



**Review of the compliance of Namibian domestic legislation to the
Convention on the Rights of the Child (CRC)**

R. F. Zimba and E. Zimba
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and Child Welfare
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List of Acronyms

ADEA	Association for the Development of Education in Africa
AIDS	Acquired Immune Deficiency Syndrome
CBO	Community Based Organization
CRC	Convention on the Rights of the Child
ECCD	Early Childhood Care and Development
ECD	Early Childhood Development
EU	European Union
GRN	Government of the Republic of Namibia
HIV	Human Immunodeficiency Virus
MBESC	Ministry of Basic Education, Sport and Culture
MEC	Ministry of Education and Culture
MHETEC	Ministry of Higher Education, Training and Employment
Creation	
MOHSS	Ministry of Health and Social Services
MRLGH	Ministry of Regional and Local Government and Housing
MWACW	Ministry of Women Affairs and Child Welfare
NANSO	Namibia National Students Organization
NDF	Namibia Defence Force
NDP 1	National Development Plan 1
NDP 2	National Development Plan 2
NERA	Namibia Educational Research Association
NGO	Non Governmental Organization
NPC	National Planning Commission
NQA	National Qualifications Authority
OAU	Organization of African Unity
OVC	Orphans and Vulnerable Children
SIDA	Swedish Development Agency
SOS	Save Our Souls
STDS	Sexually Transmitted Diseases
TB	Tuberculosis
UNDP	United Nations Development Programme
UNESCO	United Nations Educational, Scientific and Cultural
organization	
UNFPA	United Nations Population Fund
UNICEF	United Nations Children's Fund
USAID	United States Agency for International Development

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Our hope is that this document will, to some degree, enhance the well-being and welfare of Namibian children.

EXECUTIVE SUMMARY

Introduction

The main task of this review is to compare the provisions contained in the Namibian enacted and proposed legislations on children to the provisions of the Convention on the Rights of the Child. To do this, the review:

1. highlights and discusses areas in which the enacted and drafted Namibian laws are either in conformity or in conflict with the Convention on the Rights of the Child;
2. ascertains the status, difficulties and constraints in passing laws before parliament, laws in draft form and laws whose consideration has stalled;
3. documents perceptions and opinions of stakeholders on the current acts and outstanding bills in order to determine the extent to which they are responsive to the protection of Namibian children's rights;
4. provides recommendations on possible amendments to existing legislations on children as well as to the outstanding bills to ensure that they are in conformity with the Convention on the Rights of the Child.

In order to attain the first objective, the review presents information on each article of the CRC. After this, information pertaining to objectives 2 and 3 is presented. To attain objective 4, the analysis and discussion of material pertaining to each article of the CRC under objective 1 is concluded by recommendations.

Although the review that follows contains a detailed analysis and discussion of the issues pertaining to the above-mentioned objectives, we wish to provide in this summary some of the recommendations on what should be done to ensure that Namibian legislations on children are in compliance with the CRC. We urge the reader to refer to the main body of the review for a more comprehensive treatise of issues discussed.

Some recommendations

Recommendations on article 3: Best interests of the child

- 1.1 To avoid confusion, the Child Care and Protection Bill that is being drafted should contain a section explaining what is meant by the phrase: "the child's best interests." This should benefit from community consultation and from a careful consideration of the Namibian social-cultural context.
- 1.2 The Legal Assistance Centre's technical comments on articles 11, 12 and 13 of the Children's Status Bill that are on matters of custody,

- guardianship and access should be taken into consideration as they are intended to enhance children's best interests.
- 1.3 We recommend that article 14 of the Children's Status Bill that is on inheritance should clearly stipulate how the orphans' inheritance could be protected from possession and misuse by unscrupulous guardians and relatives.
 - 1.4 The draft Childcare and Protection Bill should widen the scope of harmful social-cultural practices to include practices that would, in some Namibian communities, make it difficult to ascertain sexual abuse of girls and early marriages for some girls.
 - 1.5 We recommend that the suggestion, in the draft Childcare and Protection Bill, to shift from concepts of custody, access and guardianship to shared parenting, parental duties and responsibilities should benefit from *the child-in-context idea*. The gist of this is to relate social-cultural parenting expectations to children's best interests. Parents' duties and responsibilities should be clearly specified when doing this.
 - 1.6 In order to promote the best interests of children with disabilities, their parents should be supported to provide care and sustenance. In addition, they should be provided with empowering services to equip them with skills to look after their children with disabilities at home.
 - 1.7 Because it currently does not, we recommend that to promote the best interests of children aged 0-6 years, the Education Act of 2001 should include an article on Early Childhood Care and Development

Recommendations on article 4: Measures for implementing the CRC

- 1.1 To more adequately accommodate issues of child marginalization, orphan-hood, vulnerability and to streamline early childhood development provision of services, monitoring, evaluating and coordination of these services, we recommend that the ECD policy should be legislated and incorporated into the draft Childcare and Protection Bill.
- 1.2 Because children with disabilities have special and different needs from adults with disabilities and because their special needs are not comprehensibly catered for in the National Policy on Disability, we recommend that a separate act on children with disabilities should be promulgated
- 1.3 We recommend that to facilitate their implementation, Regional projects on children should benefit from local, national and international resource mobilization. This partly implies that bilateral and multi-lateral cooperation agreements on children entered into by Namibia and other countries should clearly stipulate how they would foster the demands of the CRC.

Recommendations on article 5: Responsibilities, rights and duties of parents

- 5.1 We recommend that whilst incorporating well articulated parental responsibilities, duties and rights, the draft Childcare and Protection Bill should safeguard and clarify the concept of the family in the Namibian context by noting that it can assume a variety of forms. These are nuclear families, extended families, single-parent headed families, child-headed families, grand-parent headed families and families where parents are not married but cohabiting.
- 5.2 For the information of parents and guardians, we recommend that the Childcare and Protection Bill should specify the support that the State provides to enable parents and other caregivers, to raise children in line with the requirements of the CRC.

Recommendations on article 6: Child survival and development

- 6.1 Because there appears to be no recent legal instruments on children's health, we recommend that legal frameworks to safeguard the survival of children in the country should be put in place. These frameworks should be sensitive to the prevention and containment of contemporary health pandemics, catastrophes and issues such as HIV/AIDS, STDS, Malaria, TB and immunization against childhood diseases.
- 6.2 To include the important aspects of the development of reasoning, problem solving and social emotional well-being, we recommend that the Childcare and Protection Bill should specifically address child and youth cognitive and psychosocial developmental issues of home, community and school environmental stimulation and support. This should contain and augment the child and youth development provisions of Vision 2030.

Recommendations on article 7: Naming, registration, acquisition of nationality and care of children by parents/guardians

- 7.1 We recommend that the Births, Marriages, and Deaths Registration Act of 1963 should either be repealed or amended to make it consistent with the Namibian Constitution. This should be done to ensure that the registration of births, the issuing of birth certificates and nationality of children is updated and its implementation should be made consistent with the Namibian Constitution, without discriminating **any** children.
- 7.2 The State should ensure that birth registration facilities are easily accessible to all children born in Namibia. Undertaken in close collaboration amongst Ministries of Women Affairs and Child Welfare, Health and social Services, Justice and Home Affairs, the State should take measures to ensure that most, if not all, children are born in medical facilities where they can easily be registered.

Recommendations on article 9: Non separation of children from their parents/guardians

- 9.1 We recommend that the Education Act of 2001 should be amended to make provision for instances in which children with disabilities may be abandoned in State Special Schools by their parents whose intention may be to sever their contacts and relationships with their children for long periods of time.
- 9.2 To build on the contents of the preceding paragraph, we recommend that the draft Childcare and Protection Bill should make provision for the maintenance of contacts and relationships between children in State Institutions (e.g. children's homes) and their parents/guardians/relatives. The wording of such provisions should be consistent with article 9(3) of the CRC.
- 9.3 We recommend that the Juvenile Justice Bill should cater for children whose parents are in prison, detained, deported or dead.
- 9.4 We recommend that the draft Childcare and Protection Bill should include the care of abandoned children and street children.
- 9.5 To further avoid the separation of some children from their parents, we recommend that the draft Childcare and Protection Bill should make provision for the availing of facilities and services for parents with children in hospitals and for children with parents in prisons.

Recommendation on article 11: Child Abduction

11.1 It is recommended that the Ministry of Women Affairs and Child Welfare as the Ministry responsible for protecting the welfare of Namibian children should ensure that the government signs and ratifies the Hague Convention on the Civil Aspects of International Child Abduction. In the meantime the Ministry of Justice should be lobbied to sign bilateral agreements on the tracing and repatriation of Namibian children from other countries.

Recommendation on article 12: Giving Children's views due weight in matters affecting them.

12.1 We recommend that the draft Childcare and Protection Bill should include provisions in which article 12 of the CRC would be adhered to in families, in adoption cases, in schools, in child employment, in immigration procedures and asylum-seeking. In school for instance, article 60 of the Education Act of 2001 should be amended as it does not provide children accused of misconduct with the protective provisions contained in article 12 (1) of the CRC when they appear before school boards.

Recommendation on article 13: The children's right to freedom of expression

13.1 We recommend that to be in conformity with article 13 (2) of the CRC, there should be in Namibia, clear legislation on children's self-

expression using the electronic media. For instance, such legislation should restrict children from seeking, receiving and disseminating pornographic materials and documents meant to corrupt their morals.

Recommendation on article 14: Children's right to freedom of thought, conscience and religion

14.1 Because there is no law on how parents can direct their children in the exercise of their rights to religion without prevailing on them to follow a particular religion and because there is no law to use when deciding cases in which learners may hold that it is against their conscience to study particular subjects (e.g. moral and religious education that includes coverage of either Christianity or Islam), we recommend that the draft Child Care and Protection Act should have a section on issues contained in article 14 of the CRC.

Recommendation on article 15: Children's Right to Freedom of Association and Freedom of peaceful assembly

15.1 We recommend that children be made aware of the restrictions placed in the exercise of this right. These are contained in article 15(2) which stipulates that *"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."*

Recommendation on article 16: Children's right to privacy

16.1 Although children have the right to receive medical treatment on their own without the consent of their parents or guardians, it is not clearly stated in the Draft Childcare and Protection Bill that this could be done in the absence of a parent or a guardian. Because of this, we recommend that a provision that expressly states that the consultation is confidential or private should be included in the draft bill.

Recommendations on article 17: Children's right of access to a variety of pieces of information

17.1 The two pieces of legislation that regulate the publication of objects, films and public entertainment in Namibia are the **Publication Act of 1974 (Act No 42 of 1974)** and the **Obscene Photographic Matter Act of 1967 (Act No 37 of 1967)**. Both of these Acts prohibit the publication of undesirable, indecent and obscene photographic matter. Because these pieces of legislation are very old and therefore do not make any mention of the protection of children from viewing the materials, we recommend

that they be repealed and replaced by new ones which will, among other content, ensure that the viewing of indecent material is prohibited.

17.2 The Namibian Broadcasting Act of 1991 (Act 9 of 1991) which established the National Broadcasting Corporation and the Namibian Film Commission Act of 2000 (Act 6 of 2000) which established the Film Commission do not mention any restrictions or prohibitions on the publication of certain materials that may be harmful to children. Because of this anomaly, we recommend that these Acts should be amended to contain provisions that would make it an offence to publish information and material that could be injurious to a children's well-being. Moreover, we recommend that the Namibian Broadcasting Corporation TV section should put in place guidelines on movies that can only be viewed after parental guidance or permission has been given.

Recommendations on article 18: State support of parents' responsibilities for the upbringing and development of their children

18.1 We recommend that the creation of social-emotional environments that promote children's optimal cognitive development and provides them with adequate psycho-social support should be part of fathers' and mothers' responsibilities that the State should recognize and support. To ensure that this is done, the Maintenance Act of 2003, the Married Persons Equality Act of 1996, the Child Status Bill and the draft Child Care and Protection Bill should include the provision of the "development of the child" as one of the parents' responsibilities.

18.2 We recommend that State-supported "parental education" should be established, included in all Namibian legislation on children and extended to OVC and grandparents who head households.

Recommendations on article 19: Children's right to protection from all forms of violence

19.1 It is recommended that the Education Act 16 of 2001 should be amended to deal with the problem of sexual abuse amongst learners in school hostels.

