parents are or were married, the surviving parent acquires sole custody upon the death of the other parent unless a competent court, on application made to it, directs otherwise.
- (5) If a person is not 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 113 is the person having custody of the child unless a competent court on application made to it directs otherwise.

### **113. Guardianship on death of guardian**

- (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 born outside marriage.
- (2) A person with sole guardianship of a child may, by testamentary disposition, name another person as the legal guardian of that child born outside marriage.
- (3) Section 114(1), (2), (3) and (4) relating to the administration of the property of a child applies to a legal guardian nominated or appointed under this section.
- (4) If there is no provision in a written will naming a guardian for a child born outside marriage or if 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, but 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) Any person who has a genuine interest in a child, whether 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.
- (6) If 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.
- (7) 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
  - (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 who compiled the report in terms of subsection (8)(c) as having an interest in the application, requesting such persons to make representations on the application.
- (8) 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 report by a designated social worker on the matter to be completed within the period specified by the children's commissioner.
  - (9) 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, on 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;
    - (c) 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 225; or
    - (c) refuse the application and give written reasons for the refusal.
- [There are two paragraphs labelled (c) in subsection (9), and no paragraph labelled (b).]
- (10) The clerk of the children's court must cause a copy of the certificate issued in terms of subsection (9) to be filed at the court in question and with the Master of the High Court.
  - (11) 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.

## Part 5 – GENERAL PROVISIONS

### 114. Powers of guardian or tutor appointed under Part 3

- (1) A legal guardian of the child appointed in terms of section 101, 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](#)).
- (2) The Master of the High Court may make the appointment of a tutor as contemplated in subsection (1) on application and must give preference to a legal guardian, but the Master may, if he or she considers it to be in the best interests of the child concerned, appoint another suitable person as tutor.
- (3) 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.
- (4) A tutor referred to in subsection (3) must comply with requirements and is entitled to remuneration as 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.

### 115. Complaints about a child's guardian or tutor

- (1) Any person who has a genuine interest in the well-being 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 designated 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 prepared in terms of subsection (2), 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 it considers appropriate and if necessary issue a new certificate of guardianship in accordance with section 113(9)(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 the Master considers necessary and if necessary issue new letters of tutorship.

### 116. Suspension of order pending review or appeal

If an order or a decision of the children's court is being reviewed in terms of section 98 or if an appeal has been lodged in terms of section 46, 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 must be the paramount consideration.

### 117. Regulations

- (1) The Minister may make regulations relating to -
  - (a) 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) the manner of conducting any investigation or hearing in terms of this Chapter;
  - (c) any other matter required or permitted to be prescribed under this Chapter; and
  - (d) any other incidental administrative or procedural matter that is necessary to be prescribed for the proper implementation or administration of this Chapter.
- (2) The Minister may, after consultation with the Minister responsible for justice, make regulations relating to -
  - (a) the manner and registration of a written agreement pertaining to custody of children born outside marriage;
  - (b) the form and manner in and time within which reviews as contemplated in section 98 are to be made to the High Court;
  - (c) the manner in which affected persons are to be notified of any proceedings brought in terms of this Chapter;
  - (d) the form and manner in which applications are to be made under this Chapter;
  - (e) any other matter required or permitted to be prescribed under this Chapter; and
  - (f) any other incidental administrative or procedural matter that is necessary to be prescribed for the proper implementation or administration of this Chapter.
- (3) Regulations made under subsection (1) may -
  - (a) create an offence for any contravention of a regulation or a failure to comply with a provision of a regulation; and

- (b) prescribe penalties in respect of an offence contemplated in paragraph (a) not exceeding a fine of N\$4 000 or imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

## **Chapter 7**

### **PARENTAL RESPONSIBILITIES AND RIGHTS AND PARENTING PLANS**

#### **118. Parental responsibilities and rights**

- (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 may hold parental responsibilities and rights in respect of the 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.

#### **119. Parenting plans**

- (1) A parenting plan is a plan between co-holders of parental responsibilities and rights in respect of a child determining the exercise of their respective responsibilities and rights in respect of the child.
- (2) Co-holders of parental responsibilities and rights in respect of a child may enter into a parenting plan.
- (3) An agreement contemplated in section 99(2) is not a parenting plan for the purpose of this Chapter.
- (4) A parenting plan must -
  - (a) be in the prescribed form;
  - (b) be in writing and signed by the parties to the plan in the presence of two witnesses and must give due consideration to the views of the child in question; and
  - (c) be in the best interests of the child as set out in section 3.
- (5) Before concluding the parenting plan the co-holders of parental responsibilities and rights in respect of a child may seek advice from a legal practitioner, social worker, traditional leader or other suitable professional or make use of mediation through a social worker or other person suitably qualified to do mediation.
- (6) 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 to the plan; 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.
- (7) A parenting plan concluded in terms of subsection (2) may be registered with the clerk of the children's court within whose area of jurisdiction the child concerned is ordinarily resident.
- (8) The co-holders of parental responsibilities and rights who are parties to a parenting plan concluded in terms of subsection (2), 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.
- (9) An order applied for in terms of subsection (8) 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.
- (10) A parenting plan not registered with the clerk of the children's court in terms of subsection (7) or not made an order of the children's court in terms of subsection (9) is not enforceable in relation to a person who is not a party to the agreed plan.
- (11) A provision dealing with maintenance of a child or children in a parenting plan registered with the clerk of the children's court or made an order of the children's court in terms of subsection (7) or (9) is enforceable under the Maintenance Act, 2003 (Act [No. 9 of 2003](#)).

## **120. Amendment or termination of parenting plan not made an order of court**

- (1) The co-holders of parental responsibilities and rights who are parties to a parenting plan may at any time, by mutual agreement, amend or terminate a parenting plan not registered with the clerk of the children's court in terms of section 119(7).
- (2) A parenting plan registered with the clerk of the children's court in terms of section 119(7) 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.

## **121. Amendment or termination of parenting plan made an order of court**

- (1) A parenting plan that was made an order of court in terms of section 119(9) 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 children's 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 contemplated in subsection (2), 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 119(5);
  - (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.

## 122. Disputes relating to parenting plans

- (1) A co-holder of parental responsibilities and rights aggrieved by -
- (a) the manner of compliance or the non-compliance with any provision of a parenting plan registered with the clerk of the children's court in terms of section 119(7) or made into an order of court in terms of section 119(8); or
  - (b) the refusal by another party to the plan to agree to an amendment or termination of parenting plan in terms of section 120,
- 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 practitioner.
- (2) Section 121(2) to (4) applies with necessary changes in respect of an application contemplated in subsection (1).

## Chapter 8 KINSHIP CARE

## 123. Kinship care and kinship care agreements

- (1) A child is in kinship care if the child has been placed, with the express or implied consent of the child's parent or guardian or by order of court in terms of section 145(3)(f)(i), in the care of a member of the child's family or extended family, other than the parent or guardian of the child or a person who has parental responsibilities and rights in respect of the child.
- (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 a kinship care agreement with the kinship care-giver, and must 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 a state maintenance grant contemplated in Chapter 16 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 149(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 legal practitioner, social worker, traditional leader or other suitable professional or a social worker or other person suitably qualified to do mediation;

- (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 119(6).
- (5) A kinship care agreement must comply with the best interests of the child standard set out in section 3.

#### **124. Parental responsibilities and rights in respect of kinship care by court order**

If a court has placed a child in kinship care in terms of section 145 the kinship care-giver of the child has parental responsibilities and rights in respect of the child as contemplated in section 149(2), 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.

#### **125. Amendment or termination of kinship care arrangement and agreement**

- (1) A parent with custody or guardianship of a child or any other guardian of that child or the kinship care-giver may at any time amend or terminate a kinship care arrangement that is not registered in terms of section 123(4)(d).
- (2) A kinship care agreement registered with the clerk of the children's court in terms of section 123(4)(d) may be amended or terminated by any of the persons who concluded that agreement, in which case such person must register the amended agreement with the clerk of the children's court or notify the clerk of the children's court of its termination within seven court days of the amendment or termination.
- (3) A children's court may, on application by a social worker or any other person who has an interest in the well-being of a child, terminate a kinship care agreement contemplated in section 123, 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 131 and may make such additional order or orders as it considers appropriate.

#### **126. Disputes relating to kinship care agreements**

If there is a dispute relating to the exercise of a kinship care agreement or in respect of its termination or amendment a party to the agreement or a child who is covered by the agreement, may -

- (a) seek to resolve it by mediation or a family meeting; or
- (b) in the prescribed manner apply to the children's court having jurisdiction for the making of an appropriate order, in which case the provisions of section 121(2) to (4) relating to parenting plans apply with necessary changes.

#### **127. Application for access by kinship care-giver after termination of agreement**

- (1) If a kinship care agreement, whether registered with the clerk of the children's court in terms of section 123(4)(d) 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 103 applies with necessary changes.

- (2) The children's 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 is in the best interests of the child concerned.

## **128. Regulations**

- (1) The Minister may make regulations relating to -
  - (a) the form of a kinship care agreement contemplated in section 123;
  - (b) any other matter required or permitted to be prescribed under this Chapter; and
  - (c) any other incidental administrative or procedural matter that is necessary to be prescribed for the proper implementation or administration of this Chapter.
- (2) Regulations made under subsection (1) may -
  - (a) create an offence for any contravention of a regulation or a failure to comply with a provision of a regulation; and
  - (b) prescribe penalties in respect of an offence contemplated in paragraph (a) not exceeding a fine of N\$4 000 or imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

## **Chapter 9 PREVENTION AND EARLY INTERVENTION**

### **129. Powers and functions of Minister**

- (1) The Minister may from money appropriated by Parliament or 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 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.

### **130. Prevention and early intervention services**

- (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 -
  - (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 care-givers 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 care-givers 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 to meet children's needs in the family environment;
  - (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 one or more of the following components:
- (a) assisting families to obtain the basic necessities of life, including assisting them with an application for a state maintenance grant contemplated in Chapter 16 or empowering them to obtain basic necessities of life for themselves and their children;
  - (b) providing families with information to enable them to access services;
  - (c) 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;
  - (d) providing families with information about gambling addiction and assisting them to address such addiction of any family member;
  - (e) supporting and assisting families with a chronically ill or terminally ill family member;
  - (f) assisting families to provide or access appropriate early childhood development opportunities for children who have not attained the school starting age;
  - (g) 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;
  - (h) providing families with information regarding the resolution of disputes at a family meeting; 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) Prevention and early intervention programmes must involve and promote the participation of traditional leaders where this is appropriate to the community or the family in question.
- (7) A children's court may make an order regarding the provision of prevention and early intervention services, summarily, in terms of section 140(3) or after a child protection hearing in terms of section 145 or 146(b).

## **Chapter 10**

### **CHILD PROTECTION PROCEEDINGS**

#### **131. Child in need of protective services**

- (1) In this Chapter, a child is in need of protective services, if that child -
  - (a) is abandoned or orphaned and has insufficient care or support;
  - (b) is engaged in behaviour that is harmful or is likely to be harmful to the child or any other person and the parent or guardian or the person with the care of the child, is unable or unwilling to control that behaviour;
  - (c) lives or works on the streets or begs for a living;
  - (d) is being or is likely to be, neglected, maltreated or physically or mentally abused;
  - (e) is addicted to alcohol or another dependence producing drug and is without any support to obtain treatment for such dependency;
  - (f) is below the age of 18 years and is involved in a criminal matter;
  - (g) is an unaccompanied foreign child;
  - (h) is chronically or terminally ill and lacks a suitable care-giver; or
  - (i) is being kept in premises which are extremely overcrowded, highly unsanitary or dangerous.
- (2) A child in the following circumstances may be a child in need of protective services and must be referred to a designated social worker for an investigation -
  - (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 who lives in or is exposed to or is at risk of living in or being exposed to circumstances which may seriously harm the physical, mental, emotional or social well-being of the child;
  - (e) a child whose parent has been imprisoned and who lacks a suitable care-giver;
  - (f) a child below the age of 16 years who is found to be pregnant;
  - (g) a child who has been the victim of a serious crime against the child's person;
  - (h) a child who is engaged in commercial sex work or has been subjected to any form of sexual exploitation;
  - (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 intervention 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) a child involved in a case referred for investigation by the Children's Advocate; and
- (n) a child reasonably suspected of falling under subsection (1).

### **132. Reporting in respect of a child who may be in need of protective services**

- (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 131, that person must report such information in the prescribed form to a state-employed 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 or dental practitioner, pharmacist, school counsellor, dentist, psychologist, psychological counsellor, nurse, physiotherapist, speech therapist, occupational therapist, traditional leader, traditional health practitioner, legal practitioner, religious leader, labour inspector, social worker in private practice or employed by a child protection organisation or a member of staff at a place of safety or a facility registered under Chapter 5.
- (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 131, may report that belief to any state-employed 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 is privileged information 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 making any report required or permitted in terms of this section, unless the person makes the report knowing it to be false or misleading.
- (6) A 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 such fine and such imprisonment.

### **133. Self-reporting by children**

- (1) A child may make a report that he or she believes himself or herself or another child to be in need of protective services contemplated in section 131, to a community child care worker, a social auxiliary worker, a social worker or a member of the police.
- (2) If a report is made under subsection (1) the person to whom the report is made must follow the prescribed procedures.

### **134. Immediate response to report that child may be in need of protective services**

- (1) If a report made under section 132(1) or (3) or section 133 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 stated in subsections (2) to (4).
- (2) A member of the police or a social worker who receives a report in terms of section 132(1) or (3) or section 133 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 well-being 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 search and removal of the child in terms of section 135 or remove the child without a warrant in terms of section 136 if the circumstances mentioned in section 135(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 135 or 137.
- (3) If a report of a child who may be in need of protective services is made under section 132(1) or (3) or section 133 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) If a designated social worker receives a report that a child may be in need of protective services in terms of section 42(1), 132(1) or (3), 133(1), 204(1), 217, 227, 234(6) or 249(4) or subsection (3) of this section or if it comes to the attention of a designated social worker that a child may be in need of protective services, the social worker must without delay -
- (a) report the matter and any steps taken in terms of this section to the Director responsible for child welfare services in the Ministry; and
  - (b) start an investigation in terms of section 139.

### **135. Removal of child or alleged offender with warrant**

- (1) If, on evidence given by any person on oath or affirmation before a children's commissioner it appears that the safety or well-being 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 designated 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 or other temporary safe care if the children's commissioner is satisfied that the removal of the child is necessary for the safety and well-being 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 the 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 well-being of the child.
- (2) A warrant issued in terms of subsection (1) must identify the child or the alleged offender in sufficient detail to execute the warrant.
- (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 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 of a child or an alleged offender in terms of this section, must -
  - (a) in the case of the removal of a child, without delay, but within 24 hours, inform the child's parent or guardian and the person in whose care the child had been before the removal if this is not the child's parent or guardian, of the removal, if that person can be traced; and
  - (b) on or before the next court day inform the clerk of the children's court which issued the warrant of the removal of the child or the alleged offender and the clerk must record the information in the prescribed form.
- (6) The best interests of the child must be the determining factor in any decision on whether a child in need of protective services must be removed and placed in a place of safety or other temporary safe care in terms of this section and all relevant facts must for this purpose be taken into account, including -
  - (a) the safety and well-being 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 subsection (1)(b) or section 137 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 such fine and such 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 Namibian Constitution, this section is enacted on the authority of Sub-Article (2) of that Article.

### **136. Removal of child without warrant**

- (1) Despite section 135, a member of the police or a designated social worker may without a warrant enter premises and remove a child and place the child in a place of safety or other temporary safe care, 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 well-being; 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 well-being.
- (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 or guardian and the person in whose care the child had been before the removal if this is not the child's parent or guardian, of the removal, if that person can be traced; and
  - (b) on or before 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 and the clerk must record the information in the prescribed form.



- (3) The best interests of the child must be the determining factor in any decision on whether a child in need of protective services must be removed and placed in a place of safety or other temporary safe care in terms of this section and all relevant facts must for this purpose be taken into account, including -
  - (a) the safety and well-being 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 137 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 designated 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 such fine and such 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 Namibian Constitution, this section is enacted on the authority of Sub-Article (2) of that Article.

### **137. Removal of alleged offender by written notice in lieu of removal of offender with warrant**

- (1) A member of the police to whom a report is made in terms of section 132(1) or (3) or section 133(1) 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 135, 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 on 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 of the written notice.
- (2) The member of the police must immediately forward a duplicate original of the written notice contemplated in subsection (1) 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 written notice to the alleged offender.

- (4) Section 55 of the Criminal Procedure Act applies with necessary changes 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 children's court may, after having considered the circumstances which gave rise to the issuing of the written notice contemplated in subsection (1) 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 if the court finds that there has been misuse of power by a member of the police under subsection (1); or
  - (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 that police official as contemplated in section 28 of the Police Act, 1990 (Act [No. 19 of 1990](#)).
- (8) An alleged offender contemplated in this section commits an offence if he or her -
  - (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,
 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 such fine and such 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 Namibian Constitution, this section is enacted on the authority of Sub-Article (2) of that Article.

### **138. Placement of child pending disposition of case**

- (1) A child removed under section 135 or 136 must be brought before a children's court as soon as possible after the removal but not later than five days after the removal for purposes of reviewing the placement of the child.
- (2) The children's court must, when reviewing the placement of the child as contemplated in subsection (1), after consideration of the reasons for the placement of the child and such other information as may be provided, on oath or affirmation, 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 removal of the child and the placement of the child in alternative care;

- (b) make an order for placement of the child in other alternative care;
- (c) direct that the child be restored to the custody of his or her 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 136(1),

and must, unless the child is returned to the custody of his or her parent, guardian or care-giver, direct the designated social worker to compile a report on whether the child is in need of protective services within 30 days from the date of the review of the placement.

### **139. Designated social worker's powers and duties to investigate**

- (1) A designated social worker who receives a report that a child may be in need of protective services in terms of section 42(1), 132(1) or (3), 133(1), 134(3), 204(1), 217, 227, 234(6) or 249(4), 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 138(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, on 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 under 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 and search 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, but search of a building or structure used as residence, may not be carried out without a warrant, unless the owner or occupier of the residence, has consented to the search or the designated social worker on reasonable grounds believes that a warrant will be granted if applied for and that delay in obtaining such warrant would defeat the objects of the search;
  - (j) be accompanied by a member of the police; and
  - (k) recommend any appropriate protective measures or intervention as provided for in this Act.
- (4) A designated social worker must, for purposes of an investigation in terms of this section, have due regard to the principles of child participation set out in section 4.
- (5) A report made by a designated social worker following 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 contemplated in subsection (1) 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, immediately report the alleged offence to a member of the police for investigation.

#### **140. Procedure if social worker report concludes that child is not in need of protective services**

- (1) If, after an investigation in terms of section 139, the designated social worker concludes that the child is not in need of protective services, the social worker must submit the report referred to in that section to a children's court for review in the prescribed manner.
- (2) The children's court may on review, as contemplated in subsection (1) -
  - (a) find that, contrary to the social worker's opinion, the child appears to be in need of protective services and in that case the court must proceed in terms of section 142; or
  - (b) confirm the opinion of the designated social worker that the child is not in need of protective services.
- (3) If the children's court in terms of subsection (2)(b) 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 is likely to 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 130 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 of such service provision or programme as it considers necessary.
- (4) An order made in terms of subsection (3)(b) must be for a specified period not exceeding six months.
- (5) If a case resumes after the expiry of the specified period referred to in subsection (4), the designated social worker dealing with the matter in question 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.

- (6) The children's court may after considering the report contemplated in subsection (5) -
  - (a) order the removal of the child and placement of the child in alternative care if this would be in the child's best interests;
  - (b) order the continuation of the early intervention programme for a further period not exceeding six months; or
  - (c) make no further order.
- (7) A person aggrieved by a summary order issued in terms of subsection (3) may request the children's court to conduct a child protection hearing for review of the order.

#### **141. Procedure if social worker report concludes that child is in need of protective services**

If, after an investigation contemplated in section 139, a designated social worker concludes that the child who is the subject of the investigation is in need of protective services, that 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.

#### **142. Scheduling of child protection hearing**

- (1) The children's court must, on receiving an application for a child protection hearing as contemplated in section 141, determine the date of the hearing as soon as possible but not more than 30 days from the date on which the application has been made.
- (2) A child protection hearing must be heard and determined within 60 days from the date on which it starts.
- (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 considers appropriate.
- (4) The children's court may, after having enquired into the reasons for the delay in adherence to time-frames contemplated in subsection (3), notify the registrar of Social Work and Psychology Council to take appropriate action.

#### **143. Notice of child protection hearing**

- (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 the 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 145 or 146 at the conclusion of the hearing.
- (2) The children's court may, on 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 child protection hearing, in which case section 57(2) applies 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.

#### **144. Adjournments of child protection hearings**

- (1) A child protection hearing may not be adjourned for longer than 14 days at a time.
- (2) If an adjournment of a child protection hearing 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 extended family member; or
  - (e) be placed in temporary safe care, if the child is not already in such care.

#### **145. Court orders when child in need of protective services**

- (1) The children's court must, on the completion of a child protection hearing and subject to section 146, 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 139 and any other report requested by the court in terms of section 47(2)(g); 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 -
    - (i) the occupation or means of income has an effect on the general well-being or development of the child; or
    - (ii) 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 children's 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 well-being 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 alternative care, if the court finds that that person is a suitable person to provide for the safety and well-being of the child, subject to such conditions or supervision as the court considers to be appropriate;
  - (c) that the child be placed in the care of a parent or guardian who did not have care of the child immediately before the proceedings;

- (d) 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;
- (e) 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;
- (f) 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 a child detention centre that provides a programme suited to the child's needs;
- (g) 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 in terms of section 225(2);
- (h) 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 in terms of section 225(2);
- (i) 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 well-being or safety of the child; or
  - (iii) the child is exposed to a substantial risk of imminent harm;
- (j) giving consent to medical intervention in respect of or to a surgical operation to be performed on a child;
- (k) directing that the child receive appropriate medical, psychological or psychiatric treatment or attendance, if need be at State expense, if the court finds that the child is in need of such treatment or attendance;
- (l) instructing a hospital to retain a child who on reasonable grounds is suspected of having been subjected to abuse or neglect, pending further inquiry;
- (m) 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;
- (n) 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;



- (o) 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;
  - (p) instructing a child or other person involved in the matter to participate in a professional assessment;
  - (q) instructing a person to undergo a specified skills development, education, training, treatment or rehabilitation programme;
  - (r) 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;
  - (s) relating to the assignment, exercise, extension, restriction, suspension or termination of parental responsibilities and rights in respect of a child, including an order in terms of section 237;
  - (t) 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;
  - (u) of contribution in terms of section 160;
  - (v) 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;
  - (w) 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;
  - (x) of early intervention as contemplated in section 130; or
  - (y) which in the court's opinion is 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, but 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) or (f)(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 other 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, by a designated social worker or authorised person; or
    - (iii) requiring the person in whose care the child has been placed, to co-operate with the supervising designated social worker or other 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.



**146. Court orders when child not in need of protective services**

If the children's court, after a child protection hearing contemplated in section 141, determines that a child is not in need of protective services -

- (a) 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) is living in a situation which is likely to 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 -
  - (i) section 140(3)(a) or (b), in which case subsections (4) to (7) of that section apply with necessary changes; or
  - (ii) section 145(3), excluding an order for placement in alternative care in respect of the child.

**147. Court orders for alternative placement**

- (1) Before a children's court makes an order in terms of section 145 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, but the child's safety and well-being must receive first priority;
    - (ii) placing the child in the care of a parent or guardian who did not have care of the child immediately before the children's court proceeding;
    - (iii) referring the child to a designated social worker for consideration of the conclusion of a kinship care agreement contemplated in section 123(2), either temporarily or permanently or making the child available for adoption by the child's family members;
    - (iv) 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;
    - (v) placing the child in permanent foster care or making the child available for adoption by persons who are not extended family members, preferably of similar ethnic, cultural and religious backgrounds or making the child available for adoption by extended family members;
    - (vi) 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
    - (vii) placing the child in a place of safety, a children's home or a child detention centre with or without terminating parental responsibilities and rights of the parent, guardian or care-giver.
- (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), (iii), (vi) and (vii) 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 plan for alternative permanent care.

#### **148. Family access to children in alternative placements**

A children's court making an order that a child be placed in alternative care may make an order regarding regular access to the child by any member of the child's family, including a step-parent or any other person if the court finds that access would be in the child's best interests, and may impose such conditions relating to such access as it considers appropriate.

#### **149. Transfer of certain parental powers at placement**

- (1) If a child is placed by a court order in alternative care 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 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, extended family members 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 that the child be returned home for a specified trial period; 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 has been placed must -
  - (a) obtain basic medical intervention for the child if reasonable grounds exist to believe that he or she requires such intervention; and
  - (b) ensure that the child obtains a surgical operation 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 transferred in terms of subsection (1) to the management of the facility with regard to the care of the child.

### 150. Discharge of orders

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) the child;
- (b) a member of the child's family;
- (c) a social worker;
- (d) a member of the police;
- (e) a parent, guardian or care-giver of the child; or
- (f) any person with parental responsibility in respect of the child.

### 151. Duration, extension and monitoring of orders

- (1) An order made by a children's court in terms of section 145 or 146(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 on 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 47(2).
- (2) Despite 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 reaches the age of majority.
- (3) The children's court must, when deciding on an extension of the period of a court order in terms of subsection (1) or (2), 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 145(3)(m), may not extend beyond the date on which the child in respect of whom it was made reaches the age of majority.
- (5) A child placed in foster care, kinship care, a children's home or a child detention 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 a child detention 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 145 or 146(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 considers appropriate, but a designated social worker must visit a child subject to an order in terms of section 145 or 146 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.

### **152. Unauthorised removal from place of safety, kinship care or residential child care facility**

A person commits an offence, if that person without reasonable cause removes a child from alternative care in which the child has been placed in terms of this Chapter without the authority or permission of the person under whose care the child is placed and is liable on conviction to a fine not exceeding N\$4 000 or to imprisonment for a period not exceeding 12 months, or to both such fine and such imprisonment.

### **153. Regulations**

- (1) The Minister may -
  - (a) with the concurrence of the minister responsible for safety and security, make regulations prescribing the form of a written notice to be issued by a member of the police in terms of section 137;
  - (b) with the concurrence of 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) with the concurrence of the minister responsible for justice, make regulations prescribing the reasonable efforts to be made in order to serve a written notice contemplated in section 137(1) and (3);
  - (e) make regulations prescribing the form of a report and particulars to be included in the report by a designated social worker in terms of section 139(1);
  - (f) make regulations relating to any other matter required or permitted to be prescribed under this Chapter; and
  - (g) make regulations relating to any other incidental administrative or procedural matter that is necessary to be prescribed for the proper implementation or administration of this Chapter.
- (2) Regulations made under subsection (1) may -
  - (a) create an offence for any contravention of a regulation or a failure to comply with a provision of a regulation; and
  - (b) prescribe penalties in respect of an offence contemplated in paragraph (a) not exceeding a fine of N\$4 000 or imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

## **Chapter 11**

### **FOSTER CARE**

#### **154. Foster care**

- (1) A child is in foster care if the child has been placed, in terms of an order of a children's court under section 145(3)(f)(i) after a child protection hearing contemplated in section 141, in the care of a person who is not the parent, guardian, family member or extended family member of the child.
- (2) The Minister may by regulation establish and regulate the registration of cluster foster care services 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.
- (3) This Chapter applies to both parents, if married or living together, in whose foster care a child has been or is to be placed, unless foster care of such child is awarded to one foster parent only.

#### **155. Application for approval as prospective foster parent**

- (1) A person or persons who intends to be approved as a prospective foster parent must make an application, accompanied by 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 156(1) and (2).
- (3) The Minister may approve a person in respect of whom an assessment has been made in terms of subsection (2) 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 information as may be prescribed.

#### **156. Prospective foster parent**

- (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 238.
- (2) A person who has been convicted of an offence contemplated in section 238 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; or
    - (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 10; or
  - (v) if the registered person is convicted of an offence referred to in section 238.
- (4) Subsections (1) and (2) apply with necessary changes to a person employed at or involved in an organisation managing a cluster foster care scheme.

### **157. Parental responsibilities and rights of foster parent**

The foster parent of a child has parental responsibilities and rights in respect of the child as contemplated in section 149, as well as any additional parental rights and responsibilities stated 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.

### **158. Number of children to be placed in foster care**

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.

### **159. Termination of foster care**

- (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 reclaims 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 12

### CONTRIBUTION ORDERS

#### 160. Issue of contribution orders

- (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 on the recommendation of a social worker or on its own initiative 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;
  - (b) as a short-term emergency contribution towards the maintenance or treatment of, or the costs resulting from, any urgent needs of a child; or
  - (c) as a contribution towards the reimbursement of state expenditure incurred as a result of the payment of a state maintenance grant contemplated in Chapter 16 in circumstances where it is shown that the respondent could have contributed towards the maintenance 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.

#### 161. Jurisdiction

- (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 145.
- (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](#)).

#### 162. Contribution order

- (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.

**163. Effect of contribution order**

- (1) A provisional contribution order and a contribution order have the effect of a provisional maintenance order and a 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](#)).
- (2) Sections 33 and 39 of the Maintenance Act, 2003 (Act [No. 9 of 2003](#)), apply with necessary changes to a person who refuses or fails to comply with a contribution order.

**164. Attachment of wages of respondent**

- (1) For purposes of subsection (2) “remuneration” includes any salary, wages, allowances or any other form of remuneration or any other income which is paid periodically to any person.
- (2) 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.
- (3) A person who fails to comply with subsection (2) commits an offence and is liable on conviction to a fine not exceeding N\$4 000.

**165. Change of residence or work by respondent**

- (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 fails to comply with the provisions of subsection (1) commits an offence and is on conviction liable to a fine not exceeding N\$2 000.

**166. Minister as respondent in appeals**

If an appeal in terms of section 46 is brought by a person against whom a contribution order was made, the Minister must be cited as the respondent in the appeal.

**167. Service of process, execution of contribution orders and costs**

- (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, 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 are 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.



## **Chapter 13**

### **ADOPTION OF CHILDREN**

#### **Part 1 – DOMESTIC ADOPTIONS**

##### **168. Adoption orders**

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.

##### **169. Adoptable children**

- (1) A child is adoptable if -
  - (a) the child does not have a parent and does not have a 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 and the child does not have a suitable guardian or care-giver willing to care for him or her;
  - (c) the child has been abandoned;
  - (d) the child is to be adopted by a step-parent;
  - (e) the child is in need of a permanent alternative care; or
  - (f) 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)(e), a child who is in permanent foster care or stable kinship care is not in need of a permanent alternative care.

##### **170. Persons who may adopt a child**

- (1) A child may be adopted by -
  - (a) the spouses in a marriage, jointly;
  - (b) the spouse of a parent of the child; or
  - (c) a widower, widow, divorced or an 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) living in circumstances which are suitable for the adoption of a child;
  - (d) 25 years of age and older, unless the applicant or applicants can show grounds why he, she or they are suitable to adopt a child at a younger age, but a child may be adopted by a married couple jointly where at least one of the spouses is 25 years of age or older;
  - (e) properly assessed by a designated social worker for compliance with paragraphs (a), (b) and (c), and any proposed exception to the age limit in paragraph (d);
  - (f) in possession of a valid police clearance certificate as contemplated in section 238; and

- (g) habitually resident in Namibia or if a married couple each of them must be habitually resident in Namibia.
- (3) The social worker conducting the assessment in terms of subsection (1), may require, if he or she considers it to be in the best interest of the child to be adopted, that other members of the household where the child is to live be in possession of a valid police clearance certificate contemplated in section 238.

**[Note that subsection (3) contains an erroneous cross-reference. The social worker assessment referred to is conducted in terms of subsection (2)(e), not subsection (1).]**

- (4) A prospective adoptive parent who is not a Namibian citizen but who is habitually resident in Namibia may only be registered as a prospective adoptive parent if the Minister is satisfied -
  - (a) that the country of which that person has citizenship recognises the adoption;
  - (b) that the child may enter the country contemplated in paragraph (a) and remain there permanently; and
  - (c) with any prescribed additional information which has been submitted.
- (5) 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).
- (6) A designated social worker must assess a prospective adoptive parent for compliance with subsection (2).
- (7) A person may not be disqualified from adopting a child by reason of that person's financial status, but the prospective adoptive parent must be able to provide for the adoptive child's basic needs.
- (8) A person who has been convicted of an offence contemplated in section 238 is not a fit and proper person, within the meaning of subsection (2)(a), to be an adoptive parent.

### **171. Register of Adoptable Children and Prospective Adoptive Parents**

- (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 (hereinafter referred to as the RACAP).
- (2) The name and other identifying information of a child must be entered into the RACAP if the child is adoptable.
- (3) If the child contemplated in subsection (2) has been adopted the name and other identifying information of the child must remain in the RACAP and an entry must be made in the RACAP that the child has been adopted.
- (4) The name and other identifying information of a person approved as a prospective adoptive parent, including that person's citizenship and residency status, must be entered in the RACAP.
- (5) 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 -
    - (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 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 the person registered as a prospective adoptive parent as contemplated in Chapter 10;
  - (v) if the person registered as a prospective adoptive parent is convicted of an offence referred to in section 238; or
  - (vi) if an adoption arising from the registration has been concluded.
- (6) Only the Minister and staff members of the Ministry designated by the Minister have access to the RACAP.

## 172. Consent to adoption

- (1) The children's court must 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 minor, but a minor parent who has a parent or guardian must be assisted by that parent or guardian, if available, unless the children's court dispenses with such assistance with due regard to the best interests of the minor parent and the child whose adoption is under consideration;
  - (b) any other person who holds guardianship in respect of the child to be adopted, excluding the guardian of a minor contemplated in paragraph (a);
  - (c) the child to be adopted, if the child is 10 years of age or older; and
  - (d) the child to be adopted, if the child is under the age of 10 years, but of sufficient maturity and stage of development to understand the effect of giving consent.
- (2) Subsection (1) does not include a parent or a person contemplated in subsection (12) or (13) 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 or guardian 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 contemplated in subsection (1).
- (5) The eligibility of the person contemplated in subsection (4) must be determined in terms of section 170(2) and the children's commissioner must be satisfied that the expression of wishes in terms of subsection (4) was not a result of undue pressure or inducement.
- (6) If a person named in terms of subsection (4) is not habitually resident in Namibia, any requirements relating to inter-country adoption as set out in Part 2 of this Chapter must be complied with.
- (7) Consent to the adoption of a child may not be given before the birth of the child.
- (8) Consent contemplated 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 a 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.
- (9) The consent contemplated 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.
- (10) The court may on good cause shown condone any deficiency in the provision of a consent given outside Namibia in terms of subsection (8)(b) 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.
- (11) 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, failing which the consent is final irrespective of the period of any delay in finalising the adoption.
- (12) The children's court may dispense with consent of a parent or guardian to an adoption, if -
  - (a) the court is satisfied that the parent or guardian -
    - (i) is incompetent to give consent due to mental incapacity confirmed by a report from a suitably qualified person;
    - (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) did not make an attempt 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 238; or
  - (b) the child is an orphan and does not have a guardian to care for or arrange for the care of 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.
- (13) 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 after conception and has not acknowledged paternity in a manner set out in subsection (14) or in any other prescribed manner that he is the biological father of the child; or

- (b) 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.
- (14) A person referred to in subsection (13)(a) may, for the purposes of that subsection, acknowledge that he is the biological father of a child by -
  - (a) voluntarily paying or offering to pay maintenance in respect of the child;
  - (b) paying damages in respect of the pregnancy in terms of customary law; or
  - (c) 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 [No. 81 of 1963](#)).
- (15) 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.

### 173. Unreasonable withholding of consent

- (1) If a parent or person referred to in section 172(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.