19.2 It is recommended that the Ministry of Health and Social Services should enact a legislation regulating circumcision. The legislation will protect boys who are currently subjected to unhygienic circumcision rituals that could possibly make them vulnerable to HIV infection, especially if the same knife is used on many boys. Once enacted, the legislation should be translated into various local languages to ensure that as many people as possible are made aware of it. Moreover, the legislation should contain a provision on the mandatory reporting of child abuse by community members.

Recommendation on article 20: The protection and placement of children in alternative care

20.1 It is recommended that the children's homes and places of safety that are not registered be prompted to register by the Ministries of Women Affairs and Child welfare and of Health and Social Services so that the children being accommodated in them can be eligible to receive grants and the homes can get government assistance.

Recommendation on article 21: Procedures and legislations on the adoption of children

21.1 The Namibian government has not yet signed the Hague Convention on the Protection of Children and Cooperation in respect of Inter-country Adoption. This is an international regulatory instrument that applies to inter-country adoptions. The Hague Convention requires that States Parties create a Central Authority that will handle inter-country adoptions. This could be a government ministry, specific board or committee. The authority created would be responsible for implementing procedures listed in the Convention for inter-country adoptions.

It is recommended that the government should sign and ratify the Convention referred to in the preceding paragraph and rephrase the provisions in the draft Child Care and Protection Bill to include inter-country adoptions.

21.2 We recommend that Namibia establishes a State Authority to handle inter-country adoptions.

Recommendations on article 23: Rights of children with disabilities

23.1 The national policy on disability neither mentions the creation of a body that would be responsible for the evaluation of the situation of disabled children, nor provides for a system of identifying and monitoring the needs and difficulties of these children. It further does not clearly state whether any of the services that will be provided shall be free of charge. Because of all these limitations in the policy, we recommend that it be amended to take into account the situation where parents of children with disabilities may not have the financial resources to access the services provided. The service providers should also be educated on the special needs and development of disabled children.

23.2 We recommend that unless they are covered in legislations we are unaware of, the National Pensions act of 1992 should be amended to

include disability grants for children with disabilities that are younger than 16 years of age.

23.3 We recommend that the National Vocational Training Act number 18 of 1994 should be amended to cover and deal with Special Institutions for the training of children with disabilities.

23.4 We recommend that as is the case in the Maintenance Act No.9 of 2003, the Education act of 2001 should be amended to include educational provisions offered to children with disabilities that should be based on the extent of the children's disability and the costs of medical and other kinds of care.

23.5 The Combating of Domestic Violence Act, No. 4 of 2003 makes provision for the application and granting of protection orders by the Magistrate's court in cases where a person is a victim of domestic violence. In terms of the Act a complainant or a person on behalf of the complainant can apply for a protection order with the consent of the complainant. There are however, certain exceptions to obtaining the consent of the complainant. One such situation is where the complainant is mentally incapacitated. Because the Act does not specifically mention mentally incapacitated children, we recommend that it be amended to cater for this.

Recommendation on article 24: Children's right to health services

24.1 We recommend that the Public Health Act 36 of 1919 should be repealed and replaced with one that would speak to issues contained in article 24 of the CRC. In addition, the new health act should contain contemporary health matters that affect Namibians. We feel that the new law should be put in place without delay as it is long over due. Ministries of Health and Social Services, Basic Education, Sport and Culture, Women Affairs and Child Welfare and Justice should collaborate when promulgating the new law.

Recommendation on article 25: Children's right to periodic review of the treatment and care offered in environments of placement

25.1 While endorsing the provision in the Draft Childcare and Protection Bill that calls for the periodic review of a child placed outside his or her home, we strongly recommend that existing measures to monitor and evaluate services provided to children in need of care and support in various centres and institutions should be strictly enforced. This should be done to protect these children from mediocre and harmful care.

Recommendations on article 26: Children's right to social security and insurance

26.1 We recommend that the regulations under the draft Basic State Grants Bill of 2000 should make all children who are unable to support themselves eligible for State grants. Currently the Bill restricts these grants only to children who are older than six years. We make this recommendation because there are in the country many children aged 0-6 years who are in need of financial and other support.

26.2 We strongly endorse the Ministry of Women Affairs and Child Welfare's proposal that the State should consider providing grants to children who are orphaned by the HIV/AIDS pandemic.

Recommendation on article 27: Children's right to a standard of living adequate for their physical, mental, spiritual, moral and social development

27.1 To more effectively enforce the Maintenance Act of 2003 and the Reciprocal Enforcement of Maintenance Orders Act No. 3 of 1995, we recommend that the Ministry of Justice should enter into agreements for this purpose with more foreign countries. This should be done to facilitate the process of obtaining child maintenance money from parents who reside in foreign countries.

Recommendations on article 28: The children's right to education

28.1 To remove the payment of various kinds of school fees as a barrier to poor children's access to education, we recommend that the establishment of the National Education Development Fund as provided for in articles 26, 27, 28 and 29 of the Education Act of 2001 be implemented. Once implemented, poor children should have access to this fund. In addition, poor parents and guardians should be made aware of the existence of this fund.

28.2 To comply more adequately with article 28 of the CRC, we recommend that Namibia should make available and accessible to all learners in school educational and vocational guidance information. This means that the Educational System should utilize the services of more qualified guidance and counselling teachers.

28.3 We recommend that to discourage learners from **dropping out of secondary school**, the Education Act of 2001 should be amended to include a provision on mandatory school attendance.

Recommendations on article 29: The direction of children's education towards the development of respect for human rights, parents, cultural identities, language and values.

29.1 We recommend that under parents' rights, the draft Child Care and Protection Bill should include an article on children's respect for their parents.

29.2 To promote respect for the environment amongst children the Ministry of Basic Education, Sport and Culture and the Ministry of Environment and Tourism should design and implement a policy on environmental education.

Recommendations on article 31: Children's right to rest and leisure

31.1 Although Namibian children seem to have enough time to rest, we recommend that existing legislation on children's access to cinema facilities and night clubs should be more strictly enforced to protect them from physical harm, HIV/AIDS infection, moral decadence and death.

31.2 Because it is silent on children's sport and other leisure activities, we recommend that the Educational Act of 2001 should be amended to make explicit provision for the availability of differentiated play and recreational facilities for young children, mid-aged children and other children in and out of school.

31.3 We recommend that the Local Authorities Act of 1992 and the Regional Councils Act of 1992 be amended to make provision for the establishment of functioning departments in charge of recreation facilities for children and youth. This should be done because the after school centres in some urban areas are inadequate in catering for the recreation needs of the majority of the country's children and youth.

Recommendations on Article 32: Children's right to protection from economic exploitation

32.1 We recommend that the Labour Bill of 2003 should allow children between the ages of 16 and 18 years to work between 20h00 and 22h00 to earn some income that could be used to pay for educational-related expenses.

32.2 We recommend that the powers of the Minister to put in place regulations to permit child labour be subjected to some control. As currently stipulated in the Labour Bill, the Minister is at liberty to make any

regulations permitting the employment of children. There is potential here for the Minister to make regulations that may be in conflict with children's best interests.

Recommendations on Article 33: Children's protection from the illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties

33.1 We recommend that the Abuse of Dependence – Producing Substances and Rehabilitation Centres Act 1971 (Act No 41 of 1971) be either amended or repealed to make provisions for the prevention of the abuse of dependence producing substances by children.

33.2 We recommend that the Medicines and related Substances Control Act 1965 (Act No 101 of 1965) be either amended or repealed in order to:

- address the problem of children who may be using cocaine, cannabis or any psychotropic drugs that may be harmful not only to their health but also to their social-emotional well-being;
- prohibit the use of children to traffic and produce drugs for adults;
- provide a list of drugs that should not be sold to children;
- list substances that can only be bought by children with parental authorization.

33.3 We recommend that the Liquor Act, 1998 (No. 6 of 1998) be amended to include mechanisms of preventing children from abusing alcohol. We make this recommendation because the Act is currently only limited to the prohibition of the sell of liquor to children.

Recommendations on Articles 34 and 35: Protection of children from sexual abuse and exploitation

34.1 We recommend that the Combating of Immoral Practices Act 1980 (Act No 21 of 1980) be amended to include provisions that cover boys as well. As it stands, the Act seems to only contain prohibitions of sexual activities with a female person. It does not expressly refer to males. In this state, the Act only affords protection to female children .

34.2 We recommend that the Namibian Government should sign the Hague Convention on Inter-country Abduction. Doing this is important because the signing and ratifying of this Convention would reinforce the laws that protect children from sexual exploitation as some of the children may be abducted for the purposes of child prostitution or pornography.

Recommendations on Article 39: Rehabilitation of child victims

39.1 We recommend that because several abused children (especially those in rural areas) have no access to services that could cater for their physical, psychological and emotional healing, more women and child protection units and places of safety be established where they may be accessed by the majority of children.

39.2 We recommend that the Combating of Rape Act 8 of 2000, the Combating of Domestic Violence Act 4 of 2003, and the Childcare and Protection Bill should contain articles legislating children's recovery and healing from effects of violence and various forms of abuse. Currently, these pieces of legislation do not make provision for this.

Recommendation on Article 40: Administration of Juvenile Justice

40.1 We recommend that to be in compliance with the CRC, Namibia should, expeditiously, pass the Child Justice Bill.

Conclusion of the Executive Summary

The source of the recommendations just presented is the detailed analysis in the main body of the review. The reader is asked to augment the reading of this Summary with the reading of the main document.

We wish to point out that notwithstanding the recommendations provided in this summary, Namibia has largely complied and continues to comply with the provisions of the CRC.

REVIEW TO DETERMINE WHETHER CURRENT LEGISLATIONS ON CHILDREN IN NAMIBIA ARE IN CONFORMITY WITH THE CONVENTION ON THE RIGHTS OF THE CHILD (CRC)

INTRODUCTION

To protect, defend and advocate for the welfare of children everywhere in the world, the Convention on the Rights of the Child (CRC) was adopted, opened for signature, ratification and accession by the United Nations General Assembly resolution 44/25 of 20th November, 1989. The Convention entered into force on 2nd September 1990. By 30th November, 2003, 192 nations of the world had ratified the convention. Namibia signed the convention on 26th September, 1990 and ratified it on 30th September of the same year.

To monitor the implementation of the convention by States Parties, the Committee on the Rights of the Child was established by the United Nations. All States Parties that are signatory to the convention are mandated to make periodic reports to the committee (UNICEF, 1998). Namibia submitted its first report to the committee in 1992. In explaining what Namibia was doing and planned to do in implementing the provisions of CRC, the report covered general principles, civil rights and freedoms, the family environment and alternative care, basic health and welfare, education, leisure and cultural activities and special protection measures (GRN, 1992). Since 1992, Namibia has promulgated and drafted for consideration a variety of legislations to protect the rights of children and to promote their welfare. Examples of enacted legislations that impact on Namibia's children are:

- Combating of Domestic Violence Act, 2003 (Act No. 4 of 2003);
- Maintenance Act, 2003 (Act No. 9 of 2003);
- Combating of rape Act, 2000 (Act No. 8 of 2000);
- Education Act, 2001 (Act No. 16 of 2001);
- Married Persons Equality Act, 1996 (Act No. 1 of 1996), especially as it pertains to the domicile of minor children and the guardianship of minor children of a marriage;
- The Criminal Procedure Amendment Act, 2003, especially as it relates to children as vulnerable witnesses.

Examples of Bills relating to children that are before Parliament are:

- The Children's Status Bill;
- The Labour Bill.

Examples of bills on children that are either under discussion by stakeholders or are being prepared by legal drafters are:

- The Child Care and Protection Bill;
- The Child Justice Bill;
- The Divorce Bill.

The main task of this review is to compare the provisions contained in the Namibian enacted and proposed legislations on children to the provisions of the Convention on the Rights of the Child. To do this, the review will:

1. highlight and discuss areas in which the enacted and drafted Namibian laws are either in conformity or in conflict with the Convention on the Rights of the Child;
2. ascertain the status, difficulties and constraints in passing laws before parliament, laws in draft form and laws whose consideration has stalled;
3. document perceptions and opinions of stakeholders on the current acts and outstanding bills in order to determine the extent to which they are responsive to the protection of Namibian children's rights;
4. provide recommendations on possible amendments to existing legislations on children as well as to the outstanding bills to ensure that they are in conformity with the Convention on the Rights of the Child.

In order to attain the first objective, the review will present information on each article of the CRC. After this, information pertaining to objectives 2 and 3 will be presented. To attain objective 4, the analysis and discussion of material pertaining to each article of the CRC under objective 1 will be concluded by recommendations.

AREAS IN WHICH THE NAMIBIAN ENACTED LAWS AND DRAFTED BILLS ARE EITHER IN CONFORMITY OR IN CONFLICT WITH THE CONVENTION ON THE RIGHTS OF THE CHILD

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.

According to the Committee on the Rights of the Child, to conform to article 1, States Parties should pronounce themselves on the beginning and end of childhood, whether the child acquires all adult rights by his or her 18th birth day and whether minimum ages are defined in legislation for the beginning and end of compulsory education and admission to employment, including hazardous work and part-time work.

Consistent with international understanding, the Namibian constitution, enacted laws and drafted bills are silent on the beginning of childhood. The Combating of domestic violence act, 2003 (Act No. 4 of 2003), the Married Persons Equality Act, 1996 (Act No. 1 of 1996) and the Children's Status Bill define a child as any person below the age of 18 years. The Maintenance Act, 2003 (Act No. 9 of 2003) however, does not seem to define who is a child.

According to article 17 (2) of the Namibian Constitution, every Namibian has a right to vote at the age of 18 years. In addition, any person aged 18 years can drive and marry. All this does not however, entitle him or her to be elected to public office. He or she can only do this at the age of 21 years. This implies that in Namibia, the child does not acquire all adult rights at the age of 18 years. Although this may be perceived to be discriminatory, it may in fact protect young adults who may suddenly lose the support of their parents through death. Because of HIV/AIDS, it is important to consider in Namibia, as is the case in several African countries, the issue of protecting and supporting young adults older than 18 years and below the age of 21 years. The suggestion that the Child Care and Protection Act ought to include a stipulation that reduces the age of majority from 21 years to 18 years by repealing the Age of Majority Act should take this into account.

Minimum ages are indeed defined in the Namibian legislation for the beginning and end of compulsory education and admission to employment, including hazardous work and part-time work.

In the area of education, article 20 (3) of the Namibian Constitution and article 53 (1) (a) (b) of the Education Act, 2001 (Act No. 16 of 2001) define children's compulsory entry into and exit ages from the education system. The education act in the sections just cited specifically stipulates that "school attendance is compulsory for every child from the beginning of the year in which the child attains the age of seven years, until (a) the day the child completes primary education before reaching the age of 16 years; or (b) the last school day of the year in which the child reaches the age of 16 years". This stipulation contains aspects that may put a child at a disadvantage. For instance, a parent of a child who completes primary school at the age of 12 years is not compelled to keep the child in school after this age. The other problem is that the education act does not consider the fact that a child with special needs may require more time to complete primary education. The act may need to be amended in this area so that it is consistent with article 20 (3) of the Namibian Constitution which states that "children shall not be allowed to leave school until they have completed their primary education or have attained the age of sixteen (16) years, whichever is the sooner, *save in so far as this may be authorized by Act of Parliament on grounds of health or other considerations pertaining to the public interest.*" The part of this stipulation that is in italics may be interpreted to cover children with special needs. This is that the Namibian Constitution provides for the possibility that a child with disabilities may take longer than 16 years to complete Primary Education. The Education Act of 2001 does not make this provision explicitly.

Article 15 (2) (3) of the Namibian Constitution defines minimum ages for children's admission to employment, including protection from hazardous work. The Labour Bill amplifies on the constitutional provisions to ensure that all children under the age of 18 years are protected from hazardous work.

Recommendations on article 1: Implications of the meaning of who is a child

Although Namibia has largely complied with article 1 of the CRC, we recommend the following:

- 1.1 The Education Act 16 of 2001 should be amended to require parents and guardians to keep children (especially girls) in school after grade 7.
- 1.2 The Education Act 16 of 2001 should specifically stipulate that children with disabilities may need more time beyond their 16th birth day to complete the compulsory primary education cycle.

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.***

Whereas the first section of this article seeks to ensure that ***all*** children irrespective of their or their parents' or legal guardian's background characteristics are covered and protected by the rights enshrined in the CRC, the second section compels States Parties to take measures and engage in activities aimed at protecting ***all*** children under their jurisdiction from all forms of discrimination and punishment on the basis of their background characteristics. The Committee on the Rights of the Child has identified several grounds of discrimination against children. For instance, children can be discriminated against on the basis of gender, disability, race, their parents' religion, ethnic origin, language, nationality, social-economic status, their or their parents' HIV/AIDS status, place of residence (e.g. residing in remote areas, rural areas), whether they were born to parents who were married, whether they are orphans, homeless, abandoned and subjected to violence (UNICEF, 1998, p. 28).

Our task in this review is to consider the extent to which Namibia has put in place legal and other mechanisms of protecting children from all forms of discrimination in order to respect the provisions of article 2 of the CRC. Because the ramifications of this article are covered in more detail in other articles of the CRC, it would be sufficient at this point in the review to merely point out in general terms examples of what Namibia has done to protect children from various forms of discrimination.

As persons, Namibian Children are protected from all forms of discrimination by article 10 (2) of the Namibian Constitution which stipulates that “no persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status”. To effect this, Namibia has enacted non-discriminatory laws in support of children and formulated policies meant to protect all children from discrimination. For instance, whereas the Combating of Domestic Violence Act of 2003 and the Combating of Rape Act of 2000 protect children from violence that in many cases is the result of discrimination on the basis of sex, the Education Act of 2001 ensures that all children, without discrimination, have access to education and the Children’s Status Bill is intended to protect several children that may be discriminated against on the basis that they were born outside marriage.

Although Namibia should be commended for putting in place these and other legal mechanisms to protect children from discrimination, more attention should be paid to the strengthening of law enforcement mechanisms. The need for this arises when, for example, the impact of the protective provisions of the Combating of Domestic Violence Act is diminished by the withdrawal of domestic violence cases under the pretext that pursuing them to their logical conclusion would be harmful to children (Hubbard, 1999, p. 38). To give another example, despite the safeguards against discrimination contained in the Education Act of 2001 and in the *Educational for All Policy* (Ministry of Education and Culture, 1993), many children-especially those from urban areas- are barred from attending state schools because they are unable to pay school development fund fees.

To illustrate the instance of discrimination due to the inability to pay fees, Godana and Kalili, (2002, p. 38) report that some schools “carefully scrutinize new applicants on the basis of their ability to afford high fees”. To camouflage that doing this is illegal, Principals of these schools deny some children access to education by stating that their schools are full when in fact the schools may not be full (Ibid, p.38).

To protect children infected and affected by HIV/AIDS, orphans and vulnerable children from discrimination in educational settings, Namibia has formulated the *National Policy on HIV/AIDS for the education sector* (Ministry of Basic Education, Sport and Culture and the Ministry of Higher Education, Training and Employment Creation, 2003). Among other things, this policy guards against discrimination on the basis of HIV/AIDS status by stipulating that “ no learner or student may be stopped from attending an educational institution or from participating in sports or play activities, only on the basis of his or her HIV status” and “ no learner or student may be denied admission to or continued attendance at an educational institution as a result of his or her HIV/AIDS status or perceived HIV/AIDS status” (p. 4). One main shortcoming of this policy is that it does not provide penalties that would be attracted if its provisions are violated.

To prevent discrimination of some children due to marginalization (i.e. due to indigenous and minority group membership, place of residence and work, disability, vulnerability and orphan-hood and due to refugee status), Namibia formulated *National Policy Options for Educationally Marginalized Children* (Ministry of Basic Education, Sport and Culture, 2000). The policy options are intended to protect and ensure that children of farm workers, San children, Ovahimba children, street children, working children, children in squatter areas and resettlement camps, orphans and vulnerable children, children with special educational needs and refugee children have access to compulsory basic education.

As a result of the Policy Options for Educationally Marginalized Children, many programmes and projects have been established in Namibia. For example, mobile schools have been established for Ovahimba children who together with their parents lead a semi-nomadic life style, programmes have been put in place by the State and NGOs to facilitate the education of San children in their own mother tongue, school hostels are being reorganized to supportively promote the education of orphans and other vulnerable children, a school feeding programme is used in all regions of the country to supplement the nutrition requirements of learners from poor families and based on the Education Act of 2001 educational forums have been organized in all 13 regions to advance the interests of all learners, including those with special educational needs (Zimba and Nuujoma-Kalomo, 2002). Moreover, Ministries of Education have been advised to establish in each school *circles of support* consisting of teachers, social workers, the peer group, health workers, NGOs, the Police, the community (i.e. school boards, parents, churches and community based organizations) and those in the legal field to protect orphans and vulnerable children from discrimination and to support and promote their education by ensuring that they remain in school (Ministry of Basic Education, Sport and Culture and Ministry of Higher Education, Training and Employment Creation, 2002). These proposals are being implemented.

Notwithstanding the protective provisions in the Policy Options for the Education of Marginalized Children and how they are being used in practice, these provisions have not yet been legislated. To ameliorate this, the Education Act of 2001 could be amended to include not only these provisions but also those contained in the *National Policy on HIV/AIDS for the Educational Sector*.

Recommendations on article 2: Non-discrimination

- 2.1 To prevent discrimination of access to education on the basis of inability to pay various kinds of fees, the Education Act of 2001 should be amended to include specific conditions under which some learners would qualify to be exempted from paying the school development fund fees, hostel fees and other fees.

- 2.2 To ensure that the National Policy on HIV/AIDS in the education sector is complied with, the Education act of 2001 should be amended to include penalties that could be incurred as a result of discrimination due to learners' or teachers' HIV/AIDS status.
- 2.3 To be legally binding, we recommend that Policy options for Educationally Marginalized Children should be legislated. These options should be included in an act on inclusive education, the education of children with disabilities and on children with various educational special needs.

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, shall take all appropriate legislative and administrative measures.**
- 3. State 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**

The three sections of this article require that all governmental and non-governmental institutions should determine the impact of their actions, plans and policies on children, protect and care for children in such a way that their well-being is, at all times, enhanced and establish standards for assessing whether or not "children's best interests" are respected and taken account of (Collins and Pearson, 2002). Although all this sounds very clear, the phrase "children's best interests" creates difficulties in assessing whether or not article 3 has been adhered to by specific States Parties.

The problem is that there does not exist neutral children's best interests with universal interpretations. Based on individualistic and communal (i.e. collectivistic) world views and cultures, "children's best interests" in one community may not be taken as so in another community (Scandlyn, 2004; Alston, 1994; Rwezaura, 1994). This tends to be the case because whereas in some communities children may largely be treated as individual moral subjects requiring protection, care and support at the individual level, in other communities children are embedded in social fabrics where their interests transcend their individuality and assume communal identities. This does not mean that children's interests get lost in community interests. It means that

their interests are considered as part of familial and community interests, (Zimba, 2002, pp. 101-104).

It should be recognized that in whatever community, concrete cases requiring the explicit respect and protection of children's best interests do not neatly fall into either *individualist* or *collectivistic* piles. The point to note however, is that the individualistic perspective in which article 3 of the CRC is formulated should be complimented by the view of *the child in context*. This implies that legislations intended to protect children from harm and from actions that diminish their well-being should be sensitive to this context. Do Namibian laws and proposed laws take this into account?