### 174. Adoption plans

- (1) Before the making of an adoption order, but only after the required consents to the adoption have been given, the parties to the adoption may agree on an adoption plan.
- (2) If the children's court, in the course of approving an adoption, concludes that an adoption plan concluded after the adoption order is finalised would be in the best interests of the child concerned, it may direct the parties to attempt to conclude such an agreement and may order the parties to make use of mediation for this purpose.
- (3) An adoption plan is a plan agreed to by two or more of the parties to the adoption of a child that may include the making of arrangements for the exchange of information between the parties to the adoption in relation to any one or more of the following -
  - (a) the child's medical background or condition;
  - (b) the child's development and important events in the child's life;
  - (c) the means and nature of contact between the parties and the child; or
  - (d) any other matter relating to the child.
- (4) Without limiting the matters for which an adoption plan may be made, an adoption plan may include the manner in which the child is to be assisted to develop a healthy and positive cultural identity and to foster links with the child's cultural heritage.

- (5) 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 by -
    - (i) a party to the agreement; or
    - (ii) the adopted child; and
  - (d) must contain the prescribed particulars.
- (6) An adoption plan 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.
- (7) The designated social worker facilitating the adoption of the child must assist the parties to an adoption in preparing an adoption plan and counsel the parties on the implications of such an agreement.
- (8) 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.

### **175. Application for adoption**

- (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 as contemplated in section 169;
    - (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 170(6);
  - (d) be accompanied by an adoption plan referred to in section 174, if any; and
  - (e) contain such particulars as may be prescribed.
- (2) The person who applies for an adoption of a child may not have access to any document lodged with the court by other parties except with the permission of the court.

### **176. Notice of application to parties**

- (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 by clerk of the children's court to -
  - (a) each person whose consent to the adoption is required in terms of section 172; and
  - (b) the Minister.
- (2) An adoption order may be granted provisionally before the expiry of the period referred to in section 172(11) 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 required in terms of section 172 and the Minister 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.

### **177. Consideration of adoption application**

- (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 169(2) and section 170(6);
  - (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 or guardian and stated in that parent or guardian's consent;
  - (e) the report contemplated in section 175(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 172, and the court is satisfied that the parent or guardian of the child understands that the effect of the adoption order means permanent deprivation of parental rights; and
  - (b) consent has not been withdrawn in terms of section 172(11).
- (3) If 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 considers appropriate.

### **178. Effect of adoption order**

- (1) Except when provided otherwise in the adoption 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 is for all purposes regarded as the child of the adoptive parent and an adoptive parent is for all purposes regarded as the parent of the adopted child.

### **179. Rescission of adoption order**

- (1) A children's court may rescind an adoption order on application in the prescribed form 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 interest of the child and -
  - (a) the applicant is a parent or guardian 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 170.
- (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 172 or who have withheld consent to the adoption, if the child or the adoptive parent brings the application;
  - (c) the Minister and the competent authority responsible for adoptions in the other country, in the case of an inter-country adoption; and
  - (d) any other person whom the court finds has a sufficient interest in the matter.

### **180. Effect of rescission**

- (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 178(2) and (3) no longer apply in respect of the child concerned; and



- (b) all responsibilities, rights and other matters terminated by section 178(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 145(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.

### **181. Recording of adoption in births register**

- (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 court must transmit the adoption order to the minister responsible for home affairs, who must alter the birth register accordingly.
- (2) A notice in terms of subsection (1) must be accompanied by -
  - (a) the relevant adoption order as registered by the adoption registrar contemplated in section 183;
  - (b) the birth certificate of the child, if any; and
  - (c) the prescribed application to note an adoption.

### **182. Registration of birth and recording of adoption of child whose birth is registered outside Namibia**

- (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 183;
  - (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 application to note an adoption, completed as far as possible and signed by the adoptive parent; and
  - (d) a fee prescribed in terms of any applicable law, if any.

### **183. Adoption Register**

- (1) The Minister must designate a staff member of the Ministry as the adoption registrar, who must in the prescribed manner record information relating 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.
- (3) The Adoption Registrar must -
  - (a) ensure that the births of all children who are to be adopted, including all children listed in the RACAP contemplated in section 171, are registered in accordance with the provisions of the relevant legislation regulating the registration of births; and
  - (b) submit a certified copy of each adoption order made in terms of section 177 or in Part 2 of this Chapter to the minister responsible for home affairs, including a certified copy of any rescission of such order as contemplated in section 179.
- (4) The Adoption Registrar may provide to a birth registration authority of a foreign country such information as may be requested by the foreign country relating to a child born in Namibia but adopted by citizens of a foreign country after the competent authority of that country has made the certification required by the Convention.

#### **184. Access to Adoption Register**

- (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 adopted 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 174 are entitled to have access to such information about the child as has been stated in the plan.

**185. Offences in respect of adoption services**

- (1) A person may not provide adoption services in terms of this Chapter or facilitate an adoption, unless such person is a social worker who is designated by the Minister in terms of section 33 to provide adoption 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 Part 1 or Part 2 of this Chapter; or
  - (b) by any means induce another person to give up a child for adoption in terms of Part 1 or Part 2 of this Chapter.
- (3) Subsection (2)(a) does not apply to -
  - (a) the care-giver or biological parent of a child receiving compensation for prescribed expenses;
  - (b) a legal practitioner, psychologist or other professional person receiving prescribed fees 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 or other prescribed expenses must be paid directly to the medical institution or other service provider in question.
- (5) Expenses incurred in terms of subsection (3) are not refundable if the adoption, due to the death of the child or for any other reason based on good faith, fails to be concluded.
- (6) Any person who contravenes 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 both such fine and such imprisonment.

**186. Advertising**

- (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 to -
  - (a) the publication of a court order or a notice in terms of this Act;
  - (b) an advertisement by the Ministry for purposes of recruiting prospective adoptive parents for inclusion in the RACAP contemplated in section 171; or
  - (c) other forms of prescribed advertisements.
- (3) A 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 both such fine and such imprisonment.

**187. Regulations**

- (1) The Minister may make regulations relating to -
  - (a) 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) procedures to be followed to locate persons whose whereabouts are unknown for obtaining their consent to adoptions;
  - (c) procedures for determining the age of a child;
  - (d) procedures for payment for adoption services undertaken by persons or organisations to prevent conflict of interests from arising;
  - (e) requirements that a social worker has to comply with to provide adoption services or inter-country adoption services;
  - (f) procedure and form of an application to be provided with a certificate to render adoption services;
  - (g) advertising guidelines for recruitment of prospective adoptive parents;
  - (h) guidelines for the training of prospective adoptive parents;
  - (i) any other matter required or permitted to be prescribed under this Part; and
  - (j) any other incidental administrative or procedural matter that is necessary to be prescribed for the proper implementation or administration of this Part.
- (2) Regulations made under subsection (1) may -
- (a) create an offence for any contravention of a regulation or a failure to comply with a provision of a regulation; and
  - (b) prescribe penalties in respect of an offence contemplated in paragraph (a) not exceeding a fine of N\$ 4 000 or imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

## Part 2 – INTER-COUNTRY ADOPTIONS

### 188. Purpose of this Part

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 the Child and the African Charter on the Rights and Welfare of the Child and the Hague Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption.

### 189. Convention to have force of law

The Convention has the force of law in Namibia from the date that it becomes binding on Namibia.

### 190. Central Authority in Namibia

- (1) The Minister is the Central Authority for Namibia for the purpose of Article 6(1) of the Convention.
- (2) The Minister may exercise all the powers and must perform all the functions that a Central Authority has under the Convention.

### 191. Delegation of Convention powers and functions

- (1) The Minister may, to the extent permitted by the Convention, delegate the powers or functions of a Central Authority under Article 9 or Chapter IV of the Convention to a staff member of the Ministry or to an organ of state as the Minister may consider appropriate.
- (2) A delegation under subsection (1) does not prevent the performance or exercise of a power or function delegated under that subsection by the Minister.

## **192. Recognition of Convention adoptions**

The competent authority to certify under Article 23 of the Convention that an adoption has been made in accordance with the Convention is a children's court designated by the minister responsible for justice for this purpose with the concurrence of the Minister and the Magistrate's Commission.

## **193. Notice of adoption application**

Each application for the adoption of a child habitually resident in Namibia, whether by prospective adoptive parents habitually resident within or outside the borders of Namibia, must, apart from any other requirements, be served on Namibia's Central Authority.

## **194. Application of Part 1**

Part 1 of this Chapter applies 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.

## **195. Exceptional cases involving inter-country adoptions**

- (1) The adoption of a child habitually resident in Namibia by a family member of that child resident in a contracting State to the Convention or by a person resident in a contracting State to the Convention who will become an adoptive parent jointly with the child's biological parent, may be dealt with in the prescribed manner as an inter-country adoption, but the Minister may dispense with one or more of the formal requirements of inter-country adoption if it is in the best interests of the child concerned in the context of a specific case.
- (2) The adoption of a child habitually resident in Namibia by a prospective adoptive parent resident in a State that is not a contracting state to the Convention, may be dealt with in the prescribed manner as an inter-country adoption -
  - (a) if the -
    - (i) prospective adoptive parents are family members of that child;
    - (ii) prospective adoptive parents had a pre-existing relationship with the child; or
    - (iii) child has special needs which can only be catered for in the country of habitual residence of the prospective adoptive parents; and
  - (b) if the prospective adoptive parents have been assessed for eligibility to adopt;
  - (c) if the adoption will be recognised in the country of habitual residence of the prospective adoptive parents;
  - (d) if the child to be adopted will be allowed to enter and remain permanently in the country of habitual residence of the prospective adoptive parents; and
  - (e) the standards that are being or will be applied to the adoption accord with those in the Convention.

## **196. Authority for Namibian accredited bodies to act overseas**

The Minister may accredit a social worker or a child protection organisation designated to facilitate inter-country adoptions under section 33 to act in another State which is a contracting state to the Convention.

**197. Authority for overseas accredited bodies to act in Namibia**

The Minister may authorise a body accredited under Chapter III of the Convention in another contracting state to act in Namibia.

**198. Inter-country adoption required in respect of certain children**

- (1) A person, other than the child's parent, family member or an extended family member, who is not habitually resident in Namibia and who has obtained custody or guardianship of a child who is habitually 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) If an application is made in the High Court for the guardianship of a child who is habitually resident in Namibia by a person who is not habitually resident in Namibia, the application must be referred to a children's court having jurisdiction to be dealt with in terms of this Part as an inter-country adoption.
- (3) A person who contravenes 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 such fine and such imprisonment.

**199. Regulations**

- (1) 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 relating to -
  - (a) accreditation of bodies in accordance with Articles 10 and 11 of the Convention;
  - (b) authorisation of an accredited body from another contracting State to act in Namibia in accordance with Article 12 of the Convention;
  - (c) procedures governing the giving of consent in accordance with Article 4(c) of the Convention;
  - (d) requirements relating to a child who may be considered for inter-country adoption;
  - (e) requirements relating to the applicants in an inter-country adoption;
  - (f) authority to make orders in relation to inter-country adoption and the form of such orders;
  - (g) additional safeguards that are necessary to ensure that the fundamental rights of the child are respected in the adoption process, including the principle of subsidiarity;
  - (h) any other matter required or permitted to be prescribed under this Part; and
  - (i) any other incidental administrative or procedural matter that is necessary to be prescribed for the proper implementation or administration of this Part.
- (2) Regulations made under subsection (1) may -
  - (a) create an offence for any contravention of a regulation or a failure to comply with a provision of a regulation; and
  - (b) prescribe penalties in respect of an offence contemplated in paragraph (a) not exceeding a fine of N\$4 000 or imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

## Chapter 14

### CHILD TRAFFICKING

#### Part 1 – GENERAL PROVISIONS IN RESPECT OF CHILD TRAFFICKING

##### 200. Definitions relating to this Chapter

- (1) For the purpose of this Chapter -

**“carrier”** includes a person who is the owner or employee of the owner, an agent, an operator, a lessor, a driver, a charterer or a master, of any means of transport;

**“electronic communications”** means the emission, transmission or reception of information, including without limitation, voice, sound, data, text, video, animation, visual images, moving images and pictures, signals or a combination thereof by means of magnetism, radio or other electromagnetic waves, optical, electromagnetic systems or any agency of a like nature, whether with or without the aid of tangible conduct;

**“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 a forced marriage;
- (d) servitude;
- (e) the removal of any body parts; or
- (f) the impregnation of a female against her will for the purpose of selling the child when the child is born;

**“trafficking”** in relation to a child means to deliver, recruit, transport, transfer, harbour, adopt, sell, exchange, lease or receive a child within or across the borders of Namibia for the purpose of exploitation.

- (2) For the purpose of subsection (1) -

**“adopt”** in relation to a child, includes an adoption facilitated or secured through legal or illegal means;

**“prohibited child labour”** means any labour which is in contravention of this Act or the Labour Act, 2007 (Act [No. 11 of 2007](#));

**“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;

**“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;

**“removal of any 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; and

**“sexual exploitation”** means the commission of any offence of a sexual nature in terms of Namibian law against a victim of trafficking.

## 201. Objects of Chapter

The objects of this Chapter are -

- (a) to give effect to the United Nations Protocol to Prevent Trafficking in Persons insofar as it relates to children;
- (b) to give effect to the Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour; and
- (c) to combat trafficking in children.

## 202. Child trafficking

- (1) A person may not traffic a child.
- (2) A person who contravenes subsection (1) commits an offence and is on conviction liable to -
  - (a) a fine not exceeding N\$1 000 000 or to imprisonment for a period not exceeding 20 years or to both such fine and such imprisonment; or
  - (b) imprisonment for a period not exceeding 20 years, without the option of a fine.

## 203. Behaviour facilitating trafficking in children prohibited

- (1) A person commits an offence, if that person -
  - (a) leases or subleases any room, house, building or establishment for facilitating or promoting trafficking in children or allows it to be so used where the person knows or suspects or ought reasonably to have known or suspected that it will be used to facilitate or promote trafficking in children;
  - (b) subsequent to the lease or sublease of any room, house, building or establishment, becomes aware or ought reasonably to have known or suspected that it is being used to facilitate or promote trafficking in children and fails to report that knowledge to a member of the police;
  - (c) intentionally advertises, publishes, prints, broadcasts, distributes or causes the advertisement, publication, printing, broadcast or distribution of information that facilitates or promotes trafficking in children by any means, including the use of the internet or other information technology; or
  - (d) finances, controls or organises the commission of an offence under this Chapter.
- (2) Every electronic communications service provider operating in Namibia who becomes aware or is aware that any electronic communications, stored on or transmitted over its electronic communications system contains information in contravention of subsection (1)(c), must -
  - (a) report the particulars relating to any such communication, to a member of the police;
  - (b) take such reasonable steps as are necessary to preserve evidence as may be required by the relevant investigative and prosecuting authorities, for purposes of investigation and prosecution by the relevant authorities; and
  - (c) without delay take such reasonable steps as are necessary to prevent continued access to those electronic communications by any -
    - (i) of the customers of that electronic communications service provider; or



- (ii) person if they are stored on the system of the electronic communications service provider.
- (3) An electronic communications service provider who fails to comply with subsection 2(a) or (b) commits an offence.
- (4) A person who is convicted of an offence under subsection (1) or subsection (3) is liable to -
  - (a) a fine not exceeding N\$1 000 000 or to imprisonment for a period not exceeding 20 years or to both such fine and such imprisonment; or
  - (b) imprisonment for a period not exceeding 20 years without the option of a fine.

#### **204. Reporting child trafficking**

- (1) Any person who has information about child trafficking must make a report to a state-employed social worker or a member of the police.
- (2) A social worker or a member of the police who receives a report under subsection (1) must follow the prescribed procedures.

#### **205. Possession, destruction, confiscation, concealment of or tampering with documents**

- (1) A person commits an offence if that person has in his or her possession or intentionally or recklessly destroys, confiscates, conceals or tampers with any actual or purported identification document, passport or other travel document of a victim of child trafficking in facilitating or promoting child trafficking.
- (2) A person who is convicted of an offence under subsection (1) is liable to -
  - (a) a fine not exceeding N\$1 000 000 or to imprisonment for a period not exceeding 20 years or to both such fine and such imprisonment; or
  - (b) imprisonment for a period not exceeding 20 years without the option of a fine.

#### **206. Using services of victims of child trafficking**

- (1) A person commits an offence if that person intentionally benefits, financially or otherwise, from the services of a victim of child trafficking or uses or enables another person to use the services of a victim of child trafficking.
- (2) A person who is convicted of an offence under subsection (1) is liable to -
  - (a) a fine not exceeding N\$1 000 000 or to imprisonment for a period not exceeding 20 years or to both such fine and such imprisonment; or
  - (b) imprisonment for a period not exceeding 20 years without the option of a fine.

#### **207. Liability of carriers**

- (1) A carrier commits an offence if he or she knowingly transported or ought to have known that he or she is transporting a victim of child trafficking within or across the borders of Namibia.
- (2) A carrier who knows or ought reasonably to have known that any of its child passengers is a victim of child trafficking must immediately report that suspicion to a state-employed social worker or a member of the police.
- (3) A social worker or member of the police, who receives a report under subsection (2), must follow the prescribed procedures.
- (4) A carrier who fails to comply with the provisions of subsection (2) commits an offence.

- (5) A carrier is liable to pay the expenses incurred or reasonably expected to be incurred in connection with the care, accommodation, transportation and repatriation or return of a victim of child trafficking to his or her country of origin or country or place from where he or she was trafficked, if the court finds, on a balance of probabilities, that the carrier has knowingly transported a victim of child trafficking who has been trafficked or ought reasonably to have known that it was transporting a victim of child trafficking.
- (6) A person who is convicted of an offence under subsection (1) or (4) is liable to -
  - (a) a fine not exceeding N\$1 000 000 or to imprisonment for a period not exceeding 20 years or to both such fine and such imprisonment; or
  - (b) imprisonment for a period not exceeding 20 years without the option of a fine.

## **208. Ancillary offences under this Chapter**

- (1) A person commits an offence, if that person -
  - (a) attempts to commit or performs any act aimed at participating in the commission of an offence under this Chapter;
  - (b) incites, instigates, commands, directs, aids, promotes, advises, recruits, encourages or procures any other person to commit an offence under this Chapter; or
  - (c) conspires with any other person to commit an offence under this Chapter.
- (2) A person convicted of an offence under subsection (1) is liable to -
  - (a) a fine not exceeding N\$1 000 000 or to imprisonment for a period not exceeding 20 years or to both such fine and such imprisonment; or
  - (b) imprisonment for a period not exceeding 20 years without the option of a fine.