While complimenting the provisions in article 15 of the Namibian Constitution, in article 2 (a, b, d, e and g) of the Combating of Domestic Violence Act of 2003 and in article 3(3) of the Maintenance Act of 2003 that foster, promote and protect the best interests of the child, the Children's Status Bill, which has been designed to protect children born outside marriage, is a good example in Namibia of legislation that respects the children's best interests. To illustrate this point, the bill in article 2(1) states that "*the objectives of this Act are to promote and protect **the best interests of the child** and to ensure that no child suffers any discrimination or disadvantage because of the marital status of his or her parents*". In addition to this, the bill stipulates guiding principles that are consistent with **children's best interests**. To this effect, article 3(1) of the bill states, in part, the following principles:

When making any decision pertaining to custody, guardianship, or access, the children's court or any other competent court must take the following factors into consideration:

- (b) the child's physical, emotional and educational needs;*
- (d) the fitness of all relevant persons to exercise the rights and responsibilities in question **in the best interests of the child**;*
- (g) any harm which the child has suffered or is at risk of suffering, directly or indirectly, from being subjected or exposed to abuse, ill-treatment, violence or other behaviour;*
- (i) any wishes expressed by the child or his or her representative, in light of the child's maturity and level of understanding.*

Because no definition is provided in the Bill and no institution, which has made comments on the bill, has provided any definition, it seems to be taken for granted that **children's best interests are context-free** and every one understands what they are. To avoid confusion, some conceptualization of **children's best interests** in the Namibian context should be provided in the bill. Because there are contextualized views of the child's best interests, Namibian communities should be extensively consulted when doing this. Moreover, guiding principle (b) of article 3(1) should include the fostering and

protection of children's ***cognitive or intellectual needs*** which focus on ***thinking and the development of thinking capacities.***

The protective provisions in articles 11, 12, and 13 of the Children's Status Bill that are on matters of *custody, guardianship and access* should be improved upon and benefit from technical comments from the Legal Assistance Centre as these comments are intended to enhance children's best interests. When this is done, the Namibian social-cultural context should be taken into consideration as well. This should be so especially in areas where customary law and Namibian communities' beliefs and values on children are concerned. These should not be glossed over as resistance to some provisions of the bill may emanate from conceptions of children and childhood that are based on entrenched belief systems whose expression is not being understood.

Article 14 of the Children's Status Bill is on inheritance. The sections under this bill are not very clear on what would happen when a child loses both parents and becomes an orphan. There is evidence to indicate that some relatives volunteer to take care of orphans with the sole purpose of getting their hands on the children's assets (Zimba and Nuujoma-Kalomo, 2002). The Legal Assistance Centre has suggested that before their death, parents with custodian powers should name custodians in their wills. We agree with this suggestion.

Several suggestions have been made on what the **Draft Childcare and Protection Act** should contain. Aspects in this proposed Act that illustrate children's best interests pertain to the protection against harmful social and cultural practices, the proposal to shift from concepts of custody, access and guardianship to concepts of shared parenting, duties and responsibilities of parents and the protection of children with disabilities.

Female genital mutilation and the unhealthy circumcision of young boys are given as examples of harmful social-cultural practices on which legislation is needed in Namibia. For instance, should there be provision in the proposed childcare and protection act to have safe, hygienic and healthy ways of circumcising boys while taking tradition into account? While answering this question in the affirmative, we would emphasize the need to widen the scope of harmful social-cultural practices to include practices allowing marriages of underage children and practices that would, in some communities, make it difficult to ascertain sexual abuse of children (Talavera, 2002).

The proposal to shift from concepts of custody, access and guardianship to concepts of shared parenting, duties and responsibilities of parents should benefit from community consultation. It is not sufficient in our view to base the shift on the premise that it would facilitate the attitudinal move away from parental ownership and control of children to parental duties and

responsibilities. The *child in context* principle would require that Namibian communities with varying traditional and contemporary world-views on relationships between parents and their children should be widely consulted before the shift is made into law. The main point of the consultations would be to relate social-cultural parenting expectations that are inherent in various Namibian cultures to children's best interests.

The protection of the best interests of children with disabilities is covered in the draft childcare and protection act together with that of other children with special needs. A more detailed comment on these children will be provided later in this review. At the moment it is important to note two points.

The first point is on the emphasis in the act that is appropriately put on unique interests of these children. These include rehabilitation, special subsidies in respect of grants tied to placement of these children and clear procedures for obtaining financial and other assistance with the provision of assistive treatment or equipment for children with disabilities, by parents, other caretakers or relevant institutions. Including these provisions in the act is crucial because the best interests of children with disabilities would not be sufficiently served if their parents are expected to be the sole source of supportive care and sustenance. These parents need not only financial and material support but they also need empowering services that would equip them with specialized skills to look after their children with disabilities at home.

The second point is that the draft Child Care and Protection Act should be more comprehensive in its coverage of children with special needs. In addition to those that have been included in discussion documents, all other marginalized children should be catered for under the category of children with special needs. Some of these are the Ovahimba and San children, orphans and vulnerable children, children of farm workers on commercial and communal farms, children residing in informal settlements and in isolated and remote areas.

As indicated above, article 3(3) of the CRC states that “***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.***”

To comply with these requirements, Namibia has put in place authorities in education, health, social services and social welfare to establish standards against which institutions, services and facilities responsible for the care and protection of children can be judged. In education for instance, articles 33, 34, 41, 42, 45, 46, 47 and 48 of the Education Act of 2001 provide standards for

the establishment, registration and closure of state and private schools. Notwithstanding this, an issue of concern that should be raised here is that the Education Act of 2001 is neither explicit nor comprehensive enough on the grounds that should be followed to permanently or temporarily close either a State or a Private school. Article 34 (1) merely states that “the Minister may, after consultation with the Forum and the school board concerned, close or change the site of a state school or hostel.” The grounds for the closure of the school are not clear from this. Similarly, article 34 (2) merely stipulates that “the Minister may temporarily close any state school, class or hostel on the ground of health or public interest.” Again, the grounds for this kind of school closure should be more comprehensive than this. It was expected that the Regulations on the Education Act of 2001 that were effected on 28th October, 2002 by the Ministry of Basic Education, Sport and Culture through Government Gazette No. 2841, would make this situation clearer. However, the regulations are silent on the closure of schools.

Another issue worth highlighting is that the Education Act of 2001 is silent on the legislation of Early Childhood Care and Development (ECCD) indicators that have been proposed to monitor and evaluate the quality of childcare and protection services for young children (Iithete, Haihambo-Muetudhana, Hengari and Otaala, 2000). Because of this shortcoming, a number of ECCD programmes are established without meeting policy standards on buildings, equipment, materials, ablution facilities and services that should be offered to young children. The challenge here is for the country to put in place an enforceable control mechanism for the establishment and running of ECCD programmes. One essential function of such a mechanism would be that of ensuring that ECD facilities which fail to meet standards for their establishment should not be registered and allowed to operate (Hengari and Zimba, 2003). In effect, this means that the Childcare and Protection Bill should be crafted in such a way that it supports the functioning of a revised National Early Childhood Development Policy.

Moreover, although the National Qualifications Authority (NQA) was established through the NQA Act, 1996 (Act 29 of 1996) to ensure that educational services provided by educational institutions in Namibia meet the curricular and other requirements before certificates are awarded, its role is not referred to in the Education Act of 2001. We suggest that the accreditation policy of 2001, one of whose purposes is to provide quality assurance in education, should be taken into account when ameliorating this.

It is not clear whether standards for judging services for children provided by the Ministry of Health and Social Services, the Ministry of Women Affairs and Child Welfare, various NGOs, CBOs and other agencies are included in specific legislations. If they are not, we urge that they be included in the draft Childcare and Protection Act and in any other legislation that implicates

children's issues. Not doing this would leave Namibian children unprotected against possible abuse, harm and exploitation (Zimba, 2002).

Recommendations on article 3: Best interests of the child

- 3.1 To avoid confusion, the Child Care and Protection Act that is being drafted should contain a section explaining what is meant by the phrase: "the child's best interests." This should benefit from community consultation and from a careful consideration of the Namibian social-cultural context.
- 3.2 The Legal Assistance Centre's technical comments on articles 11, 12 and 13 of the Children's Status Bill that are on matters of custody, guardianship and access should be taken into consideration as they are intended to enhance children's best interests.
- 3.3 We recommend that article 14 of the Children's Status Bill that is on inheritance should clearly stipulate how the orphans' inheritance could be protected from possession and misuse by unscrupulous guardians and relatives.
- 3.4 The draft Childcare and Protection Bill should widen the scope of harmful social-cultural practices to include practices that would, in some Namibian communities, make it difficult to ascertain sexual abuse of girls and approve early marriages of young girls.
- 3.5 We recommend that the suggestion, in the draft Childcare and Protection Bill, to shift from concepts of custody, access and guardianship to shared parenting, parental duties and responsibilities should benefit from *the child-in-context idea*. The gist of this is to relate social-cultural parenting expectations to children's best interests. Parents' duties and responsibilities should be clearly specified when doing this.
- 3.6 In order to promote the best interests of children with disabilities, their parents should be supported to provide care and sustenance. In addition, they should be provided with empowering services to equip them with skills to look after their children with disabilities at home.
- 3.7 Because it currently does not, we recommend that to promote the best interests of children aged 0-6 years, the Education Act of 2001 should include an article on Early Childhood Care and Development

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 cooperation.

In conformity with this article, Namibia formulated and implemented the Early Childhood Development Policy in 1996, the National Policy on Disability in

1997 and infused children's rights matters in the first and second national development plans (NDP 1 and NDP 2) (GRN, 1996 & 1997; National Planning Commission, 1992, 2001). In addition, Namibia has included children's rights issues in the Policy Framework for Long-term National Development that provides the country's developmental vision up to the year 2030 (Office of the President, 2004).

The Early Childhood Development (ECD) Policy provides a good example of how various stakeholders could be organized to cater for children, promote their welfare and protect them from harm (See figure 1). Mainly because of lack of resources and due to difficulties in the coordination of ECD work performed by various stakeholders, the policy has not yet yielded the optimal protection for children that it was initially intended to yield (Hengari and Zimba, 2003; the Association for the Development of Education in Africa, 'ADEA', 2001). ADEA and the vision 2030 framework have proposed that the ECD policy should be revised and enacted into law to accommodate and to more clearly deal with child marginalization, orphan-hood and vulnerability and ECD provision monitoring, evaluation and coordination. We suggest that the content of the revised ECD policy be incorporated into the draft Child Care and Protection Act. This will be advantageous because the act will cover all children from birth to 18 years of age.

To avoid the problem of Stakeholders not working effectively together to serve children that was faced by implementers of the National Early Childhood Development Policy, the National Disability Policy requires that various government Ministries be responsible for specific facets of the policy. For instance, the Ministry of Health and Social Services' mandate, among other responsibilities, is aptly encapsulated in the following statement:

The state will design, develop and strengthen early intervention programmes to prevent impairments and disabilities. These will include, inter alia, improvements in primary health care, immunization activities, hygiene, nutrition, and occupational health and safety.

As was the case with the ECD Policy, the National Policy on Disability has not yet produced the positive changes in the welfare of children with disabilities as it was intended to produce. For instance, Zimba, Mostert, Hengari, Haihambo-Muetudhana, Mowes and Mwoombola (2002) found, in a National Study, that although included in schools by default, several children with disabilities received poor instruction because the majority of their teachers did not have special needs education expertise to teach them. In another situation analysis on the provision of special needs education in all 13 Regions of Namibia that was undertaken by Zimba, Haihambo and February (2004), Regional Directors of Education reported that they did not have adequate expertise in their respective regions to adequately cater for the educational needs of children with disabilities. Our contention is that if there

was a comprehensive policy on inclusive education, these children would have been served better.

It was proposed in the National Policy on Disability that an Act on the Establishment of the National Council on Disability should be promulgated. The goal was that once enacted into law, the council would:

- “identify areas where legislation is required and advise on new legislation”,
- propose amendments on existing legislation to ensure that it meets the needs of people with disabilities,
- monitor and evaluate the implementation of the National Policy on Disability” (GRN, 1997, p. 7).

The National Disability Council Bill has just been past by the National Assembly. It is now before the National Council. Our suggestion is that when established as a legally constituted entity, the National Disability Council should look into the issue that because children with disabilities and adults with disabilities have rather specialized needs, the present National Policy on Disability should be transformed into two policies, one for children with disabilities and the other one for adult with disabilities.