## **209. Exclusion of defences and vicarious liability**

- (1) It is not a defence to a charge of contravening section 202, 203, 205, 206, 207(1) or 208 that a child who is a victim of trafficking or a person having control or authority over a child who is a victim of trafficking has consented to the intended exploitation or the action which was intended to constitute an offence under this Chapter or that the intended exploitation or action did not occur.
- (2) In order to establish liability, in terms of section 202, 203, 205, 206, 207(1) or 208, of an employer or principal of the employer, 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.
- (3) Subsection (2) does not exclude the liability of an employee or agent of, or any other person acting on behalf of the employer or principal for committing an offence under this Chapter.
- (4) A finding by a court that an employer or principal has contravened section 202, 203, 205, 206, 207(1) or 208 serves as a ground for the revocation or cancellation of any licence or registration that the employer or principal may require in order to conduct its business.
- (5) The clerk or registrar of the court which makes the finding referred to in subsection (4) must, in writing, notify the authority that granted the licence or registration of the finding.

- (6) The authority that granted the licence or registration must review the licence or registration and, where necessary, revoke or cancel the licence or registration.

## 210. Factors to be considered in sentencing

If a person is convicted of any offence under this Chapter, the court that imposes the sentence must consider, but is not limited to, the following aggravating factors:

- (a) the significance of the role of the convicted person in the trafficking process;
- (b) previous convictions relating to the offence of trafficking in persons or related offences;
- (c) whether the convicted person caused the victim of child trafficking to become addicted to the use of a dependence-producing substance;
- (d) the age of the victim of child trafficking;
- (e) the conditions in which the victim of child trafficking was kept;
- (f) whether the victim of child trafficking was held captive for any period;
- (g) whether the victim of child trafficking suffered abuse and the extent thereof;
- (h) the physical and psychological effects the abuse had on the victim of child trafficking;
- (i) whether the offence formed part of organised crime contemplated in the Prevention of Organised Crime Act, 2004 (Act [No. 29 of 2004](#));
- (j) the nature of the relationship between the victim and the convicted person;
- (k) the state of the mental health of the victim of child trafficking; and
- (l) whether the victim of child trafficking had any physical disability.

## 211. Criminal prosecution of victim of child trafficking prohibited

Criminal prosecution may not be instituted against a child who is found to be a victim of trafficking after an investigation contemplated in section 139, for -

- (a) entering or remaining in Namibia in contravention of the Immigration Control Act, 1993 (Act [No. 7 of 1993](#));
- (b) assisting another person to enter or remain in Namibia in contravention of the Immigration Control Act, 1993 (Act [No. 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 child trafficking.

## 212. Extra-territorial jurisdiction

- (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 contemplated in subsection (1) is liable on conviction to the penalty provided for in this Act for that offence.
- (3) The minister responsible for justice must, with the concurrence of 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), but only the High Court has jurisdiction in respect of an offence referred to in subsection (1)(d).
- (4) Prosecution may not 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.

## **Part 2 – PROTECTIVE MEASURES IN RESPECT OF VICTIM OF CHILD TRAFFICKING**

### **213. Assistance to victim of child trafficking**

- (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 child trafficking.
- (2) A person or organisation appointed or designated in terms of subsection (1) must -
- (a) ensure that the victim of child trafficking is placed in appropriate accommodation with access to food, water, clothes and bedding;
  - (b) arrange for counselling of the victim of child trafficking concerned, if required;
  - (c) ensure that the victim of child trafficking is informed of his or her rights in a language which the child understands;
  - (d) ensure that the victim of child trafficking receives medical or psychological services, if required;
  - (e) ensure the safety of the victim of child trafficking;
  - (f) assist in finding employment for the victim of child trafficking, 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 victim of child trafficking 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 is or 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 the Minister 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 victim of child trafficking must, pending the completion of an investigation contemplated in section 139, 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 state grant contemplated in Chapter 16 and which is payable in respect of children in a place of safety.

#### **214. Provision of health care and education services to non-resident victim of child trafficking**

A victim of child trafficking who is not a citizen or lawful resident of Namibia is entitled to the same services, including public health care and education services, as any other child in Namibia.

#### **215. Non-resident victim of child trafficking found in Namibia**

- (1) If, after an investigation contemplated in section 139, a 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 finding in terms of section 139 that a child who is illegally present in Namibia and who is a victim of child 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.

#### **216. Repatriation of non-resident victim of child trafficking from Namibia**

The minister responsible for home affairs and immigration may not repatriate a child who is not a Namibian resident and who is a victim of child trafficking to his or her country of origin or the country from where the child is or has been trafficked without giving due consideration to the -

- (a) best interests of the child standard set out in section 3;
- (b) safety of the child during the repatriation process;
- (c) availability and suitability of care arrangements and the safety of the child in the country to which the child is to be repatriated; and
- (d) possibility that the child might be harmed, trafficked again or killed.

#### **217. Repatriation of suspected victim of child trafficking to Namibia**

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 habitual resident of Namibia and who is a victim of child 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 victim of child trafficking is a citizen or lawful resident of Namibia; and

- (iv) on the child's entry into Namibia refer the child to a designated social worker who must act in accordance with the provisions of section 139 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.

## **218. Trafficking of child by parent, guardian or other person who has parental responsibilities and rights in respect of child**

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 may, in addition to any other action that may be taken in terms of this Chapter -

- (a) suspend any or all parental responsibilities and rights of that parent, guardian or other person in terms of section 237; and
- (b) place that child in temporary safe care, pending an inquiry by a children's court into whether the child is in need of protective services in terms of section 42.

## **Part 3 – REGULATIONS**

### **219. Regulations**

- (1) The Minister, after consultation with the minister responsible for home affairs and immigration and the minister responsible for foreign affairs, where it relates to powers exercised or duties performed by them under a law, may make regulations relating to -
  - (a) procedure to be followed where a report is made under section 204, that a child is or has been trafficked;
  - (b) the criteria for appointment or designation of a person or organisation under section 213;
  - (c) the powers and duties of person organisation appointed or designated under section 213; and
  - (d) any other matter required or permitted to be prescribed under this Chapter; and
  - (e) any other incidental administrative or procedural matter that is necessary to be prescribed for the proper implementation or administration of this Chapter.
- (2) Regulations made under subsection (1) may -
  - (a) create an offence for any contravention of a regulation or a failure to comply with a provision of a regulation; and
  - (b) prescribe penalties in respect of an offence contemplated in paragraph (a), not exceeding a fine of N\$4 000 or imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

## **Chapter 15**

### **PROTECTIVE MEASURES IN RESPECT OF CHILDREN**

#### **Part 1 – PROTECTIVE MEASURES RELATING TO HEALTH OF CHILDREN**

##### **220. Consent to medical intervention and surgical operation**

- (1) Despite any law to the contrary -
  - (a) a child may consent to a medical intervention in respect of himself or herself if -
    - (i) the child is 14 years of age or older; and
    - (ii) a medical practitioner concerned is satisfied that the child is of sufficient maturity and has the mental capacity to understand the benefits, risks and implications of the medical intervention;
  - (b) a child may consent to the performance of a surgical operation on himself or herself if -
    - (i) the child is 14 years of age or older;
    - (ii) a medical practitioner concerned is satisfied that the child is of sufficient maturity and has the mental capacity to understand the benefits, risks and implications of the surgical operation; and
    - (iii) the child is duly assisted by his or her parent or guardian or if the child does not have a parent or a guardian, by the child's care-giver.
- (2) A child who is a parent and who is competent to consent to a medical intervention or surgical operation in respect of himself or herself in terms of subsection (1) is also competent to consent to a medical intervention or surgical operation in respect of his or her child.
- (3) The parent or a guardian of a child or if the child does not have a parent or guardian the child's care-giver may, 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 medical intervention or surgical operation.
- (4) The superintendent of a hospital or the regional director of a clinic or an acting superintendent or regional director and in the case of a private hospital or clinic an equivalent official, 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, on the request of any person with an interest in the well-being of a child, consent to a medical intervention in respect of or a 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, on the request of any person with an interest in the well-being of a child, consent to a medical intervention in respect of or surgical operation on the child if the child unreasonably refuses or is unable to give consent.
- (7) A children's court may, following failure to obtain consent as contemplated in this section and on the request of any person with an interest in the well-being of a child, consent to a 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) If 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 must 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 is in the best interests of the child.

## 221. HIV-testing

- (1) A child may be tested for HIV, if -
  - (a) it is in the best interests of the child and consent has been given in terms of subsection (3);
  - (b) the test is necessary in order to establish whether -
    - (i) a person who is working with the child in a health care setting may have contracted or been exposed to HIV due to contact 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 is authorised by a court; or
  - (c) the child is pregnant.
- (2) A child may consent to an HIV test on himself or herself, if the child is -
  - (a) 14 years of age or older; or
  - (b) under the age of 14 years and the person who conducts the pre-test counselling is satisfied that the child is of sufficient maturity to understand the benefits, risks and social implications of such a test.
- (3) For the purpose of consent, section 220(2) to (7) applies with necessary changes to this section.

## 222. Counselling before and after HIV-testing

- (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 precludes the child from deriving any benefit from such counselling; and



- (b) the child's parent, guardian or care-giver, if the parent, guardian or care-giver has knowledge of the test.
- (2) Counselling must be provided to a child after the child is tested for HIV by an appropriately trained person -
  - (a) if the person doing the counselling is satisfied that the child is of sufficient maturity to understand the implications of the result; and
  - (b) to the child's parent, guardian or care-giver, if the parent, guardian or care-giver has knowledge of the test.

### **223. Confidentiality of information on HIV/AIDS status of children**

- (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 the child, if the child is -
  - (a) 14 years of age or older; or
  - (b) under the age of 14 years and the person doing the pre-test or post-test counselling is satisfied that child is of sufficient maturity to understand the benefits, risks and social implications of such a disclosure.
- (3) For the purpose of consent, section 220(2) to (7) applies with necessary changes to this section.
- (4) A person who contravenes 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 such fine and such imprisonment.

### **224. Consent for and conditions pertaining to examination or assessment of abused or neglected children**

- (1) Despite section 220, a medical, dental, social work, psychology, nursing or an allied health practitioner, acting within the scope of his or her duty may -

**[The word "psychology" is misspelt in the Government Gazette, as reproduced above.]**

  - (a) conduct an assessment or examination of a child whom he or she suspects of having been abused or deliberately neglected for medical or forensic purposes or both; and
  - (b) provide any reasonable medical interventions required to respond to the suspected abuse or neglect,

without the consent of the child's parent or guardian or care-giver, regardless of the age of the child, but general anaesthetic may not be administered to the child without an appropriate consent in terms of section 220.
- (2) A practitioner 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, but an assessment or examination may

proceed in the absence of such child's consent if it is considered 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 the person doing the assessment or examination 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 the child understands;
  - (b) allow the child to be accompanied by a support person of the child's choice, unless the child, if the child is of sufficient maturity and mental capacity to understand the reasons for the assessment or examination, expresses a wish not to be accompanied by any support 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.

## **Part 2 – OTHER PROTECTIVE MEASURES**

### **225. Child-headed household**

- (1) The Minister may, in the prescribed manner, 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, is imprisoned 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 in the prescribed manner, by -
- (a) a children's court; or
  - (b) the Minister or a non-governmental organisation designated 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 238.
- (4) The child heading the household or the adult designated under subsection (2) may collect and administer for the child-headed household a state maintenance grant in terms of Chapter 16 or other assistance to which the household is entitled to, subject to, in the case of a designated adult, such requirements regarding accountability as may be prescribed.
- (5) If there is disagreement between the child heading the household and the adult designated under subsection (2) regarding the collection or administration of a grant contemplated in subsection (4),

- a non-governmental organisation contemplated in subsection (2)(b) must collect and administer such grant or assistance.
- (6) The adult designated under subsection (2), a 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 who is the head of the household; and
  - (b) given the age, maturity and stage of development of the other children, the other children.
- (7) The child who is the head of a child headed 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 care-giver.
- (8) A child who is the head of 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.
- (9) The child who is the head of the child headed household or any other children in the household with the sufficient maturity and stage of development, if not satisfied with the manner in which the adult designated under subsection (2) is performing his or her duties, may report that adult to a designated social worker.
- (10) The social worker contemplated in subsection (9) 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 Minister or non-governmental organisation, in the case of a designation in terms of subsection (2)(b).
- (11) 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 such fine and such imprisonment.
- (12) A child living in a child headed household may not leave Namibia without the permission of the Minister.
- (13) In granting permission in terms of subsection (12) the Minister may impose conditions to protect the child's best interests.

## 226. Harmful social, cultural or religious practices

- (1) A person may not subject a child to social, cultural and religious practices which are detrimental to his or her well-being.
- (2) A person may not give a child out in marriage or engagement if such child does not consent to the marriage or engagement or is below the minimum age for marriage contemplated in section 24 of the Marriage Act, 1963 (Act [No. 25 of 1961](#)).
- (3) A -
- (a) child requires the consent of the minister responsible for home affairs in order to marry; and
  - (b) person below the age of 21 years also requires the consent of his or her parent, parents or guardian in terms of section 10(10) of this Act in order to marry.
- (3) A person who contravenes subsection (1) or (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 such fine and such imprisonment.
- [Note that there are two subsections labelled (3).]**
- (4) The Minister may, after consultation with interested parties including traditional leaders, by regulation prohibit any social, cultural or religious practice, including but not limited to any form of sexual initiation, 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 of a regulation, commits an offence and is liable on conviction to a fine not exceeding N\$10 000 or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment.

## **227. Procedure for dealing with abandoned children left with approved authorities**

- (1) The parent, guardian or care-giver of a child who abandons the child may not be prosecuted under section 254 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) A person who finds an abandoned child must immediately report that fact to a member of the police or a designated social worker.
- (3) A member of the police to whom a report is made in terms of subsection (2) must immediately inform a designated social worker.
- (4) A designated social worker to whom a report is made under subsection (2) or (3) must place the child in question in a place of safety and start an investigation in terms of section 139.
- (5) A designated social worker who has been notified of the abandonment of a child under subsection (2) or (3) must cause -
  - (a) an advertisement to be published in at least one national newspaper circulating in Namibia and at least one local or additional national newspaper circulating in the area where the child has been found, calling upon any person to claim responsibility for the child; 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.
- (6) If the person who abandoned a child as contemplated in subsection (1) 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 131(1) and is subject to an investigation in terms of section 139.
- (7) 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 or announcement whichever is the latest, referred to in subsection (5) during which period a person has not claimed responsibility for the child.

## **228. Corporal punishment**

- (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 conferred by Article 8 of the Namibian Constitution.
- (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 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, a school, whether a state or private school or to a child in foster care, prison, police cell or any other form of alternative care resulting from a court order.

- (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 in all the regions in Namibia; and
  - (b) programmes and materials promoting appropriate discipline at home and in other contexts where children are cared for are available in all the regions in Namibia.

## **229. Child safety at place of entertainment**

- (1) A person providing entertainment to children on any premises or in any enclosure or hosting any performance or event, must comply with subsection (3) 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) Despite subsection (1), the Minister may in writing designate facilities providing entertainment or recreation to children to comply with subsection (3).
- (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) Alcohol or tobacco products may not be sold, served or made available to children under the age of 18 years at places of entertainment contemplated in subsection (1) or (2).
- (5) A member of the police or a person authorised by a local authority council or by a regional council, in whose area of jurisdiction a premises or enclosure where the entertainment or recreation described in subsection (1) or (2) is or is to be provided is situated or who reasonably suspects that such entertainment or recreation is or is to be provided, may enter such premises or enclosure in order to inspect whether subsections (3) and (4) are complied with.
- (6) Section 77(3), (4), (5), (6) and (7) apply with necessary changes to any inspection in terms of subsection (5).
- (7) A person who contravenes subsections (3) or (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 10 years or to both such fine and such imprisonment.

**230. Coercing, allowing, inducing or encouraging children to take liquor or other substances**

Any adult commits an offence, if that adult -

[The word “offence” should be “offence”.]

- (a) coerces any child to drink any liquor or methylated spirits or to take any illegal drug;
- (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 or induces any child to take any illegal drug,

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.

**231. Rules regarding children in prison or police cell**

- (1) In the absence of a court order to the contrary, a child detained in a place used as a prison or police cell or present in a prison or police cell in the company of a parent, guardian or care-giver must be -
  - (a) kept 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 correctional officer; and
    - (ii) children may stay with a parent, guardian or care-giver under the prescribed conditions in circumstances where this would be in the best interests of the child;
  - (b) permitted visits by parents, guardians, care-giver, legal practitioners, social workers, probation officers, health workers, religious counsellors or any other person who in terms of any law is entitled to visit the child, but such visit must be 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; and
  - (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) If a child is present in a prison or police cell in the company of a parent who is detained, the police must without delay and in the prescribed form inform a designated social worker, who may conduct any investigation necessary and determine the course of action which is in the best interests of the child, which may include dealing with the child as a child in need of protective services in terms of Chapter 10.
- (3) If any complaint is received from a child or any other person concerning the conditions of a child in prison or police cell 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.
- (4) On receipt of a report under subsection (3), the Permanent Secretary must -
  - (a) 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) 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.
- (5) If a report on the injury, trauma or an observation of injury or trauma is made under subsection (3), a copy of that report, including a copy of the report of the social worker into the circumstances of the child concerned, the designated social worker must be submitted to the Children's Advocate as soon as is reasonably practicable.

**[The phrase "the designated social worker" appears to be extraneous.]**

- (6) Each police station and prison must keep a register in which the detention or the presence of any child is detailed and recorded in a way that clearly distinguishes the detention or presence of children from adults and such registers may be examined by any person, under conditions as may be prescribed.

### **232. Children lacking identification documentation**

- (1) A public health care facility may not refuse to assist or a school may not refuse to enrol or admit a child, including a child contemplated in section 233, on the basis of nationality, immigration status or lack of identification documentation.
- (2) An order of the children's court, regarding a child's age or identity, in the absence of identification documentation, is sufficient basis to satisfy any criteria which involve age or identification in respect of eligibility for a state maintenance grant contemplated in Chapter 16.

### **233. Unaccompanied foreign children**

- (1) An asylum-seeker may, in the prescribed manner, be recognised as a temporary care-giver for an unaccompanied foreign child to enable such child to stay within a particular refugee community as far as possible.
- (2) An unaccompanied foreign child may not 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 designated social worker must be present when an unaccompanied foreign child is interviewed by any government official for any purpose.
- (4) If the age of an unaccompanied foreign 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 the examination.
- (5) An unaccompanied foreign 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.
- (6) An unaccompanied foreign child may apply for asylum without assistance, but a social worker must be present when the child is being interviewed by a government official for official purposes.
- (7) A person who harbours or renders assistance to an unaccompanied foreign child does not commit a criminal offence under section 30 of the Immigration Control Act, 1993 (Act [No. 7 of 1993](#)).

**234. Child labour and exploitation of children**

- (1) A person may not -
- (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, 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;
    - (i) 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;
- [There are two items labelled (i) in the original gazette as reproduced above.]**
- (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) 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 a registered non-profit organisation, registered welfare organisation, school, religious institution or for other charitable purpose; or
  - (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) regulations and conditions governing the licence contemplated in paragraph (i) are fully complied with,

but, a parent, guardian or care-giver must provide written consent for the child's participation.

- (3) Subsection (2)(c) does not apply to activities in respect of which authorisation has been obtained from a local authority council or a regional council concerned.
- (4) 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.
- (5) 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.
- (6) A 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 139.
- (7) A 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 10 years or to both such fine and such imprisonment.
- (8) A 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 such fine and such imprisonment.

### **235. Unlawful removal or detention of child**

- (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 contravenes 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 10 years or to both such fine and such imprisonment.

### **236. Unlawful taking or sending of child out of Namibia**

- (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, in the prescribed form; 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 -
      - (iii) causes the child to be taken or in any way assists in taking the child, out of Namibia; or
      - (iv) causes or induces the child to accompany or to join him or her or any other person when departing from Namibia; or
- [The subparagraphs above should be labelled as (i) and (ii).]**
- (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 contravenes 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 10 years or to both such fine and such imprisonment.

### **237. Termination or suspension of parental responsibilities and rights in certain cases**

- (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, guardian 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.

### **Part 3 – REQUIREMENTS IN RESPECT OF CERTAIN PERSONS WHO WORK WITH CHILDREN**

#### **238. Requirements in respect of certain persons who work with children**

- (1) A person may not employ a person convicted of an offence listed in subsection (8) in an institution referred to in subsection (3).
- (2) A person may not act in a capacity referred to in subsection (3) if convicted of an offence listed in subsection (8).

**[The word “referred” is misspelt in the Government Gazette, as reproduced above.]**

- (3) Subsections (1) and (2) apply to -
  - (a) a person who manages, operates, 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 or association providing welfare services to children;
  - (b) a person who works with or have 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 or association providing welfare services to children;
  - (c) an alternative care giver or adoptive parent; and
  - (d) a person who works in any other form of employment or activity as may be prescribed.

**[The word “prescribed” is misspelt in the Government Gazette, as reproduced above.]**

- (4) Subsection (1) applies to employment on a part-time, full-time or volunteer basis.
- (5) Before employing a person as contemplated in subsection (1) the employer must ensure that the person submits a valid police clearance certificate stating that the person has not been convicted of an offence listed in subsection (8), within 10 years before the date of assumption of duty.
- (6) An employer or a person who has reason to believe that a person who has been convicted of an offence listed in subsection (8) is employed has applied for employment or is acting in such capacity as contemplated in subsection (3), must prescribed manner inform the registrar referred to in subsection (11).

**[The words “in the” appear to have been omitted in the phrase “must prescribed manner”.]**

- (7) The registrar, referred to in subsection (11), who receives information in terms of subsection (6) must deal with the information in the prescribed manner.
- (8) For the purpose of this section the offences are:
  - (a) murder;
  - (b) rape;
  - (c) indecent assault;
  - (d) incest;
  - (e) kidnapping;
  - (f) any statutory sexual offence;
  - (g) any offence relating to the manufacture, distribution or possession of pornography; or

- (h) any offence relating to human trafficking;
  - (i) 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; or
  - (j) assault with intent to cause grievous bodily harm.
- (9) A person who contravenes subsection (1) or (2) commits an offence and is liable to a fine not exceeding N\$20 000.00 or imprisonment for a period not exceeding five years or to both such fine and such imprisonment.
- (10) The registrar referred to in subsection (11) must keep a register in which is recorded -
- [The word “referred” is misspelt in the Government Gazette, as reproduced above.]**
- (a) the names of persons convicted of offences listed in subsection (8); and
  - (b) other prescribed information.
- (11) The Minister must for the purpose of subsection (12) designate a staff member as a registrar, who will have the function of keeping a register and such other function as may be prescribed.
- (12) A court which has convicted a person of an offence listed in subsection (8) must ensure that the prescribed information on convictions is submitted to the registrar referred to in subsection (11).
- (13) The Minister may prescribe requirements relating to police clearance certificates, duties of employers for the purpose of this section and register to be kept in terms of this section.

## Part 4 – REGULATIONS

### 239. Regulations

- (1) The Minister may make regulations relating to -
- (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 manner and from of recognition of a household as a child headed household referred to in section 225;
- [The word “from” should be “form”.]**
- (c) 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;
  - (d) the manner of identification of abandoned children contemplated in section 227 in order to allow for the possible reclaiming of such children.
  - (e) the prohibition of entertainment, performances or events contemplated in section 229;
  - (f) form and manner of application and issuing of licences contemplated in section 234;
  - (g) the form of police clearance certificate contemplated in section 238, after consultation with minister of safety and security;
  - (h) any other matter required or permitted to be prescribed under this Chapter; and
  - (i) any other incidental administrative or procedural matter that is necessary to be prescribed for the proper implementation or administration of this Chapter.

- (2) The Minister, after consultation with the minister responsible for labour, may make regulations concerning work performed by children in terms of section 234(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;
- [There are no paragraphs (f), (g), (h) or (i). The lettering in the Government Gazette skips from (e) to (j).]**
- (j) requirements for food and refreshment;
  - (k) permits to be issued in respect of certain categories of work;
  - (l) guidelines for the financial security of a child earning more than an amount determined by the Minister;
  - (m) work conditions and facilities where the child is two years of age or younger;
  - (n) any other matter required or permitted to be prescribed under this Chapter; and
  - (o) any other incidental administrative or procedural matter that is necessary to be prescribed for the proper implementation or administration of this Chapter.
- (3) Regulations made under subsection (1) or (2) may -
- (a) create an offence for any contravention of a regulation or a failure to comply with a provision of a regulation; and
  - (b) prescribe penalties in respect of an offence contemplated in paragraph (a) not exceeding a fine of N\$4 000 or imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

## Chapter 16 STATE GRANTS

### 240. State maintenance grant

- (1) The Minister may, subject to the provisions of this Act and with the concurrence of the minister responsible for finance, pay state maintenance grants in respect of children in an amount and frequency prescribed by regulation.
- (2) The grant contemplated in subsection (1) must be paid from money as may be appropriated annually by Parliament or from any other source.
- (3) The following persons may, in the prescribed manner, apply for and receive a state maintenance grant for a child -
- (a) a parent or guardian of a child;
  - (b) a kinship care-giver who is caring for a child in terms of an agreement registered in section 123(4);
  - (c) a child heading a household in terms of section 225, on behalf of the children in such household including himself or herself;

- (d) an adult designated to supervise a child-headed household under section 225(2) or an organ of state or non-governmental organisation contemplated in subsection (2)(b) of that section, on behalf of the children in that household,

if the applicant demonstrates to the Permanent Secretary that he or she satisfies any requirements as may be prescribed, but such requirements may not include any limit on the total number of children in a single household who may receive such a grant.

- (4) 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 the grant.
- (5) A state maintenance grant is payable until such time as the child concerned reaches the age of majority or ceases to fulfil the requirements of the grant.

#### **241. Child disability grant**

- (1) The following persons may apply for a child disability grant for a child in their care who has a prescribed disability and who complies with the prescribed requirements -
  - (a) the parent or guardian of the child;
  - (b) a kinship care-giver who is caring for a child in terms of an agreement registered in section 123(4);
  - (c) a child heading a household in terms of section 225, who may apply for this grant on behalf of any of the children in the household or for himself or herself;
  - (d) an adult designated to supervise a child-headed household under section 225(2) or an organ of a state or non-governmental organisation contemplated in subsection (2)(b) of that section, who may apply for this grant on behalf of any of the children in the household;
  - (e) a foster parent who is caring for a child in terms of a court order; or
  - (f) a residential child care facility where a child has been placed by court order.
- (2) The grant contemplated in subsection (1) must be paid from money as may be appropriated annually by Parliament or from any other source.
- (3) A child disability grant may be paid in addition to a state maintenance or other grant paid in terms of this Chapter.
- (4) 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](#)).

#### **242. Foster parent grant**

- (1) The foster parent of a child who has been placed in foster care by a court order in terms of Chapter 10 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.
- (2) If a grant contemplated in subsection (1) is terminated on the lapsing of an order placing a child in foster care in terms of section 151 but the child remains in such foster care, the grant must be extended until such time as the children's court has made a decision on whether or not to extend the order placing the child in foster care.

#### **243. Authority to access grant on behalf of child**

- (1) A kinship care agreement registered in terms of section 123(2) and a court order contemplated in section 145(3) serve as authorisation for a foster parent or kinship care-giver who complies with the

prescribed requirements to gain immediate access to such to a grant to which a child in foster care or kinship care is entitled.

- (2) The designation of a child heading a household in terms of section 225(1) or a written designation of an adult supervising a child headed household in terms of section 225(2) serves as authorisation for that child or adult to gain immediate access to a grant which the children in that household are entitled to receive.

#### **244. Residential child care facility grant**

A place of safety approved in terms of section 64 or a children's home or a child detention centre in possession of a certificate of registration as contemplated in section 74, 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.

#### **245. Short term emergency grant or assistance in kind**

- (1) The Minister may, subject to the provisions of this Act and with the concurrence of the 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.

[The word "the" is incorrectly repeated in the phrase  
"concurrence of the minister responsible for finance".]

- (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 and which are not covered by any other Government relief measures;
  - (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.

#### **246. Automatic exemptions**

A child who receives a state maintenance grant contemplated in section 240 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.

#### **247. Suspension, cancellation and administration of grants**

- (1) The Permanent Secretary may suspend payment of any grant paid in terms of this Chapter, from a date determined by the Permanent Secretary, if the beneficiary of such grant is absent from

Namibia for a continuous period exceeding six months, but 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 satisfy the prescribed criteria for such grant;
  - (b) 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
  - (c) if an investigation conducted in terms of section 249(3) indicates that a person received a grant under this Chapter in violation of section 249(1) or (2).

#### **248. Grants not assignable or executable**

- (1) A grant paid in terms of this Chapter may not be assigned, transferred, ceded, pledged or hypothecated and is not 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 the grant may with the direction of the Permanent Secretary be withheld, suspended or cancelled and the Permanent Secretary must cause an investigation to be conducted in terms of section 139.

#### **249. Offences relating to false statements and improper receipt or misuse of grants**

- (1) A person commits an offence, if that person for the purpose of obtaining 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,and is liable on conviction to a fine not exceeding N\$4 000 or to imprisonment for a period not exceeding 12 months or to both such fine and such imprisonment.
- (2) A person commits an offence, if that person has received a grant on behalf of a child in terms of this Chapter and fails to use the grant for the benefit of the child and is liable on conviction to a fine not exceeding N\$4 000 or imprisonment for a period not exceeding 12 months or to both such fine and such imprisonment.
- (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 139.
- (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 132(5) apply with necessary changes.

#### **250. Refund of grants**

- (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 in the prescribed manner.



- (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 249.

## **251. Appeal to Minister**

A person may in the prescribed manner appeal to the Minister against a decision made or action taken by the Permanent Secretary in terms of this Chapter.

## **252. Regulations**

- (1) The Minister may make regulations relating to -
  - (a) amounts payable during a financial year, and the schedule and method of payment, in respect of any grant contemplated in terms of this Chapter;
  - (b) additional requirements to be complied with by the recipient of any grants contemplated in terms of this Chapter;
  - (c) procedures to monitor and prevent possible misuse or mismanagement of aid or a grant contemplated in this Chapter;
  - (d) the circumstances in which a grant which has been suspended or cancelled may be reinstated;
  - (e) adjustment of the amounts of any grants payable in terms of this Chapter from time to time to keep pace with rising costs;
  - (f) manner and procedure for the refund of grants contemplated in section 250;
  - (g) manner and procedure for appeals referred to in section 251;
  - (h) any other matter required or permitted to be prescribed under this Chapter; and
  - (i) any other incidental administrative or procedural matter that is necessary to be prescribed for the proper implementation or administration of this Chapter.
- (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.
- (3) Regulations made under subsection (1) may -
  - (a) create an offence for any contravention of a regulation or a failure to comply with a provision of a regulation; and
  - (b) prescribe penalties in respect of an offence contemplated in paragraph (a) not exceeding a fine of N\$ 4 000 or imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

## Chapter 17

### GENERAL PROVISIONS

#### 253. Conventions to have force of law

- (1) The provisions of the following conventions have the force of law in Namibia as from the date that each convention becomes binding on Namibia:
  - (a) The Hague Convention on the Civil Aspects of International Child Abduction, 1980, a copy of the English text of which is set out in Schedule 5;
  - (b) 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, a copy of the English text of which is set out in Schedule 7; and
  - (c) The Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, 2007, a copy of the English text of which is set out in Schedule 8.
- (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.

#### 254. Offences relating to abuse, neglect, abandonment or maintenance

- (1) Subject to the provisions of section 227(1), a parent, guardian or 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 such fine and such 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 10 years or to both such fine and such imprisonment.

#### 255. Delegation

- (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; or
  - (c) a child protection organisation which is in possession of a certificate contemplated in section 33(2).
- (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.

## 256. Regulations

- (1) The Minister may make regulations relating to -
  - (a) forms and methods for the collection of statistics pertaining to the implementation of this Act;
  - (b) any other matter required or permitted to be prescribed under this Act; and
  - (c) any other incidental administrative or procedural matter that is necessary to be prescribed for the proper implementation or administration of this Act.
- (2) Regulations made under subsection (1) may -
  - (a) create an offence for any contravention of a regulation or a failure to comply with a provision of a regulation; and
  - (b) prescribe penalties in respect of an offence contemplated in paragraph (a) not exceeding a fine of N\$4 000 or imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

## 257. Repeal and amendment of laws

- (1) The laws specified in Schedule 1 are repealed or amended 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 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, 2015 (Act [No. 3 of 2015](#)), 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;”.
- (3) The Combating of Immoral Practices Act, 1980 (Act [No. 21 of 1980](#)) is 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] a female or a 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 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.”.

(4) The Liquor Act, 1998 (Act [No. 6 of 1998](#)), is amended by -

(a) the substitution for section 56 of the following section:

56. “Provision of liquor to persons under the age of 18 years, establishing the age of such persons and offences by such persons

(1) No person shall sell or supply any liquor to a person under the age of 18 years.

(2) A person intending to sell or supply liquor to another person shall take reasonable measures to determine the age of that other person.

(3) 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 or unlicensed shebeen, night club or dance hall unless accompanied by his or her parent, guardian or care-giver.

(4) A licensee, or manager or employee of a licensee referred to in subsection (3), shall take reasonable measures to determine -

(a) the age of a person suspected to be under the age of 18 years; and

(b) 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.

(5) 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.

(6) 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.

(7) No person shall -

(a) make a false document;

(b) sell or supply a false document to another person; or

(c) 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.

(8) 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.

(9) 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.

(10) No person under the age of 18 years shall -

- (a) consume liquor, except as part of a generally recognised religious sacrament;
- (b) produce liquor;
- (c) possess liquor;
- (d) import liquor; or
- (e) supply liquor to any other person.

(11) 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.

(12) 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 paragraph (s) of subsection (1) of section 71; and
- (d) the addition after subsection (2) of section 72 of the following subsections:

“(2A) 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.

(2B) 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.

(2C) 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 -

- (a) cancel the licence held by such licensee;
- (b) declare such licensee or other person so convicted a disqualified person for the purpose of obtaining a licence or acting as a manager.”.

- (5) Section 72 of the Administration of Estates Act, 1965 (Act [No. 66 of 1965](#)) is 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 [No. 33 of 1960](#))];

- (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]
  - (e) 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 (f), with the provisions of the Child Care and Protection Act, 2015 (Act [No. 3 of 2015](#)); or
  - (f) who has been appointed as guardian of a minor by the children's court under section 102 or 113 of the Child Care and Protection Act, 2015 (Act [No. 3 of 2015](#)),
- grant letters of tutorship or curatorship, as the case may be, to such person.”.
- (6) The following subsection is substituted for section 24 of the Marriage Act 1961, (Act [No. 25 of 1961](#)):
- “(1) No marriage officer shall solemnize a marriage between parties of whom one or both are [minors] have not attained the age of 21 years unless the consent to the party or parties which is legally required for the purpose of contracting the marriage has been granted and furnished to him in writing.
- (2) [For the purposes of subsection] Subsection (1) [a minor] does not include a person who is under the age of twenty-one years and previously contracted a valid marriage which has been dissolved by death or divorce.”.
- (7) The Criminal Procedure Act, 1977 (Act [No. 51 of 1977](#)) is amended by the insertion after the definition of “police official” of the following definition:
- “probation officer” means a probation officer referred to in section 1 of the Child Care and Protection Act, 2015 (Act [No. 3 of 2015](#));”.

## 258. Transitional provisions

- (1) Anything done in terms of a law repealed in terms of section 257(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 257(1) and which could be made, granted, entered into, issued or taken under any provision of this Act, is regarded 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.