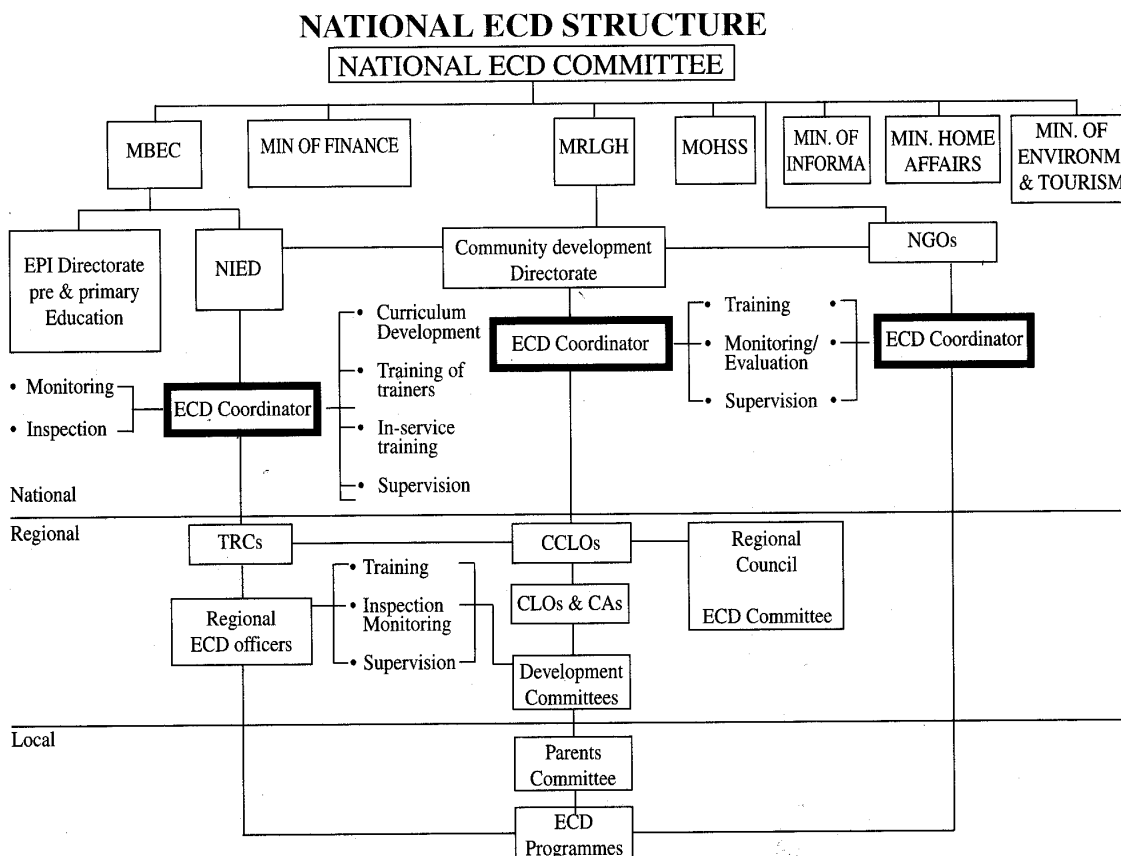


Figure 1. The initial National ECD coordination structure

Source: National Early Childhood Development Policy, 1996.

Note: The Ministry of Women Affairs and Child Welfare (MWACW) took over the lead role of coordinating national ECD activities from the Ministry of Regional and Local Government and Housing (MRLGH) in 2000.

Recommendations on article 4: Measures for implementing the CRC

- 4.1 To more adequately accommodate issues of child marginalization, orphan-hood, vulnerability and to streamline early childhood development provision of services, monitoring, evaluating and coordination of these services, we recommend that the ECD policy should be legislated and incorporated into the draft child care and protection act.
- 4.2 Because children with disabilities have special and different needs from adults with disabilities and because their special needs are not comprehensibly catered for in the National Policy on disability, we recommend that a separate act on children with disabilities should be promulgated

4.3 We recommend that to facilitate their implementation, Regional projects on children should benefit from local, national and international resource mobilization. This partly implies that bilateral and multi-lateral cooperation agreements on children entered into by Namibia and other countries should clearly stipulate how they would foster the demands of the CRC.

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.

To comply with article 5, the Committee on the Rights of the Child requires, among other things, that States Parties demonstrate whether or not they have defined the family in as a flexible a manner as is consistent with the CRC, that State Parties show whether or not they have and use legal definitions of parental responsibilities, duties and rights and whether such definitions are in conformity with the principles and provisions of the CRC, and that legislations on children ensure that direction and guidance provided by parents to their children is in conformity with the principles and provisions of the CRC (UNICEF, 1998, p. 82). On the issue of the family, article 14 (1)(3) of the Namibian Constitution bases the family on the marriage of men and women and recognizes it as a fundamental unit of society that is entitled to protection by the State. Beyond this, the Constitution does not define what the family is or should be in the Namibian context. The first report that Namibia submitted to the Committee on the Rights of the Child provides a detailed narrative on the various forms the family can take in Namibia including, nuclear families, extended families, female-headed families and other single-headed families (GRN, 1992). It was emphasized in that report that most of the various family types did not provide optimal environments in which children could thrive as they were under strain and adversity due to societal dislocation mainly caused by apartheid and due to poverty.

Because of the negative impact of the spread of HIV/AIDS in the country, the flexible definition of the family that was applied in Namibia's first report to the Committee on the Rights of the Child should now include child-headed families and families headed by grandparents. Furthermore, it should include families where parents are not married but cohabiting. In addition to specifying how the state would safeguard the family's protection, its flexible definition should be clearly spelt out in all legislations affecting Namibian children.

According to article 20 (1) of the *African Charter on the Rights and Welfare of the Child*, parents or other persons responsible for the child shall have the primary responsibility of the upbringing and development of the child and shall have the duty:

- (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.

To support parents and other primary child caregivers, States Parties to the Charter are, in accordance with their means, urged in article 20 (2) to take appropriate measures:

- (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.

There is no single legal instrument in Namibia that details parents' responsibilities, duties and rights as clearly as spelt out in the preceding statements from the *African Charter on the Rights and Welfare of the Child*. However, Namibian parents' responsibilities and duties can be deciphered from some legislations such as the Education Act of 2001, the Children's Status Bill, the Maintenance Act of 2003, the Married Persons Equality Act of 1996 and the draft Divorce Bill. For instance, article 3(3) of the Maintenance Act of 2003 stipulates that "the parental duty to maintain a child includes the rendering of support which the child reasonably requires for his or her proper living and upbringing and this includes provision of food, accommodation, clothing, medical care and education."

The rights of parents and primary care givers do not seem to be clearly spelt out in existing or proposed laws that affect children. We suggest that the **Draft Childcare and Protection Act** should contain well-articulated parental duties, responsibilities and rights. In addition, the support that the State should provide to enable parents to effectively raise children should also be pointed out in the proposed act.

In our judgment, Namibian legislations that affect children ensure that direction and guidance provided by parents to their children is in conformity with the principles and provisions of the CRC. For instance, consistent with article 20 (1) (c) of the African Charter on the Rights and Welfare of the Child which stipulates that parents or other persons responsible for the child shall have the duty “to ensure that domestic discipline is administered with humanity and in a manner consistent with the inherent dignity of the child” and article 8 (2) (b) of the Namibian Constitution which states that “no person shall be subject to torture or to cruel, inhuman or degrading treatment or punishment”, it is illegal in Namibia for parents or any other adult to use corporal punishment as a form of disciplining children. Whether or not parents in the privacy of their homes adhere to this is difficult to verify. Notwithstanding this, the Combating of Domestic Violence Act of 2003 was, among other things, designed to protect children from various forms of abuse that could be meted out by parents and other primary care givers.

Recommendations on article 5: Responsibilities, rights and duties of parents

- 5.3 We recommend that whilst incorporating well articulated parental responsibilities, duties and rights, the child care and protection act should safeguard and clarify the concept of the family in the Namibian context by noting that it can assume a variety of forms. These are nuclear families, extended families, single-parent headed families, child-headed families, grand-parent headed families and families where parents are not married but cohabiting.
- 5.4 For the information of parents and guardians, we recommend that the Child Care and Protection Act should specify the support that the State provides to enable parents and other caregivers, to raise children in line with the requirements of the CRC.

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.***

As persons, the Namibian children’s inherent right to life is respected and protected by article 6 of the Namibian Constitution. As cited earlier, article 3 (3) of the Maintenance Act of 2003 provides some legislative protection to ensure Namibian children’s physical well-being and survival. Recently, the Ministry of Health and Social Services published a book in which it reported the maternal and child care regimes that, throughout the country, it uses to protect mothers and their children from death. In addition, whereas since independence, the Primary Health Care programme has prevented the death of thousands of children through well organized, sustained and systematically implemented

immunisation campaigns against several diseases, the Ministry has designed and implemented policies and programmes to combat Malaria, TB, and vigorously prevent and deal with HIV/AIDS amongst mothers, their children and the youth (el Obeid, Mendelson, lejars, Forster and Brule, 2001). The only shortcoming is that these health services seem not to be provided under recent legal frameworks that should consider the handling of possible malpractices which could place the health of children in jeopardy. Moreover, we suggest that the draft Child Care and Protection Act should state and partly be based on specific child survival principles.

As indicated earlier in this review, Namibia sought to promote and foster children's cognitive and social-emotional development by designing and implementing the National Early childhood Development Policy (GRN, 1996). We reiterate that this policy be revised and enacted into law. Such a law should augment the youth development provisions that the draft Child Care and Protection Act ought to contain (Office of the President, 2004, pp. 98-99; 111-120).

Recommendations on article 6: Child survival and development

- 6.3 Because there appears to be no recent legal instruments on children's health, we recommend that legal frameworks to safeguard the survival of children in the country should be put in place. These frameworks should be sensitive to the prevention and containment of contemporary health pandemics, catastrophes and issues such as HIV/AIDS, STDS, Malaria, TB and immunization against childhood diseases.
- 6.4 To include the important aspects of the development of reasoning, problem solving and social emotional well-being, we recommend that the Child Care and Protection Act should specifically address child and youth cognitive and psychosocial developmental issues of home, community and school environmental stimulation and support. This should contain and augment the child and youth development provisions of Vision 2030.

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.***
- 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.***

According to UNICEF (2003), article 7 (1) gives the child the first legal acknowledgement of his or her existence. In addition, the registration of births enables children to realise a number of their rights and needs that include:

- Access to health care;
- Access to immunization;
- Ensuring that children enrol in school at the right age;
- Enforcing laws relating to minimum age for employment, handicapping efforts to prevent child labour;
- Effectively countering the problem of girls forced into marriage before they are legally eligible, without proof of age;
- Ensuring that children in conflict with the law are given special protection, and not treated (legally and practically) as adults;
- Protecting young people from under-age military service or conscription;
- Securing the child's right to a nationality, at the time of birth or at a later stage;
- Protecting children who are trafficked, and who are eventually repatriated and reunited with family members;
- Getting a passport, opening a bank account, obtaining credit, voting or finding employment
(www.unicef.org/newsline/2003/03fsbirthregistration.htm)

Article 4 (a, b, c) of the Namibian Constitution confers citizenship by birth on children born of Namibian parents. Section (d) of the same article gives children born of some non Namibian parents the right to become citizens by birth if their parents were resident in Namibia at the time of their birth. Moreover, in conformity with article 7 of the CRC, article 15 (1) of the Namibian Constitution states that “children shall have the right from birth to a name, the right to acquire a nationality and, subject to legislation enacted in the best interests of children, as far as possible the right to know and be cared for by their parents.”

Since Namibia's independence in March 1990, the registration of children's births has been rationalized and undertaken throughout the country. For children born to Namibian parents, the registration is initially free of charge, leads to birth certificates and automatic citizenship. For children born to all non-Namibians this is not the case. For these children, 'confirmation of birth certificates' are given.

Although we do not have statistics on this, it is plausible to assume that a number of children, especially those born out of medical facilities in rural areas, do not get registered as quickly as they should and in some cases, do not get registered at all. Without birth certificates, it is difficult for such children to be enrolled in school, get maintenance grants and have access to medical services.

The naming of children born within marriage is not a problem in Namibia. However, the naming of children born outside marriage needs clarification. In the past, According to the Births, Marriages and Deaths Registration Act 81 of 1963 these children in the first instance assumed their mothers' surnames. They

assumed their fathers' surnames if the fathers acknowledged paternity and the mothers consented to the registration of the children's birth in the fathers' surnames. Before the Child Status Bill was tabled in Parliament, it was recommended that the Births, Marriages and Deaths Registration Act 81 of 1963 be amended to make the naming of children born outside marriage gender neutral. To this effect, the following suggestions were made:

- The child born outside marriage should be registered under the custodian parent's surname. This could be either the mother's or father's surname.
- The child could assume the non-custodian parent's name if the non-custodian parent has acknowledged paternity and the custodian parent has consented to registration in the name of the other parent.
- The child could assume joint surnames of both parents, if the non-custodian parent has acknowledged parentage and the custodian parent consents to joint surnames.