## 259. Short title and commencement

- (1) This Act is called the Child Care and Protection Act, 2015, and commences on a date 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 or amended by section 257(1)

Column 1	Column 2	Column 3
No. and year of Law	Title of law	Extent of amendmend or repeal [The word “amendment” in the heading of this column is misspelt.]
Proclamation 37 of 1943	Consent to Operations on Native Minors, Proclamation, 1943	The repeal of the whole
Act <a href="#">No. 33 of 1960</a>	Children’s Act, 1960	The repeal of the whole
Act <a href="#">No. 69 of 1962</a>	Commonwealth Relations Act, 1962	Sections 69 and 70
Act <a href="#">No. 93 of 1962</a>	General Law Further Amendment Act, 1962	Section 1
Act <a href="#">No. 50 of 1965</a>	Children’s Amendment Act, 1965	The repeal of the whole
Act <a href="#">No. 62 of 1966</a>	General Law Amendment Act, 1966	Sections 15 and 16
Act <a href="#">No. 102 of 1967</a>	General Law Amendment Act, 1967	Section 16
Act <a href="#">No. 101 of 1969</a>	General Law Amendment Act, 1969	Sections 18 and 19
Act <a href="#">No. 58 of 1970</a>	Births, Marriages and Deaths Registration Amendment Act, 1970	Sections 50 and 51
Act <a href="#">No. 92 of 1970</a>	General Law Further Amendment Act, 1970	Section 11
Act <a href="#">No. 57 of 1972</a>	Age of Majority Act, 1972	The repeal of the whole
Act <a href="#">No. 74 of 1973</a>	Children’s Amendment Act, 1973	The repeal of the whole



Act <a href="#">No. 43 of 1976</a>	Children's Amendment Act, 1976	The repeal of the whole
Act <a href="#">No. 15 of 1977</a>	Children's Amendment Act, 1977	The repeal of the whole
Act <a href="#">No. 7 of 1981</a>	Children's Amendment Act (Rehoboth) 1981	The repeal of the whole
Act <a href="#">No. 6 of 2006</a>	Children's Status Act, 2006	The repeal of the whole
Act. No. 51 of 1977	Criminal Procedure Act, 1977	Sections 292, 293 and 294 and consequential removal of words "or a whipping" in section 290(2)

## Schedule 2

### TEXT OF THE AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD

[Due to inability to access the official signed version of the African Charter, the text in this Schedule was checked against the version on the African Union website: [https://au.int/sites/default/files/treaties/7773-treaty-0014\\_-\\_african\\_charter\\_on\\_the\\_rights\\_and\\_welfare\\_of\\_the\\_child\\_e.pdf](https://au.int/sites/default/files/treaties/7773-treaty-0014_-_african_charter_on_the_rights_and_welfare_of_the_child_e.pdf).]

#### PREAMBLE

The African Member States of the Organization of African Unity, Parties to the present Charter entitled 'African Charter on the Rights and Welfare of the Child',

CONSIDERING that the Charter of the Organization of African Unity recognizes the paramountcy of Human Rights and the African Charter on Human and People's Rights proclaimed and agreed that everyone is entitled to all the rights and freedoms recognized and guaranteed therein, without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status,

[There should be a comma after the word "colour" instead of a full stop. This error is replicated in the Government Gazette from the text of the Charter as it appears on the AU website.]

RECALLING the Declaration on the Rights and Welfare of the African Child (AHG/ST.4 Rev.1) adopted by the Assembly of Heads of State and Government of the Organization of African Unity, at its Sixteenth Ordinary Session in Monrovia, Liberia, from 17 to 20 July 1979, recognized the need to take appropriate measures to promote and protect the rights and welfare of the African Child,

[There should be a comma after the word "Liberia" instead of a full stop. This error is replicated in the Government Gazette from the text of the Charter as it appears on the AU website.]

NOTING WITH CONCERN that the situation of most African children, remains critical due to the unique factors of their socio-economic, cultural, traditional and developmental circumstances, natural disasters, armed conflicts, exploitation and hunger, and on account of the child's physical and mental immaturity he/she needs special safeguards and care,

RECOGNIZING that the child occupies a unique and privileged position in the African society and that for the full and harmonious development of his personality, the child should grow up in a family environment in an atmosphere of happiness, love and understanding,

[There should be a comma after the word "personality" instead of a full stop. This error is replicated in the Government Gazette from the text of the Charter as it appears on the AU website.]

RECOGNIZING that the child, due to the needs of his physical and mental development requires particular care with regard to health, physical, mental, moral and social development, and requires legal protection in conditions of freedom, dignity and security,

TAKING INTO CONSIDERATION the virtues of their cultural heritage, historical background and the values of the African civilization which should inspire and characterize their reflection on the concept of the rights and welfare of the child,

CONSIDERING that the promotion and protection of the rights and welfare of the child also implies the performance of duties on the part of everyone,

REAFFIRMING ADHERENCE to the principles of the rights and welfare of the child contained in the declaration, conventions and other instruments of the Organization of African Unity and in the United Nations and in particular the United Nations Convention on the Rights of the Child; and the OAU Heads of State and Government's Declaration on the Rights and Welfare of the African Child.

[The word "to" erroneously appears as "Lo" in the text of the Charter as it appears on the AU website.]

HAVE AGREED AS FOLLOWS:

## **Part 1 – RIGHTS AND DUTIES**

### **Chapter ONE RIGHTS AND WELFARE OF THE CHILD**

#### **Article 1 – Obligation of States Parties**

1. Member States of the Organization of African Unity Parties to the present Charter shall recognize the rights, freedoms and duties enshrined in this Charter and shall undertake to the necessary steps, in accordance with their Constitutional processes and with the provisions of the present Charter, to adopt such legislative or other measures as may be necessary to give effect to the provisions of this Charter.
2. Nothing in this Charter shall affect any provisions that are more conducive to the realization of the rights and welfare of the child contained in the law of a State Party or in any other international Convention or agreement in force in that State.
3. Any custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the present Charter shall to the extent of such inconsistency be discouraged.

#### **Article 2 – Definition of a Child**

For the purposes of this Charter a child means every human being below the age of 18 years.

[The word "the" in the phrase "For the purposes" erroneously appears as "tile" in the text of the Charter as it appears on the AU website.]

#### **Article 3 – Non-Discrimination**

Every child shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in this Charter irrespective of the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status.

## Article 4 – Best Interests of the Child

1. 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 all judicial or administrative proceedings affecting a child who is capable of communicating his/her own views, and opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings, and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law.

[The phrase “and opportunity” should be “an opportunity”. This error is replicated in the Government Gazette from the text of the Charter as it appears on the AU website.]

## Article 5 – Survival and Development

1. Every child has an inherent right to life. This right shall be protected by law.
2. States Parties to the present Charter shall ensure, to the maximum extent possible, the survival, protection and development of the child.
3. Death sentence shall not be pronounced for crimes committed by children.

## Article 6 – Name and Nationality

1. Every child shall have the right from his birth to a name.

[The word “to” in the phrase “to a name” erroneously appears as “no” in the text of the Charter as it appears on the AU website.]

2. Every child shall be registered immediately after birth.
3. Every child has the right to acquire a nationality.

Para 4. States Parties to the present Charter shall undertake to ensure that their Constitutional legislation recognize the principles according to which a child shall acquire the nationality of the State in the territory of which he has been born if, at the time of the child’s birth, he is not granted nationality by any other State in accordance with its laws.

## Article 7 – Freedom of Expression

Every child who is capable of communicating his or her own views shall be assured the rights to express his opinions freely in all matters and to disseminate his opinions subject to such restrictions as are prescribed by laws.

## Article 8 – Freedom of Association

Every child shall have the right to free association and freedom of peaceful assembly in conformity with the law.

## Article 9 – Freedom of Thought, Conscience and Religion

1. Every child shall have the right to freedom of thought conscience and religion.

2. Parents, and where applicable, legal guardians shall have a duty to provide guidance and direction in the exercise of these rights having regard to the evolving capacities, and best interests of the child.

**[The first comma is misplaced in the Government Gazette. On the AU website, the opening phrase is punctuated as follows: “Parents and, where applicable, legal guardians ...”.]**

3. States Parties shall respect the duty of parents and where applicable, legal guardians to provide guidance and direction in the enjoyment of these rights subject to the national laws and policies.

**[There should be a comma after the word “and”. The error is replicated in the Government Gazette from the text of the Charter as it appears on the AU website.]**

## **Article 10 – Protection of Privacy**

No child shall be subject to arbitrary or unlawful interference with his privacy, family home or correspondence, or to the attacks upon his honour or reputation, provided that parents or legal guardians shall have the right to exercise reasonable supervision over the conduct of their children. The child has the right to the protection of the law against such interference or attacks.

## **Article 11 – Education**

1. Every child shall have the right to an education.
2. The education of the child shall be directed to:
  - (a) the promotion and development of the child’s personality, talents and mental and physical abilities to their fullest potential;
  - (b) fostering respect for human rights and fundamental freedoms with particular reference to those set out in the provisions of various African instruments on human and peoples’ rights and international human rights declarations and conventions;
  - (c) the preservation and strengthening of positive African morals, traditional values and cultures;
  - (d) the preparation of the child for responsible life in a free society, in the spirit of understanding tolerance, dialogue, mutual respect and friendship among all peoples ethnic, tribal and religious groups;
  - (e) the preservation of national independence and territorial integrity;
  - (f) the promotion and achievements of African Unity and Solidarity;
  - (g) the development of respect for the environment and natural resources;
  - (h) the promotion of the child’s understanding of primary health care.
3. States Parties to the present Charter shall take all appropriate measures with a view to achieving the full realization of this right and shall in particular:
  - (a) provide free and compulsory basic education;
  - (b) encourage the development of secondary education in its different forms and to progressively make it free and accessible to all;
  - (c) make the higher education accessible to all on the basis of capacity and ability by every appropriate means;
  - (d) take measures to encourage regular attendance at schools and the reduction of drop-out rates;
  - (e) take special measures in respect of female, gifted and disadvantaged children, to ensure equal access to education for all sections of the community.

4. States Parties to the present Charter shall respect the rights and duties of parents, and where applicable, of legal guardians to choose for their children's schools, other than those established by public authorities, which conform to such minimum standards may be approved by the State, to ensure the religious and moral education of the child in a manner with the evolving capacities of the child.
5. States Parties to the present Charter shall take all appropriate measures to ensure that a child who is subjected to schools or parental discipline shall be treated with humanity and with respect for the inherent dignity of the child and in conformity with the present Charter.
6. States Parties to the present Charter shall have all appropriate measures to ensure that children who become pregnant before completing their education shall have an opportunity to continue with their education on the basis of their individual ability.
7. No part of this Article shall be construed as to interfere with the liberty of individuals and bodies to establish and direct educational institutions subject to the observance of the principles set out in paragraph 1 of this Article and the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the States.

[The word "teal" in the phrase "the requirement teal the education given in such institutions" should be "that". This error is replicated in the Government Gazette from the text of the Charter as it appears on the AU website.]

### **Article 12 – Leisure, Recreation and Cultural Activities**

1. States Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.
2. States Parties shall respect and promote the right of the child to fully participate in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.

### **Article 13 – Handicapped Children**

1. Every child who is mentally or physically disabled shall have the right to special measures of protection in keeping with his physical and moral needs and under conditions which ensure his dignity, promote his self-reliance and active participation in the community.
2. States Parties to the present Charter shall ensure, subject to available resources, to a disabled child and to those responsible for his care, of assistance for which application is made and which is appropriate to the child's condition and in particular shall ensure that the disabled child has effective access to training, preparation for employment and recreation opportunities in a manner conducive to the child achieving the fullest possible social integration, individual development and his cultural and moral development.
3. The States Parties to the present Charter shall use their available resources with a view to achieving progressively the full convenience of the mentally and physically disabled person to movement and access to public highway buildings and other places to which the disabled may legitimately want to have access to.

### **Article 14 – Health and Health Services**

1. Every child shall have the right to enjoy the best attainable state of physical, mental and spiritual health.

2. States Parties to the present Charter shall undertake to pursue the full implementation of this right and in particular shall take measures:
  - (a) to reduce infant and child morality rate;
 

**[The word “morality” should be “mortality”. This error is replicated in the Government Gazette from the text of the Charter as it appears on the AU website.]**
  - (b) to ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;
  - (c) to ensure the provision of adequate nutrition and safe drinking water;
  - (d) to combat disease and malnutrition within the framework of primary health care through the application of appropriate technology;
  - (e) to ensure appropriate health care for expectant and nursing mothers;
  - (f) to develop preventive health care and family life education and provision of service;
  - (g) to integrate basic health service programmes in national development plans;
  - (h) to ensure that all sectors of the society, in particular, parents, children, community leaders and community workers are informed and supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of domestic and other accidents;
  - (i) to ensure the meaningful participation of non-governmental organizations, local communities and the beneficiary population in the planning and management of a basic service programme for children;
  - (j) to support through technical and financial means, the mobilization of local community resources in the development of primary health care for children.

### **Article 15 – Child Labour**

1. Every child shall be protected from all forms of economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child’s physical, mental, spiritual, moral, or social development.
2. States Parties to the present Charter take all appropriate legislative and administrative measures to ensure the full implementation of this Article which covers both the formal and informal sectors of employment and having regard to the relevant provisions of the International Labour Organization’s instruments relating to children, States Parties shall in particular:
  - (a) provide through legislation, minimum wages for admission to every employment;
  - (b) provide for appropriate regulation of hours and conditions of employment;
  - (c) provide for appropriate penalties or other sanctions to ensure the effective enforcement of this Article;
  - (d) promote the dissemination of information on the hazards of child labour to all sectors of the community.

### **Article 16 – Protection Against Child Abuse and Torture**

1. States Parties to the present Charter shall take specific legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman or degrading treatment and especially

physical or mental injury or abuse, neglect or maltreatment including sexual abuse, while in the care of the child.

[The last phrase, “while in the care of the child”, correctly replicates online versions of the Charter, but must be in error as it does not make sense. Various secondary sources suggest that the phrase should read “while in the care of parent(s), legal guardian(s) or any other person who has the care of the child”, echoing the similar provision in Article 19(1) of the Convention on the Rights of the Child.]

2. Protective measures under this Article shall include effective procedures for the establishment of special monitoring units to provide necessary support for the child and for those who have the care of the child, as well as other forms of prevention and for identification, reporting referral investigation, treatment, and follow-up of instances of child abuse and neglect.

## Article 17 – Administration of Juvenile Justice

1. Every child accused or found guilty of having infringed penal law shall have the right to special treatment in a manner consistent with the child’s sense of dignity and worth and which reinforces the child’s respect for human rights and fundamental freedoms of others.
2. States Parties to the present Charter shall in particular:
  - (a) ensure that no child who is detained or imprisoned or otherwise deprived of his/her liberty is subjected to torture, inhuman or degrading treatment or punishment;
  - (b) ensure that children are separated from adults in their place of detention or imprisonment;
  - (c) ensure that every child accused in infringing the penal law:
    - (i) shall be presumed innocent until duly recognized guilty;
    - (ii) shall be informed promptly in a language that he understands and in detail of the charge against him, and shall be entitled to the assistance of an interpreter if he or she cannot understand the language used;
    - (iii) shall be afforded legal and other appropriate assistance in the preparation and presentation of his defence;
    - (iv) shall have the matter determined as speedily as possible by an impartial tribunal and if found guilty, be entitled to an appeal by a higher tribunal;
  - (d) prohibit the press and the public from trial.
3. The essential aim of treatment of every child during the trial and also if found guilty of infringing the penal law shall be his or her reformation, re-integration into his or her family and social rehabilitation.
4. There shall be a minimum age below, which children shall be presumed not to have the capacity to infringe the penal law.

## Article 18 – Protection of the Family

1. The family shall be the natural unit and basis of society. it shall enjoy the protection and support of the State for its establishment and development.

[The word “it” at the beginning of the second sentence should be capitalised. This error is replicated in the Government Gazette from the text of the Charter as it appears on the AU website.]

2. States Parties to the present Charter shall take appropriate steps to ensure equality of rights and responsibilities of spouses with regard to children during marriage and in the even of its dissolution. In case of the dissolution, provision shall be made for the necessary protection of the child.

**[The word “even” should be “event”. This error is replicated in the Government Gazette from the text of the Charter as it appears on the AU website.]**

3. No child shall be deprived of maintenance by reference to the parents’ marital status.

## Article 19 – Parent Care and Protection

1. Every child shall be entitled to the enjoyment of parental care and protection and shall, whenever possible, have the right to reside with his or her parents. No child shall be separated from his parents against his will, except when a judicial authority determines in accordance with the appropriate law, that such separation is in the best interest of the child.

**[The punctuation of the last sentence is grammatically incorrect. The comma after “appropriate law” is superfluous; alternatively, it should be paired with a comma after the word “determines” to offset the phrase “in accordance with the appropriate law”. This error is replicated in the Government Gazette from the text of the Charter as it appears on the AU website.]**

2. Every child who is separated from one or both parents shall have the right to maintain personal relations and direct contact with both parents on a regular basis.
3. Where separation results from the action of a State Party, the State Party shall provide the child, or if appropriate, another member of the family with essential information concerning the whereabouts of the absent member or members of the family. States Parties shall also ensure that the submission of such a request shall not entail any adverse consequences for the person or persons in whose respect it is made.
4. Where a child is apprehended by a State Party, his parents or guardians shall, as soon as possible, be notified of such apprehension by that State Party.

## Article 20 – Parental Responsibilities

**[The word “Responsibilities” is misspelt in the heading of Article 20. This error is replicated in the Government Gazette from the text of the Charter as it appears on the AU website.]**

1. Parents or other persons responsible for the child shall have the primary responsibility of the upbringing and development the child and shall have the duty:

**[The word “of” appears to be missing in the phrase “upbringing and development the child”. This error is replicated in the Government Gazette from the text of the Charter as it appears on the AU website.]**

- (a) to ensure that the best interests of the child are their basic concern at all times;
  - (b) to secure, within their abilities and financial capacities, conditions of living necessary to the child’s development; and
  - (c) to ensure that domestic discipline is administered with humanity and in a manner consistent with the inherent dignity of the child.
2. States Parties to the present Charter shall in accordance with their means and national conditions the all appropriate measures:

**[The word “the” in the phrase “the all appropriate measures” should be “take”. This error is replicated in the Government Gazette from the text of the Charter as it appears on the AU website.]**

- (a) to assist parents and other persons responsible for the child and in case of need provide material assistance and support programmes particularly with regard to nutrition, health, education, clothing and housing;



- (b) to assist parents and others responsible for the child in the performance of child-rearing and ensure the development of institutions responsible for providing care of children; and
- (c) to ensure that the children of working parents are provided with care services and facilities.

## **Article 21 – Protection against Harmful Social and Cultural Practices**

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.

## **Article 22 – Armed Conflicts**

1. States Parties to this Charter shall undertake to respect and ensure respect for rules of international humanitarian law applicable in armed conflicts which affect the child.
2. States Parties to the present Charter shall take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain in particular, from recruiting any child.
3. States Parties to the present Charter shall, in accordance with their obligations under international humanitarian law, protect the civilian population in armed conflicts and shall take all feasible measures to ensure the protection and care of children who are affected by armed conflicts. Such rules shall also apply to children in situations of internal armed conflicts, tension and strife.

## **Article 23 – Refugee Children**

1. States Parties to the present Charter shall take all appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law shall, whether unaccompanied or accompanied by parents, legal guardians or close relatives, receive appropriate protection and humanitarian assistance in the enjoyment of the rights set out in this Charter and other international human rights and humanitarian instruments to which the States are Parties.
2. States Parties shall undertake to cooperate with existing international organizations which protect and assist refugees in their efforts to protect and assist such a child and to trace the parents or other close relatives or an unaccompanied refugee child in order to obtain information necessary for reunification with the family.
3. Where no parents, legal guardians or close relatives can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his family environment for any reason.
4. The provisions of this Article apply mutatis mutandis to internally displaced children whether through natural disaster, internal armed conflicts, civil strife, breakdown of economic and social order or howsoever caused.

## Article 24 – Adoption

States Parties which recognize the system of adoption shall ensure that the best interest of the child shall be the paramount consideration and they shall:

- (a) establish competent authorities to determine matters of adoption and ensure that the adoption is carried out in conformity with applicable laws and procedures and on the basis of all relevant and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and guardians and that, if necessary, the appropriate persons concerned have given their informed consent to the adoption on the basis of appropriate counselling;
- (b) recognize that inter-country adoption in those States who have ratified or adhered to the International Convention on the Rights of the Child or this Charter, may, as the last resort, be considered as an alternative means of a child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;
- (c) ensure that the child affected by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;
- (d) take all appropriate measures to ensure that in inter-country adoption, the placement does not result in trafficking or improper financial gain for those who try to adopt a child;
- (e) promote, where appropriate, the objectives of this Article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework to ensure that the placement of the child in another country is carried out by competent authorities or organs;
- (f) establish a machinery to monitor the well-being of the adopted child.

## Article 25 – Separation from Parents

1. Any child who is permanently or temporarily deprived of his family environment for any reason shall be entitled to special protection and assistance;

**[The semicolon at the end of the sentence in sub-article 1 should be a full stop.]**

2. States Parties to the present Charter:
  - (a) shall ensure that a child who is parentless, or who is temporarily or permanently deprived of his or her family environment, or who in his or her best interest cannot be brought up or allowed to remain in that environment shall be provided with alternative family care, which could include, among others, foster placement, or placement in suitable institutions for the care of children;
  - (b) shall take all necessary measures to trace and re-unite children with parents or relatives where separation is caused by internal and external displacement arising from armed conflicts or natural disasters.
3. When considering alternative family care of the child and the best interests of the child, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious or linguistic background.

## Article 26 – Protection Against Apartheid and Discrimination

1. States Parties to the present Charter shall individually and collectively undertake to accord the highest priority to the special needs of children living under Apartheid and in States subject to military destabilization by the Apartheid regime.

2. States Parties to the present Charter shall individually and collectively undertake to accord the highest priority to the special needs of children living under regimes practising racial, ethnic, religious or other forms of discrimination as well as in States subject to military destabilization.

**[There should be a comma after the word “ethnic” instead of a full stop. This error is replicated in the Government Gazette from the text of the Charter as it appears on the AU website.]**

3. States Parties shall undertake to provide whenever possible, material assistance to such children and to direct their efforts towards the elimination of all forms of discrimination and Apartheid on the African Continent.

### **Article 27 – Sexual Exploitation**

1. States Parties to the present Charter shall undertake to protect the child from all forms of sexual exploitation and sexual abuse and shall in particular take measures to prevent:
  - (a) the inducement, coercion or encouragement of a child to engage in any sexual activity;
  - (b) the use of children in prostitution or other sexual practices;
  - (c) the use of children in pornographic activities, performances and materials.

### **Article 28 – Drug Abuse**

States Parties to the present Charter shall take all appropriate measures to protect the child from the use of narcotics and illicit use of psychotropic substances as defined in the relevant international treaties, and to prevent the use of children in the production and trafficking of such substances.

### **Article 29 – Sale, Trafficking and Abduction**

States Parties to the present Charter shall take appropriate measures to prevent:

- (a) the abduction, the sale of, or traffick of children for any purpose or in any form, by any person including parents or legal guardians of the child;
- (b) the use of children in all forms of begging.

### **Article 30 – Children of Imprisoned Mothers**

1. States Parties to the present Charter shall undertake to provide special treatment to expectant mothers and to mothers of infants and young children who have been accused or found guilty of infringing the penal law and shall in particular:
  - (a) ensure that a non-custodial sentence will always be first considered when sentencing such mothers;
  - (b) establish and promote measures alternative to institutional confinement for the treatment of such mothers;
  - (c) establish special alternative institutions for holding such mothers;
  - (d) ensure that a mother shall not be imprisoned with her child;
  - (e) ensure that a death sentence shall not be imposed on such mothers;
  - (f) the essential aim of the penitentiary system will be the reformation, the integration of the mother to the family and social rehabilitation.

### **Article 31 – Responsibility of the Child**

Every child shall have responsibilities towards his family and society, the State and other legally recognized communities and the international community. The child, subject to his age and ability, and such limitations as may be contained in the present Charter, shall have the duty:

- (a) to work for the cohesion of the family, to respect his parents, superiors and elders at all times and to assist them in case of need;
- (b) to serve his national community by placing his physical and intellectual abilities at its service;
- (c) to preserve and strengthen social and national solidarity;
- (d) to preserve and strengthen African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and to contribute to the moral well-being of society;
- (e) to preserve and strengthen the independence and the integrity of his country;
- (f) to contribute to the best of his abilities, at all times and at all levels, to the promotion and achievement of African Unity.

## **Part 11**

[This should be the number “2” instead of the Roman numeral “II” or the number “11”.]

### **Chapter TWO ESTABLISHMENT AND ORGANIZATION OF THE COMMITTEE ON THE RIGHTS AND WELFARE OF THE CHILD**

#### **Article 32 – The Committee**

An African Committee of Experts on the Rights and Welfare of the Child hereinafter called ‘the Committee’ shall be established within the Organization of African Unity to promote and protect the rights and welfare of the child.

#### **Article 33 – Composition**

- 1. The Committee shall consist of 11 members of high moral standing, integrity, impartiality and competence in matters of the rights and welfare of the child.
- 2. The members of the Committee shall serve in their personal capacity.
- 3. The Committee shall not include more than one national of the same State.

#### **Article 34 – Election**

As soon as this Charter shall enter into force the members of the Committee shall be elected by secret ballot by the Assembly of Heads of State and Government from a list of persons nominated by the States Parties to the present Charter.

#### **Article 35 – Candidates**

Each State Party to the present Charter may nominate not more than two candidates. The candidates must have one of the nationalities of the States Parties to the present Charter. When two candidates are nominated by a State, one of them shall not be a national of that State.

## Article 36

1. The Secretary-General of the Organization of African Unity shall invite States Parties to the present Charter to nominate candidates at least six months before the elections.
2. The Secretary-General of the Organization of African Unity shall draw up in alphabetical order, a list of persons nominated and communicate it to the Heads of State and Government at least two months before the elections.

## Article 37 – Term of Office

1. The members of the Committee shall be elected for a term of five years and may not be re-elected, however. the term of four of the members elected at the first election shall expire after two years and the term of six others, after four years.

[The word “term” in its first use in subarticle 1 erroneously appears as “tenn” in the text of the Charter as it appears on the AU website. The punctuation and capitalisation of this paragraph is incorrect. It is replicated in the Government Gazette from the text of the Charter as it appears on the AU website.]

2. Immediately after the first election, the Chairman of the Assembly of Heads of State and Government of the Organization of African Unity shall draw lots to determine the names of those members referred to in sub-paragraph 1 of this Article.
3. The Secretary-General of the Organization of African Unity shall convene the first meeting of Committee at the Headquarters of the Organization within six months of the election of the members of the Committee, and thereafter the Committee shall be convened by its Chairman whenever necessary, at least once a year.

## Article 38 – Bureau

1. The Committee shall establish its own Rules of Procedure.
2. The Committee shall elect its officers for a period of two years.
3. Seven Committee members shall form the quorum.
4. In case of an equality of votes, the Chairman shall have a casting vote.
5. The working languages of the Committee shall be the official languages of the OAU.

## Article 39 – Vacancy

If a member of the Committee vacates his office for any reason other than the normal expiration of a term, the State which nominated that member shall appoint another member from among its nationals to serve for the remainder of the term - subject to the approval of the Assembly.

## Article 40 – Secretariat

The Secretary-General of the Organization of African Unity shall appoint a Secretary for the Committee.

## Article 41 – Privileges and Immunities

In discharging their duties, members of the Committee shall enjoy the privileges and immunities provided for in the General Convention on the Privileges and Immunities of the Organization of African Unity.

## Chapter THREE MANDATE AND PROCEDURE OF THE COMMITTEE

### Article 42 – Mandate

The functions of the Committee shall be:

- (a) To promote and protect the rights enshrined in this Charter and in particular to:
  - (i) collect and document information, commission inter-disciplinary assessment of situations on African problems in the fields of the rights and welfare of the child, organize meetings, encourage national and local institutions concerned with the rights and welfare of the child, and where necessary give its views and make recommendations to Governments;
  - (ii) formulate and lay down principles and rules aimed at protecting the rights and welfare of children in Africa;
  - (iii) cooperate with other African, international and regional Institutions and organizations concerned with the promotion and protection of the rights and welfare of the child.
- (b) To monitor the implementation and ensure protection of the rights enshrined in this Charter.
- (c) To interpret the provisions of the present Charter at the request of a State Party, an Institution of the Organization of African Unity or any other person or Institution recognized by the Organization of African Unity, or any State Party.
- (d) Perform such other task as may be entrusted to it by the Assembly of Heads of State and Government, Secretary-General of the OAU and any other organs of the OAU or the United Nations.

### Article 43 – Reporting Procedure

1. Every State Party to the present Charter shall undertake to submit to the Committee through the Secretary-General of the Organization of African Unity, reports on the measures they have adopted which give effect to the provisions of this Charter and on the progress made in the enjoyment of these rights:
  - (a) within two years of the entry into force of the Charter for the State Party concerned: and
  - (b) and thereafter, every three years.
2. Every report made under this Article shall:
  - (a) contain sufficient information on the implementation of the present Charter to provide the Committee with comprehensive understanding of the implementation of the Charter in the relevant country; and
  - (b) shall indicate factors and difficulties, if any, affecting the fulfilment of the obligations contained in the Charter.

[The word “fulfilment” is misspelt in paragraph (b). This error is replicated in the Government Gazette from the text of the Charter as it appears on the AU website.]
3. A State Party which has submitted a comprehensive first report to the Committee need not, in its subsequent reports submitted in accordance with paragraph I (a) of this Article, repeat the basic information previously provided.

## Article 44 – Communications

1. The Committee may receive communication, from any person, group or nongovernmental organization recognized by the Organization of African Unity, by a Member State, or the United Nations relating to any matter covered by this Charter.

[The word “nongovernmental” appears as “non-governmental” in the text of the Charter as it appears on the AU website.]

2. Every communication to the Committee shall contain the name and address of the author and shall be treated in confidence.

## Article 45 – Investigations by the Committee

1. The Committee may, resort to any appropriate method of investigating any matter falling within the ambit of the present Charter, request from the States Parties any information relevant to the implementation of the Charter and may also resort to any appropriate method of investigating the measures the State Party has adopted to implement the Charter.
2. The Committee shall submit to each Ordinary Session of the Assembly of Heads of State and Government every two years, a report on its activities and on any communication made under Article [44] of this Charter.
3. The Committee shall publish its report after it has been considered by the Assembly of Heads of State and Government.
4. States Parties shall make the Committee’s reports widely available to the public in their own countries.

## Chapter FOUR MISCELLANEOUS PROVISIONS

### Article 46 – Sources of Inspiration

The Committee shall draw inspiration from International Law on Human Rights, particularly from the provisions of the African Charter on Human and Peoples’ Rights, the Charter of the Organization of African Unity, the Universal Declaration on Human Rights, the International Convention on the Rights of the Child, and other instruments adopted by the United Nations and by African countries in the field of human rights, and from African values and traditions.

### Article 47 – Signature, Ratification or Adherence

1. The present Charter shall be open to signature by all the Member States of the Organization of African Unity.
2. The present Charter shall be subject to ratification or adherence by Member States of the Organization of African Unity. The instruments of ratification or adherence to the present Charter shall be deposited with the Secretary-General of the Organization of African Unity.
3. The present Charter shall come into force 30 days after the reception by the Secretary-General of the Organization of African Unity of the instruments of ratification or adherence of 15 Member States of the Organization of African Unity.

## Article 48 – Amendment and Revision of the Charter

1. The present Charter may be amended or revised if any State Party makes a written request to that effect to the Secretary-General of the Organization of African Unity, provided that the proposed amendment is not submitted to the Assembly of Heads of State and Government for consideration until all the States Parties have been duly notified of it and the Committee has given its opinion on the amendment.
2. An amendment shall be approved by a simple majority of the States Parties.

## Schedule 3

### TEXT OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD

[The text of this Schedule was checked against the text of the Convention in the Annex to Resolution 44/25 of 20 November 1989 at the Forty-fourth Session of the General Assembly of the United Nations as it appears at [https://treaties.un.org/doc/source/docs/A\\_RES\\_44\\_25-Eng.pdf](https://treaties.un.org/doc/source/docs/A_RES_44_25-Eng.pdf)]

### PREAMBLE

The States Parties to the present Convention,

CONSIDERING that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

BEARING in mind that the peoples of the United Nations have, in the Charter, reaffirmed their faith in fundamental human rights and in the dignity and worth of the human person, and have determined to promote social progress and better standards of life in larger freedom,

RECOGNIZING THAT THE United Nations has, in the Universal Declaration of Human Rights and in the International Covenants on Human Rights, proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

RECALLING that, in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance,

CONVINCED that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community,

RECOGNIZING 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,

CONSIDERING that the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity,

BEARING in mind that the need to extend particular care to the child has been stated in the Geneva Declaration of the Rights of the Child of 1924 and in the Declaration of the Rights of the Child adopted by the General Assembly on 20 November 1959 and recognized in the Universal Declaration of Human Rights, in the International Covenant on Civil and Political Rights (in particular in articles 23 and 24), in the International Covenant on Economic, Social and Cultural Rights (in particular in article 10) and in the statutes and relevant instruments of specialized agencies and international organizations concerned with the welfare of children,

BEARING in mind that, as indicated in the Declaration of the Rights of the Child, “the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth”,



RECALLING the provisions of the 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; the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules); and the Declaration on the Protection of Women and Children in Emergency and Armed Conflict, Recognizing that, in all countries in the world, there are children living in exceptionally difficult conditions, and that such children need special consideration,

TAKING due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child, Recognizing the importance of international co-operation for improving the living conditions of children in every country, in particular in the developing countries,

**[The paragraph above should appear as indicated below:**

**TAKING due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child, RECOGNIZING the importance of international co-operation for improving the living conditions of children in every country, in particular in the developing countries,]**

Have agreed as follows:

## **Part I**

### **Article 1**

For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

### **Article 2**

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

### **Article 3**

1. 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.
2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.
3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

## Article 4

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

## Article 5

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

## Article 6

1. States Parties recognize that every child has the inherent right to life.
2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

## Article 7

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.

[The full stop after the word “and” should be a comma.]

2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

## Article 8

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.
2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

## Article 9

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.
2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.
4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

### Article 10

1. In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.
2. A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of States Parties under article 9, paragraph 1, States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order (ordre public), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention.

### Article 11

1. States Parties shall take measures to combat the illicit transfer and non-return of children abroad.
2. To this end, States Parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements.

### Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

### Article 13

1. The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.

2. The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
  - (a) For respect of the rights or reputations of others; or
  - (b) For the protection of national security or of public order (ordre public), or of public health or morals.

### Article 14

1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.
2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.

### Article 15

1. States Parties recognize the rights of the child to freedom of association and to freedom of peaceful assembly.
2. No restrictions may be placed on the exercise of these rights other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

### Article 16

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, or correspondence, nor to unlawful attacks on his or her honour and reputation.

[The word “home” has been omitted from the phrase “privacy, family, home or correspondence”.]

2. The child has the right to the protection of the law against such interference or attacks.

### Article 17

States Parties recognize the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health.

To this end, States Parties shall:

- (a) Encourage the mass media to disseminate information and material of social and cultural benefit to the child and in accordance with the spirit of article 29;
- (b) Encourage international co-operation in the production, exchange and dissemination of such information and material from a diversity of cultural, national and international sources;
- (c) Encourage the production and dissemination of children's books;
- (d) Encourage the mass media to have particular regard to the linguistic needs of the child who belongs to a minority group or who is indigenous;

- (e) Encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being, bearing in mind the provisions of articles 13 and 18.

### **Article 18**

1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.
2. For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.
3. States Parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible.

### **Article 19**

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.
2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

### **Article 20**

1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.
2. States Parties shall in accordance with their national laws ensure alternative care for such a child.
3. Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

### **Article 21**

States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

- (a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;

- (b) Recognize that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;
- (c) Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;
- (d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;
- (e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.

## Article 22

1. States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.
2. For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the present Convention.