Article 25 of the Child Status Bill before Parliament proposes amendments to the Births, Marriages and Deaths Registration Act 81 of 1963 that are unclear and seem to maintain the status quo. This is that in the majority of cases, children born outside marriage would continue to be registered in their mothers' surnames, unless after acknowledging paternity and with the consent of mothers, they are allowed to assume their fathers' surnames at the registration of their births. Because further consultations on this are in progress, we endorse the suggestion that the status quo be maintained until the Births, Marriages and Deaths Act 81 of 1963 is either reviewed and amended in its entirety or repealed to take into account not only this issue but other issues pertaining to the child birth registration process that are referred to in the paragraph that follow.

To enhance Namibia's conformity with article 7 of the CRC, we suggest that legislation on registration of births, the issuing of birth certificates and nationality of children should be updated and its implementation should be made consistent with the Namibian Constitution, without discriminating any children. Moreover, the State should ensure that birth registration facilities are easily accessible to all children born in Namibia. In particular, to facilitate this, measures should be taken to ensure that most, if not all, children are born in medical facilities where they can easily be registered. In doing this, there should be close collaboration and coordination amongst the Ministries of Health and Social Services, Justice, Home Affairs and Women Affairs and Child Welfare.

Recommendations on article 7: Naming, registration, acquisition of nationality and care of children by parents/guardians

7.3 We recommend that the Births, Marriages, and Deaths Registration Act of 1963 should either be repealed or amended to make it consistent with the Namibian Constitution. This should be done to ensure that the registration

of births, the issuing of birth certificates and nationality of children is updated and its implementation should be made consistent with the Namibian Constitution, without discriminating **any** children.

7.4 The State should ensure that birth registration facilities are easily accessible to all children born in Namibia. Undertaken in close collaboration amongst Ministries of Women Affairs and Child Welfare, Health and social Services, Justice and Home Affairs, the State should take measures to ensure that most, if not all, children are born in medical facilities where they can easily be registered.

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 speedily re-establishing his or her identity.***

Suggestions on nationality, names and citizenship that were made under article 7 are applicable under this article as well. Language and culture as aspects that would protect children's identity are enshrined in Articles 3 and 19 of the Namibian Constitution. Our only suggestion here is that the Child Status Bill and the draft Childcare and Protection Bill should provide specific articles on children's identities and the need to keep records of these identities.

Recommendation on article 8: Preserving children's identities

8.1 To provide a legal service that is currently unavailable, the Child Status Bill and the draft Child Care and Protection Bill should contain specific articles on children's identities and the need to keep records of these identities.

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.***

According to the Committee on the Rights of the Child, children can, among other circumstances, be separated from their parents when they are under state care, abandoned, when they run away, flee from armed conflict, live on the street, are in hospital, when parents are in prison, when they are in custody as a result of being child offenders, and when they or their parents have been deported (UNICEF, 1998, pp. 121-129).

Article 26 of the Combating of Domestic Violence Act of 2003 illustrates how the Namibian State places abused children under its care in a manner that is consistent with Article 9(1)(4) of the CRC. The Education Act of 2001 requires an appropriate amendment as it does not make provision for instances in which children with disabilities may be abandoned in State Special Schools by their parents whose intention may be to sever their contacts and relationships with their children for long periods of time. In addition, the draft Childcare and Protection Act should clearly make provision for the maintenance of contacts and relationships between children in State institutions (e.g. children's homes) and their parents/guardians/relatives. The wording of such provisions should be consistent with article 9(3) of the CRC.

To ensure that Namibia conforms with Article 9 of the CRC in a comprehensive way, Ministries of Women Affairs and Child Welfare, Prisons and Correction Services, Health and Social Services, Justice and Home Affairs should work in a coordinated manner when putting in place legislation pertaining to abandoned children, children who live on the streets, children in hospitals, children whose parents are in prison, child offenders and children of parents who may be either detained or deported from Namibia. This means, for instance, that the Child Justice Bill, the draft Childcare and Protection Act, legal provisions on parents in

prison, and those who abandon children should be thoroughly considered by all line ministries before they appear before parliament. Attention should, for instance, be paid to facilities and services for parents with children in hospitals and for children with parents in prisons when networking and consultations of this type take place.

Article 9 of the CRC should be taken into account when discussing and considering the Child Status Bill issues of access, custody, guardianship and parents' duties, rights and responsibilities.

Recommendations on article 9: Non separation of children from their parents/guardians

- 9.6 We recommend that the Education Act of 2001 should be amended to make provision for instances in which children with disabilities may be abandoned in State Special Schools by their parents whose intention may be to sever their contacts and relationships with their children for long periods of time.
- 9.7 To build on the contents of the preceding paragraph, we recommend that the Child Care and Protection Act should make provision for the maintenance of contacts and relationships between children in State Institutions (e.g. children's homes) and their parents/guardians/relatives. The wording of such provisions should be consistent with article 9(3) of the CRC.
- 9.8 We recommend that the Juvenile Justice Bill should cater for children whose parents are in prison, detained, deported or dead.
- 9.9 We recommend that the draft Child Care and Protection Bill should include the care of dumped and abandoned children and street children.
- 9.10 To further avoid the separation of some children from their parents, we recommend that the Draft Child Care and Protection Bill should make provision for the availing of facilities and services for parents with children in hospitals and for children with parents in prisons.

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.

It may be interpreted that article 21 (1)(i) of the Namibian Constitution which gives all persons the right to leave and return to Namibia also meets the requirements of article 10 of the CRC. This may not be the case because there is no reference in article 21 of the Constitution to the reunification of children and their parents and the manner in which this should be done. In our view, there should be clear legal provisions on the reunification of children with parents who may reside in and outside Namibia. There may also be cases of children who were left outside Namibia by their Namibian parents. Such children should be covered by legislation on family reunification when they wish to travel to Namibia to be with their parents. Moreover, the issue of refugee children should also be covered by national legal provisions on family reunification.

Recommendation on article 10: Children and family reunification

10.1 We recommend that the Immigration Act should include provisions on the reunification of children with their parents who may reside in and outside Namibia.

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.***

The crime of abduction is a common law offence. Abduction under common law occurs when “a person, either male or female, unlawfully and intentionally removes an unmarried minor, who may likewise be either male or female, from the control of his or her parents or guardian and without the consent of such parents or guardian, intending at the time of the removal that he or she or somebody else may marry or have sexual intercourse with the minor.”¹

Section 61 of the Children’s Act, 1960 (Act No. 33 of 1960) makes it a criminal offence if any one takes a child outside the Republic. It states the following:

¹ page 357, C. R Snyman, Criminal Law, Third Edition, Butterworths, Durban 1995

“Any person who, without the consent in writing of the Minister, removes from the Republic a pupil of an institution or an protected infant or a child who is by virtue of any provision of this Act or by virtue of any order made under such a provision or under section 342 of the Criminal Procedure Act, 1955 (Act 56 of 1955), in the custody or under the control or supervision of any person, institution, or association, shall be guilty of an offence.”

Section 19 (2) of the Children’s Act makes it an offence for a parent or guardian to cause or conduce the abduction of a child. This section states as follows:

“Any parent or guardian or any person having the custody of a child who causes or conduces to the seduction, abduction or prostitution of that child or the commission by that child of immoral acts shall be guilty of an offence.”

The draft Child Care and Protection bill in section 112 (1) (a) and (b) makes it an offence for any person to remove a child from Namibia without the written approval of the Minister, parent of the child or any person authorized by law or court to remove the child from Namibia. The person who commits such an offence shall be liable, with cost, to return the child back to Namibia.²

The government of the Republic of Namibia has neither signed nor ratified the Hague Convention on the Civil Aspects of International Child Abduction. The Ministry of Women Affairs and Child Welfare has received complaints pertaining to Namibian children (born of Namibian women and foreign fathers) who have been abducted by their fathers and taken to other countries. Some of the fathers of these children take them out of the country under the pretence that they are going on a short holiday. The children are not brought back to Namibia. A few concerned mothers have approached the Ministry of Women Affairs and Child Welfare for assistance in locating their children. The Ministry of Women Affairs and Child Welfare is currently working on the repatriation of some of these Namibian children to Namibia. One of the major problems faced by the Ministry of Home Affairs is that there are currently no bilateral agreements with some of these countries to locate and then repatriate the children. The immigration officials at the border posts are also not equipped with expertise and computers to speedily obtain appropriate information on suspected child abductors or alert the head office in Windhoek that a child is about to be abducted.

It is therefore recommended that the Ministry of Women Affairs and Child Welfare as the Ministry responsible for protecting the welfare of Namibian children should ensure that the government signs and ratifies the Hague Convention on the Civil Aspects of International Child Abduction. In the meantime, the Ministry of Justice should be lobbied to sign bilateral agreements on the tracing and repatriation of Namibian children from affected countries.

Recommendation on article 11: Child Abduction

² Section 112 (2) draft Child Care and Protection Bill.

11.1 It is recommended that the Ministry of Women Affairs and Child Welfare as the Ministry responsible for protecting the welfare of Namibian children should ensure that the government signs and ratifies the Hague Convention on the Civil Aspects of International Child Abduction. In the meantime the Ministry of Justice should be lobbied to sign bilateral agreements on the tracing and repatriation of Namibian children from relevant countries.

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.**

To be in conformity with this article, Namibia has a Child justice programme whose focus is on restorative justice. In the programme, children who are in conflict with the law are encouraged to actively participate and express themselves when being offered peer counseling and crime education, youth empowerment, leadership training, victim/offender mediation and family group conference services. In addition, Namibia has infused the content and intent of article 12 of the CRC in a number of proposed bills. These include the Vulnerable Witnesses Bill, the Divorce Bill, the Child Status Bill and the Child Justice Bill. For example, whereas article 3 (1)(i) of the Child Status Bill states that decisions regarding custody, guardianship and access should be guided by “any wishes expressed by the child or his or her representative, in light of the child’s maturity and level of understanding”, article 5 (i) (2) of the Child Justice Bill stipulates that if proceedings are instituted against a child for an offence, “the child must be given the opportunity to participate in and understand the proceedings” and article 11 (1) (b) of the Divorce Bill requires that before an order for custody is made, the “ascertainable wishes and feelings of the child concerned, in light of the child’s age and understanding” should be given due regard.

We propose that for the above-mentioned provisions to be of effect, the Bills that contain them should be promulgated into law as soon as possible. Otherwise, several Namibian children would not have the opportunity to express themselves on matters that affect them. Furthermore, we suggest that the draft Childcare and Protection Act should include provisions in which article 12 of the CRC would be adhered to in families, in adoption cases, in schools, in child employment, in immigration procedures and asylum-seeking. At the moment, article 60 of the Education Act of 2001 that is on disciplinary hearings would need to be amended

as it does not provide children accused of misconduct with the protective provisions contained in article 12 (1) of the CRC when they appear before school boards.

Recommendation on article 12: Giving Children's views due weight in matters affecting them.

12.1 We recommend that the draft Childcare and Protection Bill should include provisions in which article 12 of the CRC would be adhered to in families, in adoption cases, in schools, in child employment, in immigration procedures and asylum-seeking. In school for instance, article 60 of the Education Act of 2001 should be amended as it does not provide children accused of misconduct with the protective provisions contained in article 12 (1) of the CRC when they appear before school boards.

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 the reputation of others; or***
 - (b) For the protection of national security or of public order (ordre public), or of public health or morals.***

Article 21 (a) of the Namibian Constitution gives all persons, including children, freedom of speech and expression. In addition, the Education Act of 2001 gives learners the right to express themselves through the Learners' Representative Councils and the School Boards. The Namibia Students organization (NANSO), is another forum for learners to express their views and learn how to govern and participate in the educational decision making processes. The National Youth Council also enables the youth to exercise their right to freedom of expression. Moreover, all Political Parties in Namibia have youth wings in which children and youth can express their political views and participate in the running of the country. All this is in conformity with article 13 (1) of the CRC.

To be in conformity with article 13 (2) of the CRC, there should be in Namibia, clear legislation on children's electronic self-expression. For instance, such legislation should restrict children from using the internet to seek, receive and disseminate pornographic materials and documents meant to corrupt their morals.