## Article 23

1. States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.
2. States Parties recognize the right of the disabled child to special care and shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child.
3. Recognizing the special needs of a disabled child, assistance extended in accordance with paragraph 2 of the present article shall be provided free of charge, whenever possible, taking into account the financial resources of the parents or others caring for the child, and shall be designed to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development
4. States Parties shall promote, in the spirit of international cooperation, the exchange of appropriate information in the field of preventive health care and of medical, psychological and functional treatment of disabled children, including dissemination of and access to information concerning methods of rehabilitation, education and vocational services, with the aim of enabling States Parties to improve their capabilities and skills and to widen their experience in these areas. In this regard, particular account shall be taken of the needs of developing countries.

## Article 24

1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.
2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures:
  - (a) To diminish infant and child mortality;
  - (b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;
  - (c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution;
  - (d) To ensure appropriate pre-natal and post-natal health care for mothers;
  - (e) To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents;
  - (f) To develop preventive health care, guidance for parents and family planning education and services.
3. States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.
4. States Parties undertake to promote and encourage international co-operation with a view to achieving progressively the full realization of the right recognized in the present article. In this regard, particular account shall be taken of the needs of developing countries.

## Article 25

States Parties recognize the right of a child who has been placed by the competent authorities for the purposes of care, protection or treatment of his or her physical or mental health, to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement.

## Article 26

1. States Parties shall recognize for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realization of this right in accordance with their national law.
2. The benefits should, where appropriate, be granted, taking into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child, as well as any other consideration relevant to an application for benefits made by or on behalf of the child.

## Article 27

1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.

2. 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.
3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.
4. States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad. In particular, where the person having financial responsibility for the child lives in a State different from that of the child, States Parties shall promote the accession to international agreements or the conclusion of such agreements, as well as the making of other appropriate arrangements.

## Article 28

1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:
  - (a) Make primary education compulsory and available free to all;
  - (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
  - (c) Make higher education accessible to all on the basis of capacity by every appropriate means;
  - (d) Make educational and vocational information and guidance available and accessible to all children;
  - (e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.
2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.
3. States Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.

## Article 29

1. States Parties agree that the education of the child shall be directed to:
  - (a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;
  - (b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
  - (c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;
  - (d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;
  - (e) The development of respect for the natural environment.



2. No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principle set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

### Article 30

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.

### Article 31

1. States Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.
2. States Parties shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.

### Article 32

1. States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.
2. States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular:
  - (a) Provide for a minimum age or minimum ages for admission to employment;
  - (b) Provide for appropriate regulation of the hours and conditions of employment;
  - (c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article.

### Article 33

States Parties shall take all appropriate measures, including legislative, administrative, social and educational measures, to protect children from the illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties, and to prevent the use of children in the illicit production and trafficking of such substances.

### Article 34

States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

- (a) The inducement or coercion of a child to engage in any unlawful sexual activity;
- (b) The exploitative use of children in prostitution or other unlawful sexual practices;
- (c) The exploitative use of children in pornographic performances and materials.

### Article 35

States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.

### Article 36

States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare.

### Article 37

States Parties shall ensure that:

- (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;
- (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;
- (c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;
- (d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

### Article 38

- 1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.
- 2. States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.
- 3. States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest.
- 4. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.

### Article 39

States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

## Article 40

1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.
2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:
  - (a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;
  - (b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:
    - (i) To be presumed innocent until proven guilty according to law;
    - (ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;
    - (iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;
    - (iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;
    - (v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;
    - (vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;
    - (vii) To have his or her privacy fully respected at all stages of the proceedings.
3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:
  - (a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;
  - (b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.
4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

[Obvious formatting error in the Government Gazette corrected here.]

## Article 41

Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of the child and which may be contained in:

- (a) The law of a State party; or
- (b) International law in force for that State.

## Part II

## Article 42

States Parties undertake to make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike.

## Article 43

1. For the purpose of examining the progress made by States Parties in achieving the realization of the obligations undertaken in the present Convention, there shall be established a Committee on the Rights of the Child, which shall carry out the functions hereinafter provided.
2. The Committee shall consist of eighteen experts of high moral standing and recognized competence in the field covered by this Convention.<sup>1/</sup> The members of the Committee shall be elected by States Parties from among their nationals and shall serve in their personal capacity, consideration being given to equitable geographical distribution, as well as to the principal legal systems.

**[The footnote referenced in this paragraph is missing. It appears to have been intended to explain the amendment to this provision. The original Convention referred to ten experts. The General Assembly, in Resolution 50/155 of 21 December 1995, approved an amendment to Article 43, paragraph 2, of the Convention, replacing the word “ten” with the word “eighteen”. The amendment entered into force on 18 November 2002, when it had been accepted by a two-thirds majority of the States parties (128 out of 191).]**

3. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from among its own nationals.
4. The initial election to the Committee shall be held no later than six months after the date of the entry into force of the present Convention and thereafter every second year. At least four months before the date of each election, the Secretary-General of the United Nations shall address a letter to States Parties inviting them to submit their nominations within two months. The Secretary-General shall subsequently prepare a list in alphabetical order of all persons thus nominated, indicating States Parties which have nominated them, and shall submit it to the States Parties to the present Convention.
5. The elections shall be held at meetings of States Parties convened by the Secretary-General at United Nations Headquarters. At those meetings, for which two thirds of States Parties shall constitute a quorum, the persons elected to the Committee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.
6. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. The term of five of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these five members shall be chosen by lot by the Chairman of the meeting.
7. If a member of the Committee dies or resigns or declares that for any other cause he or she can no longer perform the duties of the Committee, the State Party which nominated the member shall appoint another

- expert from among its nationals to serve for the remainder of the term, subject to the approval of the Committee.
8. The Committee shall establish its own rules of procedure.
  9. The Committee shall elect its officers for a period of two years.
  10. The meetings of the Committee shall normally be held at United Nations Headquarters or at any other convenient place as determined by the Committee. The Committee shall normally meet annually. The duration of the meetings of the Committee shall be determined, and reviewed, if necessary, by a meeting of the States Parties to the present Convention, subject to the approval of the General Assembly.
  11. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Convention.
  12. With the approval of the General Assembly, the members of the Committee established under the present Convention shall receive emoluments from United Nations resources on such terms and conditions as the Assembly may decide.

### Article 44

1. States Parties undertake to submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made on the enjoyment of those rights
  - (a) Within two years of the entry into force of the Convention for the State Party concerned;
  - (b) Thereafter every five years.
2. Reports made under the present article shall indicate factors and difficulties, if any, affecting the degree of fulfilment of the obligations under the present Convention. Reports shall also contain sufficient information to provide the Committee with a comprehensive understanding of the implementation of the Convention in the country concerned.
3. A State Party which has submitted a comprehensive initial report to the Committee need not, in its subsequent reports submitted in accordance with paragraph 1 (b) of the present article, repeat basic information previously provided.
4. The Committee may request from States Parties further information relevant to the implementation of the Convention.
5. The Committee shall submit to the General Assembly, through the Economic and Social Council, every two years, reports on its activities.
6. States Parties shall make their reports widely available to the public in their own countries.

### Article 45

In order to foster the effective implementation of the Convention and to encourage international co-operation in the field covered by the Convention:

- (a) The specialized agencies, the United Nations Children's Fund, and other United Nations organs shall be entitled to be represented at the consideration of the implementation of such provisions of the present Convention as fall within the scope of their mandate. The Committee may invite the specialized agencies, the United Nations Children's Fund and other competent bodies as it may consider appropriate to provide expert advice on the implementation of the Convention in areas falling within the scope of their respective mandates. The Committee may invite the specialized agencies, the United Nations Children's Fund, and other United Nations organs to submit reports on the implementation of the Convention in areas falling within the scope of their activities;

- (b) The Committee shall transmit, as it may consider appropriate, to the specialized agencies, the United Nations Children's Fund and other competent bodies, any reports from States Parties that contain a request, or indicate a need, for technical advice or assistance, along with the Committee's observations and suggestions, if any, on these requests or indications;
- (c) The Committee may recommend to the General Assembly to request the Secretary-General to undertake on its behalf studies on specific issues relating to the rights of the child;
- (d) The Committee may make suggestions and general recommendations based on information received pursuant to articles 44 and 45 of the present Convention. Such suggestions and general recommendations shall be transmitted to any State Party concerned and reported to the General Assembly, together with comments, if any, from States Parties.

### **Part III**

#### **Article 46**

The present Convention shall be open for signature by all States.

#### **Article 47**

The present Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

#### **Article 48**

The present Convention shall remain open for accession by any State. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

#### **Article 49**

1. The present Convention shall enter into force on the thirtieth day following the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.
2. For each State ratifying or acceding to the Convention after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the deposit by such State of its instrument of ratification or accession.

#### **Article 50**

1. Any State Party may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to States Parties, with a request that they indicate whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that, within four months from the date of such communication, at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of States Parties present and voting at the conference shall be submitted to the General Assembly for approval.
2. An amendment adopted in accordance with paragraph 1 of the present article shall enter into force when it has been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of States Parties.

3. When an amendment enters into force, it shall be binding on those States Parties which have accepted it, other States Parties still being bound by the provisions of the present Convention and any earlier amendments which they have accepted.

### Article 51

1. The Secretary-General of the United Nations shall receive and circulate to all States the text of reservations made by States at the time of ratification or accession.
2. A reservation incompatible with the object and purpose of the present Convention shall not be permitted.
3. Reservations may be withdrawn at any time by notification to that effect addressed to the Secretary-General of the United Nations, who shall then inform all States. Such notification shall take effect on the date on which it is received by the Secretary-General

### Article 52

A State Party may denounce the present Convention by written notification to the Secretary-General of the United Nations. Denunciation becomes effective one year after the date of receipt of the notification by the Secretary-General.

### Article 53

The Secretary-General of the United Nations is designated as the depositary of the present Convention.

### Article 54

The original of the present Convention, 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 THEREOF the undersigned plenipotentiaries, being duly authorized thereto by their respective Governments, have signed the present Convention.

**[Formatting errors in the Government Gazette are corrected here. The Convention in the UN Resolution reads “WHEREOF” instead of “THEREOF”.]**

### Schedule 4

#### TEXT OF THE UNITED NATIONS PROTOCOL TO PREVENT TRAFFICKING IN PERSONS

**[The text of this Schedule was checked against the text of the Convention in Annex II to Resolution 55/25 of 8 January 2001 at the Fifty-fifth Session of the General Assembly of the United Nations as it appears at [https://treaties.un.org/doc/source/docs/A\\_RES\\_55\\_25-E.pdf](https://treaties.un.org/doc/source/docs/A_RES_55_25-E.pdf). The word “against” in the title of the “United Nations Convention against Transnational Organized Crime” should not be capitalised.]**

Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, G.A. res. 55/25, annex II, 55 U.N. GAOR Supp. (No. 49) at 60, U.N. Doc. A/45/49 (Vol. I) (2001).

#### 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,

[Obvious formatting errors in the Government Gazette are corrected here.]

HAVE AGREED AS FOLLOWS:

[Throughout the Protocol as it appears in the UN Resolution, the word “Article” is not capitalised, the first words of each lettered paragraph are capitalised, and the sub-article numbers appear without brackets and are followed by a full stop. The Protocol is reproduced here as it appears in the Government Gazette.]

## *I*

### **GENERAL PROVISIONS (Articles 1-5)**

[This heading in the Protocol as it appears in the UN Resolution is “I. General provisions”.]

#### **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.

[The terms being defined in paragraphs (a) and (d) are enclosed in double quotation marks in the Protocol as it appears in the UN Resolution.]

### 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.

[The paragraph references are not enclosed in brackets in the Protocol as it appears in the UN Resolution.]

## II

### *PROTECTION OF VICTIMS OF TRAFFICKING IN PERSONS (Articles 6-8)*

[This heading in the Protocol as it appears in the UN Resolution is “II. Protection of victims of trafficking in persons”.]

## 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

**[The word “and” does not appear at the end of this paragraph in the Protocol as it appears in the UN Resolution.]**
  - (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)***

[This heading in the Protocol as it appears in the UN Resolution  
is “III. Prevention, cooperation and other measures”.]

#### **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)*

[This heading in the Protocol as it appears in the UN Resolution is “IV. Final provisions”.]

## 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.

[The Protocol as it appears in the UN Resolution includes footnotes giving references for the documents cited here: 1951 Convention: United Nations, Treaty Series, vol. 189, No. 2545. 1967 Protocol: Ibid., vol. 606, No. 8791.]

- (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.

### Schedule 5

#### TEXT OF THE HAGUE CONVENTION ON PROTECTION OF CHILDREN AND CO-OPERATION IN RESPECT OF INTER-COUNTRY ADOPTION

[The text of this Schedule was checked against the text of the Convention as it appears on the Hague Conference website: <https://www.hcch.net/en/instruments/conventions/full-text/?cid=69>. The word “Intercountry” in the title of the Convention appears without a hyphen in that text.]

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.

[The word "child" should be "child's" in the phrase "the child's origin".]

- (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.

[The reference to the sub-paragraph of Article 48 appears as “b)” rather than “(b)” in the text of the Convention on the Hague Conference website.]

### 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.

## Schedule 6

[The text of this Schedule was checked against the text of the Convention as it appears on the Hague Conference website: [www.hcch.net/en/instruments/conventions/specialised-sections/child-abduction](http://www.hcch.net/en/instruments/conventions/specialised-sections/child-abduction). Note that Namibia is not a party to this Convention.]

### TEXT OF THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

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.

**[The second paragraph of Article 6 is divided into two paragraphs in the Government Gazette. It is presented as a single paragraph here, as it appears in the text of the Convention on the Hague Conference website.]**

## 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 11 appears as a single paragraph in the Government Gazette. It is presented as two paragraphs here, as it appears in the text of the Convention on the Hague Conference website.]**

## 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 12 appears as a single paragraph in the Government Gazette. It is presented as three paragraphs here, as it appears in the text of the Convention on the Hague Conference website.]**

## 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.

**[Article 21 appears as a single paragraph in the Government Gazette. It is presented as three paragraphs here, as it appears in the text of the Convention on the Hague Conference website.]**

## 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 24 appears as a single paragraph in the Government Gazette. It is presented as two paragraphs here, as it appears in the text of the Convention on the Hague Conference website.]**

### 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 26 appears as a single paragraph in the Government Gazette. It is presented as four paragraphs here, as it appears in the text of the Convention on the Hague Conference website.]**

### **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.

**[The phrase “Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors” is italicised in the text of the Convention as it appears on the Hague Conference website.]**

### 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 37 appears as a single paragraph in the Government Gazette. It is presented as two paragraphs here, as it appears in the text of the Convention on the Hague Conference website.]**

### 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 38 appears as a single paragraph in the Government Gazette. It is presented as five paragraphs here, as it appears in the text of the Convention on the Hague Conference website.]**

### 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 39 appears as a single paragraph in the Government Gazette. It is presented as two paragraphs here, as it appears in the text of the Convention on the Hague Conference website.]**

### 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 40 appears as a single paragraph in the Government Gazette. It is presented as two paragraphs here, as it appears in the text of the Convention on the Hague Conference website.]**

### 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 42 appears as a single paragraph in the Government Gazette. It is presented as three paragraphs here, as it appears in the text of the Convention on the Hague Conference website.]**

### 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 44 appears as a single paragraph in the Government Gazette. It is presented as four paragraphs here, as it appears in the text of the Convention on the Hague Conference website.]**

### 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 7

**[The text of this Schedule was checked against the text of the Convention as it appears on the Hague Conference website: [www.hcch.net/en/instruments/conventions/full-text/?cid=70](http://www.hcch.net/en/instruments/conventions/full-text/?cid=70). Note that Namibia is not a party to this Convention.]**

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

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,

**[The phrase “Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors” is italicised in the text of the Convention as it appears on the Hague Conference website.]**

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,

**[The phrase “United Nations Convention on the Rights of the Child of 20 November 1989” is italicised in the text of the Convention as it appears on the Hague Conference website.]**

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 -
  - (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.

- (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.

**[The phrase “Convention of 25 October 1980 on the Civil Aspects of International Child Abduction” is italicised in the text of the Convention as it appears on the Hague Conference website.]**

## 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.

**[The phrases “Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors” and “Convention governing the guardianship of minors” are italicised in the text of the Convention as it appears on the Hague Conference website.]**

## 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.

## Schedule 8

**[The text of this Schedule was checked against the text of the Convention as it appears on the Hague Conference website: [www.hcch.net/en/instruments/conventions/full-text/?cid=131](http://www.hcch.net/en/instruments/conventions/full-text/?cid=131). Note that Namibia is not a party to this Convention.]**

TEXT OF THE HAGUE CONVENTION ON THE INTERNATIONAL RECOVERY OF CHILD SUPPORT AND OTHER FORMS OF FAMILY MAINTENANCE

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**

- (1) 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.

[The Latin phrase “mutatis mutandis” is italicised in the text of the Convention as it appears on the Hague Conference website.]

### 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 -

**[The Latin phrase “mutatis mutandis” is italicised in the text of the Convention as it appears on the Hague Conference website.]**

- (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.

**[In the Government Gazette, the heading of this provision is number “43L” instead of “43:”. This obvious error has been corrected here to prevent confusion.]**

### **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.

**[The phrase “Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations” is italicised in the text of the Convention as it appears on the Hague Conference website.]**

#### **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**

This Convention does not affect the Hague Convention of 1 March 1954 on civil procedure, the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters and the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters.

[The phrases “Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters” and “Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters” are italicised in the text of the Convention as it appears on the Hague Conference website.]

### **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.

[The format of the Annexes differs in the text of the Convention as it appears on the Hague Conference website. In the Government Gazette, the tick boxes have been omitted throughout the Annexes. The tick boxes have been added here and the format has been adjusted only insofar as necessary to prevent confusion. The Gazette also adds full stops in several places where they do not appear in the text of the Convention on the Hague Conference website. These remain as they appear in the Gazette.]

### 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.

1. A determination of non-disclosure has been made by a Central Authority in accordance with Article 40.

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) .....

Name: .....(in block letters) Date: .....

Authorised representative of the Central Authority (dd/mm/yyyy)

## ANNEX 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.

1. # A determination of non-disclosure has been made by a Central Authority in accordance with Article 40.

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)