Recommendation on article 13: The children's right to freedom of expression

13.1 We recommend that to be in conformity with article 13 (2) of the CRC, there should be in Namibia, clear legislation on children's electronic self-expression. For instance, such legislation should restrict children from seeking, receiving and disseminating pornographic materials and documents meant to corrupt their 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 21 (1)(b)(c) and 21 (2) of the Namibian Constitution conforms to article 14 of the CRC. However, although Namibia is a secular state, there appears to be no clear legal provision on this in Namibian laws that affect children. For instance, there is no law on how parents can direct their children in the exercise of their rights to religion without prevailing on them to follow a particular religion. Moreover, there is no law to use when deciding cases in which learners may hold that it is against their conscience to study particular subjects (e.g. moral and religious education that includes coverage of either Christianity or Islam). Because of all this, we propose that the draft Child Care and Protection Act should have a section on issues contained in article 14 of the CRC.

Recommendation on article 14: Children's right to freedom of thought, conscience and religion

14.1 Because there is no law on how parents can direct their children in the exercise of their rights to religion without prevailing on them to follow a particular religion and because there is no law to use when deciding cases in which learners may hold that it is against their conscience to study particular subjects (e.g. moral and religious education that includes coverage of either Christianity or Islam), we recommend that the draft Child Care and Protection Act should have a section on issues contained in article 14 of the CRC.

Article 15:

1. ***States Parties recognize the rights of the child to freedom of association and 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.***

Although article 21 (1: d & e) and 21 (2) of the Namibian Constitution adheres to article 15 of the CRC, there appears to be no Namibian legislation on children that takes specific account of this. Because the constitutional provision on the matter seems adequate, there may be no need for separate legislation for children that covers freedom of association and assembly. It is advisable however, to let children beware of restrictions placed on the exercise of these freedoms.

Recommendation on article 15: Children's Right to Freedom of Association and Freedom of peaceful assembly

15.1 We recommend that children be made aware of the restrictions placed in the exercise of this right. These are contained in article 15(2) which stipulates that *"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, home or correspondence, nor to unlawful attacks on his or her honour and reputation.***
2. ***The child has the right to the protection of the law against such interference or attacks.***

The Constitution of Namibia makes provision for the protection of the right to privacy. In this regard, article 13(1) states that:

"No person shall be subjected to interference within the privacy of their homes, correspondence or communications, save as in accordance with the law and as is necessary in a democratic society in the interests of national security, public safety of the economic well-being of the country, for the protection of health or morals, for the prevention of disorder or crime or for the protection of the rights or freedoms of others."

The Children's Act makes provision for the search and removal of a child from any place to a place of safety. This action of the police officer or social worker is obviously an invasion of the child's privacy in his or her home. The officials however, can remove the child if they have reasonable grounds for suspecting that the child is in need of care, or that offences listed in schedule one of the Act have been committed against the child.³

The Draft Child Care and Protection Bill has similar provisions on the removal of a child to a place of safety. The provisions in the Bill enable a social worker or a police officer to remove the child if there is a substantial risk of serious harm to the child. In terms of the Bill, this can be done with or without a warrant of removal. In determining where the child should be taken, the officers must place the child with family members in a place of safety, and siblings should be placed together unless this placement is not available or would not be in the best interests of the child.⁴

Children have the right to receive medical treatment on their own without the consent of their parents or guardians. It is not clearly stated in the Act whether the consultations between the child and medical practitioners could be held without the parent or guardian. A provision that expressly states that the consultation is confidential or private would need to be included in this section of the Act.

Section 8A of the Children's Act of 1960 (Act No 33 of 1960) gives children who are over the age of 18 years the right to consent to any operation of medical treatment without the consent of an assistant or parent.

Under the Draft Child Care and Protection Bill, a child who is older than fourteen years, may consent to medical treatment other than an operation.⁵ A person who is older than 18 years may consent to an operation.⁶ In cases where the parent or guardian of a child does not give consent to the operation but the opinion of the medical doctors is that the operation is necessary, the consent of parents or guardians can be overridden. Furthermore, the Minister can override the parent or guardian and give consent if it is believed that the consent is in the best interests of the child.⁷ Moreover, in emergency cases where a medical officer has to preserve the life of the child or prevent serious physical injury or disability and the consent of the parent, guardian or Minister cannot be obtained quickly enough, the medical superintendent can give consent to the operation or medical treatment.⁸

³ Sections 26; 27; 28 and 29 Children's Act No 33 of 1960.

⁴ Section 35;36; 37 Draft Child Care Protection Act.

⁵ Section 117 (1) (a)

⁶ Section 117 (1) (b)

⁷ Section 117 (2)

⁸ Section 117 (3)

This bill also makes it an offence to either publish the identity of any child who is or was involved with children's court proceedings or disclose information that may reveal the identity of the child.⁹ The records of the proceedings in the children court are also confidential.¹⁰

In adoption cases, an adoption record is confidential in terms of section 96 of the draft childcare and protection bill. A child may however, with the permission of the adoptive parents or the High Court, gain access to his or her records of adoption. If the natural parents had requested that their names should not be disclosed, the child would still get access to the records if the Children's court is of the opinion that it is in the best interests of the child.

Various pieces of legislation have been enacted since the last country report that especially include provisions that protect children against the arbitrary or unlawful interference with their privacy.

The Combating of Domestic Violence Act¹¹, came into force on 11 November 2003. Article 30(1)(2) of this Act prohibits and makes it an offence to publish any information concerning legal proceedings that reveal or might reveal the identity of any child or other persons involved in such proceedings.

Similarly, the Maintenance Act¹², which coincidentally came into force on 11 November 2003, also contains a provision making it a criminal offence to publish in any manner the name, address of any person under the age of 18 years who is or was involved in any proceedings at a maintenance enquiry, or the name of that person's school or any other information that is likely to reveal the identity of that person.

The privacy and safety of children is not only protected in the home but also in institutions.

A new education code that deals with setting standards for professional service, accountability and responsibility in the teaching profession was launched in March 2004.¹³ This code expressly states that teachers must take reasonable steps to ensure and protect the safety of learners in schools and hostels and that teachers who breach the provisions of the code commit misconduct and shall be dealt with in terms of the Public Service Act.

Given all the above provisions in various legislations, we conclude that Namibia has and is essentially complying with article 16 of CRC.

⁹ Section 23 draft Child Care and Protection Bill

¹⁰ Section 27 draft Child Care and Protection Bill

¹¹ Act No. 4 of 2003

¹² Act No. 9 of 2003

¹³ The Namibian, "New Education Code Launched" Vol 19 No58, March 25 2004

Recommendation on article 16: Children's right to privacy

16.1 Although children have the right to receive medical treatment on their own without the consent of their parents or guardians, it is not clearly stated in the Draft Childcare and Protection Bill that this could be done in the absence of a parent or a guardian. Because of this, we recommend that a provision that expressly states that the consultation is confidential or private should be included in the draft bill.

Articles 13 & 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.

The two pieces of legislation that regulate the publication of objects, films and public entertainment in Namibia are the **Publication Act of 1974 (Act No 42 of 1974)** and the **Obscene Photographic Matter Act of 1967 (Act No 37 of 1967)**. Both of these Acts prohibit the publication of undesirable, indecent and obscene photographic matter. These pieces of legislation are very old and therefore do not make any mention of the protection of children from viewing the materials.

The Namibian Broadcasting Act of 1991 (Act 9 of 1991) which established the National Broadcasting Corporation and the Namibian Film Commission Act of 2000 (Act 6 of 2000) which established the Film Commission do not mention any restrictions or prohibitions on the publication of certain materials that may be harmful to children. These Acts should be amended to contain provisions that

would make it an offence to publish information and material that could be injurious to a child's well-being. The Namibian Broadcasting Corporation TV section should also put in place guidelines on movies that can only be viewed after parental guidance or permission has been given.

Children on school premises are protected from viewing certain materials in terms of Section 76 of the Education Act of 2001 (Act No 16 2001). The section states that:

"The Minister may by notice in the Government Gazette prohibit any substance, article or publication from being distributed, traded, shown or used in or on the premises of the school or hostel to which this act applies, if in the Minister's opinion such material is contrary to public interest or the best interests of the learners."

It is an offence in terms of section 77(o) of the Education Act to distribute, trade, show or use in or on the premises of a school, or a hostel, any substance, article or publication which has been prohibited by the Minister under section 76.

Recommendations on article 17: Children's right of access to a variety of pieces of information

17.1 The two pieces of legislation that regulate the publication of objects, films and public entertainment in Namibia are the **Publication Act of 1974(Act No 42 of 1974) and the Obscene Photographic Matter Act of 1967(Act No 37 of 1967)**. Both of these Acts prohibit the publication of undesirable, indecent and obscene photographic matter. Because these pieces of legislation are very old and therefore do not make any mention of the protection of children from viewing the materials, we recommend that they be repealed and replaced by new ones which will, among other content, ensure that the viewing of indecent material is prohibited.

17.2 The Namibian Broadcasting Act of 1991 (Act 9 of 1991) which established the National Broadcasting Corporation and the Namibian Film Commission Act of 2000 (Act 6 of 2000) which established the Film Commission do not mention any restrictions or prohibitions on the publication of certain materials that may be harmful to children. Because of this anomaly, we recommend that these Acts should be amended to contain provisions that would make it an offence to publish information and material that could be injurious to a children's well-being. Moreover, we recommend that the Namibian Broadcasting Corporation TV section should put in place guidelines on movies that can only be viewed after parental guidance or permission has been given.

Article 18:

2. ***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.***
3. ***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.***
4. ***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 15 (1) of the Namibian Constitution, article 3 of the Maintenance Act of 2003, article 14 (1) of the Married Persons Equality Act of 1996 and article 15 of the Child Status Bill recognize the principle that both parents have common responsibilities for the upbringing of their children. It is however, not clear from the four legislations whether the “development of the child” is included in the parental responsibilities. This part of article 18 (1) of the CRC should be specified and highlighted in Namibian legislations such as the proposed Childcare and Protection Act because the creation of social-emotional environments that promote children’s optimal cognitive development and provides them with adequate psycho-social support should be part of fathers’ and mothers’ responsibilities that the State should recognize and support. This implies that the State should not only focus on the adequate provision of childcare and protection services such as childcare centres, crèches, workplace childcare facilities and preschools but it should also focus on home-based childcare facilities and resources whose appropriate utilization would benefit from State-supported parental education.

Another important matter that Namibian legislations on children should specifically include is that of orphans and vulnerable children (OVC) whose guardians are themselves children and grandparents. This should be done notwithstanding the fact that the State makes available to OVC foster care, adoption and emergency places of safety; emergency relief supplies of food, water, clothing and blankets; protection from abuse, violence and neglect; general health and services on HIV/AIDS; social welfare grants, death and survivor benefits (Open TALK, May 13, 2004).

Recommendations on article 18: State support of parents’ responsibilities for the upbringing and development of their children

18.1 We recommend that the creation of social-emotional environments that promote children’s optimal cognitive development and provides them

with adequate psycho-social support should be part of fathers' and mothers' responsibilities that the State should recognize and support. To ensure that this is done, the Maintenance Act of 2003, the Married Persons Equality Act of 1996, the Child Status Bill and the draft Child Care and Protection Bill should include the provision of the "development of the child" as one of the parents' responsibilities.

18.2 We recommend that State-supported "parental education" should be established, included in all Namibian legislation on children and extended to OVC and grandparents who head households.

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.

The Namibian Constitution protects people from being subjected to cruel, inhuman and degrading treatment. In this regard, Article 8 (2) (b) states that:

"No persons shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment".

The cruel, inhuman and degrading treatment can be either physical, mental or in any other form of degrading treatment that one may be subjected to. There is one major Court decision in Namibia that deals with the protection of children from this type of mistreatment. The Ex Parte Attorney-General, Namibia: In re Corporal Punishment by Organs of the State 1991 (3) SA 76 (Nm), the Namibian Supreme Court expressly held that corporal punishment in schools was unconstitutional because it violated Article 8 of the Constitution.

Corporal punishment of children administered by a parent or guardian in the home was not dealt with by the court. In cases where children are being abused in the home the Children's Act makes provision for their removal from the home.

In section 56 (1) of the Education Act 16 of 2001, it is considered a misconduct if, in the performance of his or her duties, a teacher or any other person employed at a state school or hostel or private school, imposes or administers corporal punishment upon a learner.¹⁴

It is an offence in terms of the Children's Act for a parent or guardian of a child to ill-treat, neglect or abandon the child. The Children's Act in section 18 states that:

“Any parent or guardian of a child or any person having the custody of a child who ill-treats, neglects, or abandons that child or allows it to be ill-treated shall be guilty of an offence if as a result of the ill-treatment, neglect or abandonment the child is likely to suffer unnecessarily or any part or function of its mind or body is likely to be injured or detrimentally affected, even though no such suffering, injury or detriment has in fact been caused or even though the likelihood of such suffering, injury or detriment has been averted by the action of another person.”

Section 19(1) and (2) on Corruption of children makes it an offence for a parent or guardian to allow that child to live or frequent a brothel, or who conduces the seduction, abduction or prostitution of a child.¹⁵

Section 26 (a) and (b) of the Children's Act provides for the removal of a child from the home if an offence listed in schedule One is committed. The offences are Abduction; child stealing; assault; any sexual offence and offences involving bodily injury of a child.

The Combating of Rape Act 8 of 2000 is one of the most progressive laws in Namibia that protects children against sexual abuse and rape. Rape is defined as “the intentional commission of a sexual act with another person under coercive circumstances.” According to the Act, rape is committed where a sexual act is committed with a person under the age of 14 by a perpetrator who is more than three years older.

Coercive circumstances are present when the complainant is incapable of understanding the nature of the sexual act due to the physical disability or helplessness, mental incapacity or other inability and is unable to understand or communicate the unwillingness to commit to the sexual act (section 2f), and in

¹⁴ “ A teacher or any other person employed at a state school or hostel or private school or hostel commits misconduct, if such teacher or person, in the performance of his or her official duties imposes or administers corporal punishment upon a learner, or causes corporal punishment to be imposed or administered upon a learner.”

¹⁵ “any parent or guardian or any person having the custody of a child who allows that child to reside in or to frequent a brothel as defined in section one of the immorality Act. 1957 (Act No.23 of 1957) shall be guilty of an offence.

circumstances where as a result of the fraudulent misrepresentation of some fact by, any fraudulent conduct on the part of, the perpetrator, or by or on the part of some other person to the knowledge of the perpetrator, the complainant is unaware that a sexual act is being committed with him or her, (section 2h).

The wording of the above mentioned sections is excellent in that it takes into consideration the circumstances of young vulnerable children who might not understand or know that they are being violated.

There have been reports by one NGO, *Women's Solidarity*, that children in schools are taking part in a practice called tournaments. 'Tournament' is a word used to describe a situation where a boy who is dating a girl would allow his friends to have sexual intercourse with his girlfriend. This practice amounts to sexual exploitation and abuse of girls.

It is recommended that the Education Act should be amended to deal with the problem of sexual abuse amongst learners in school hostels.

The Combating of Domestic Violence Act 2003 (Act No. 4 of 2003) contains a very broad definition of domestic violence. In order for this Act to be applied the domestic violence must occur within a domestic relationship. Domestic violence is defined to include any of the following acts: physical abuse, sexual abuse, economic abuse, intimidation, harassment and emotional, verbal or psychological abuse.

This Act provides that a complainant of domestic violence can apply for a protection order. A protection order is a civil remedy that would protect a complainant of domestic violence by either removing the perpetrator from the home, or warning him or her to desist from any further violence.

In terms of this Act a "minor" who is a person under 18 years of age can also apply for a protection order without the assistance of an adult if the court is satisfied that the minor has sufficient understanding to make the proposed application.¹⁶

This provision is important as it allows the child to seek assistance without having to rely on adults. There have been cases where children reported that they had requested the assistance of adults in laying charges and the adults refused to assist. In most cases an adult will not assist a child if the culprit is a family member.

The terms of the protection order will vary according to the cases before the court. Where children are involved, the order may forbid the perpetrator from having contact with the child at home, educational institution or wherever the child may be living with family members. The court may allow supervised contact

¹⁶ Section 4(5) The Combating of Domestic Violence Act

session with the child in the presence or under the supervision of a family member, a social worker chosen by the court, if the court is satisfied that it is reasonably necessary for the safety of the child in question.

A copy of the final protection order in cases where children are involved must be sent to the Ministry responsible for child welfare. The purpose of this is for the Ministry to consider what action or recommendation that can be made to provide for in legislation relating to the care and protection of children.¹⁷ This provision is welcomed as it will cater for the changing needs that occur when dealing with child care protection. If the information obtained is used appropriately new policies and legislation will be enacted as the need arises.

Although the Combating of Domestic violence Act allows those who have an interest in the well-being of a person subjected to domestic violence to apply for a protection order on that person's behalf, the legislation however, does not create an obligation for one to report. The Children's Act also does not contain any provision that obliges a person who has seen the violence against a child to report the violation. One of the most important considerations in enacting legislation that will combat any form of violence is having a mandatory reporting system. This consideration is of dire importance when dealing with violence against children because their vulnerability does not allow them to voluntarily report the violence. Professionals such as teachers, social workers and medical officers who work closely with children and might see evidence of violence should have a duty to report the suspected abuse. The provision for a voluntary reporting mechanism is not advised as in practice people are not keen to meddle into family affairs.

In section 30, the Draft Child Care and Protection Bill provides for a mandatory reporting procedure. The section is fairly broad as it applies to teachers, medical personnel and any other persons who may become aware or reasonably suspect the occurrence of child abuse. These officials are obliged to immediately report such information to a social worker or a police officer. Failure to report is a criminal offence.

The social workers assess the child's situation and make a decision as to whether the child should be removed from the place where the violence is committed. The mere fact that there is involuntary poverty, lack of food or shelter is not regarded as abuse or neglect. This means that some Namibian families may not necessarily be neglecting their families when they are, due to circumstances beyond their control, unable to provide adequate food and shelter.

The Women and Child Protection Units were established in 1992. The aim of the Units is to create a friendly environment for women and children to report cases of violence and abuse. The Units have specialized personnel that are trained to work with women and children that are victims of abuse. The personnel working

¹⁷ Section 13 (4) The Combating of Domestic Violence Act

at the Units comprise of police officers and social workers. Medical doctors are not based at the Units but are available to examine victims of abuse.

There appears not to be any legislation enacted since independence or prior to independence that deals with the regulation of traditional practices involving violence or that may be prejudicial to the health of a child. It is not known whether female genital mutilation is practiced in Namibia. The boy child in some Namibian communities however, does get circumcised as part of traditional rituals. The age of the children being circumcised varies from mere infants to adolescents. There was a public outcry about six years ago on the procedures and tools used for the circumcision. One person had been shown on national television using a blunt pocket knife to perform the procedure.

When faced with a similar problem, the Republic of South Africa quickly enacted the Application of Health Standards in Traditional Circumcision Act which provides for the observance of health standards in traditional circumcision, regulates those that perform the circumcision and regulates circumcision schools. Only certain persons mentioned in the Act may perform the circumcision.

It is recommended that the Ministry of Health and Social Services should make a proposal to government to enact legislation regulating circumcision. The legislation will protect children who are currently subjected to unhygienic circumcision rituals that could possibly make them vulnerable to HIV infection, especially if the same knife is used on many children. Once enacted, the legislation should be translated into various local languages to ensure that as many people as possible are made aware of it. Moreover, the legislation should contain a provision on the reporting of child abuse by community members.

Recommendations on article 19: Children's right to protection from all forms of violence

19.1 It is recommended that the Education Act 16 of 2001 should be amended to deal with the problem of sexual abuse amongst learners in school hostels.

19.2 It is recommended that the Ministry of Health and Social Services should enact a legislation regulating circumcision. The legislation will protect boys who are currently subjected to unhygienic circumcision rituals that could possibly make them vulnerable to HIV infection, especially if the same knife is used on many boys. Once enacted, the legislation should be translated into various local languages to ensure that as many people as possible are made aware of it. Moreover, the legislation should contain a provision on the mandatory reporting of child abuse by community members.

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.

The Children's Act makes provision for the temporary or permanent removal of a child from the family environment to a place of safety where it is suspected that the child is in need of care.¹⁸ A child can be in need of care due to a combination of factors. Some children are placed in alternative care because of abuse in their homes, unsatisfactory family circumstances, abandonment, or possibly the death of their parents.

There is only one State run Children's Home in Namibia. It has the capacity to accommodate approximately 120 children.¹⁹ It provides physical care, emotional support, psychological treatment and attends to the educational needs of children.²⁰ There are 6 private institutions that are registered as children's homes. There are two SOS children's homes country wide, one in Windhoek and the other one in Tsumeb. Other institutions are the Dutch Reformed Church's Children's Home, Educational Centre in Usakos, Youth Guidance Centre in Okahandja, Kids Shelter in Rehoboth, and the Erongo Place of Safety in Swakopmund. Many homes are being created by private citizens to assist children. The Moria Grace children's home in Katutura is a home run by a woman that accommodates children who are orphans or have been abandoned. It is recommended that the homes that are not registered be prompted to register by the Ministry of Women Affairs and Child Welfare so that the children can be eligible to receive grants and the homes can get government assistance.

¹⁸ Children's Act 1960 (Act No 33 of 1960) Chapter 4, sections 26, 27, 28, and 29.

¹⁹ A Situation Analysis of Orphan Children in Namibia, Social Impact Assessment and Policy Analysis Corporation (Pty) Ltd. (SIAPAC), page 16, April 2002

²⁰ page 95, Ministry of Women and Child Welfare, Annual Report 2001/2002

Social Workers do take into consideration certain factors when placing children in children's homes or places of safety. The Children's Act however does not expressly state that the child's ethnic, religious, cultural and linguistic background should be taken into consideration. The Draft Child Care and Protection Bill contains a few considerations that should be looked at. For example when a child is removed to a place of safety he or she must be placed in the community where he or she normally resides or may be placed with an individual or family member.²¹ The State is obliged to ensure that the place of safety, children's home or educational and vocational centre functions in such a manner that it resembles a family environment that should be consistent with the needs and characteristics of the children staying there.²² The provisions for the draft bill seem to favour a situation where children are placed in a place of safety, children's home only if they cannot initially be placed with other family members. The child's opinion is considered in finding a placement.

Recommendation on article 20: The protection and placement of children in alternative care

20.1 It is recommended that the children's homes and places of safety that are not registered be prompted to register by the Ministries of Women Affairs and Child welfare and of Health and Social Services so that the children being accommodated in them can be eligible to receive grants and the homes can get government assistance.

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;

²¹ Section 60 (6) (a) (b), Draft Child Care and Protection Bill

²² Section 63, Draft Child Care and Protection Bill

(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.

The law currently regulating adoptions in Namibia is the Children's Act 1960, section 70 and 71. The law is therefore very outdated. The test whether an adoption should be granted is whether it is in the interests and/or conducive to the welfare of the child. Parents of a child may consent to the adoption of their child. If the parents were not married the mother of the child can consent to the adoption of the child.²³ The consent of an unmarried-father is neither required nor necessary for acceding to the adoption of a child in terms of this provision. This provision could be challenged constitutionally. For instance, the unmarried-father may argue that he should legally be given the opportunity to either adopt the child himself or consent to the child's adoption. Children who are over the age of 10 may consent to an adoption. The Act provides for adoptions of Namibian children by Namibian nationals only. It does not allow non-Namibians to adopt Namibian children. Neither does it allow inter-country adoptions.

The reality however, is that there are many Namibian children that are living with foreign nationals who are residing in Namibia. The parents of these children are willing to give their children up for adoption to these foreign nationals. However, this is illegal as the law does not allow them to do so.

The draft Child Care and Protection Bill makes provision for inter-country adoptions to be granted if the Minister approves. The Minister must ensure that the adoption will be in the best interests of the child.

Part 8 section 80(1) (c) and (e) of the draft allow for adoption by the following non-Namibian citizens:

- permanent residents
- a spouse of a Namibian citizen, where the child is the biological child of the citizen-spouse or where the adoption is a joint application by both spouses.

The Namibian government has not yet signed the Hague Convention on Protection of Children and Cooperation in respect of Inter-country Adoption, which is an international regulatory instrument that applies to inter-country adoptions. The Hague Convention requires that State parties create a Central

²³ Section 71 (2) (d) Children's Act 1960

Authority that will handle inter-country adoptions. This could be a government ministry, specific board or committee. The authority created would be responsible for implementing procedures listed in the Convention for inter-country adoptions.

It is recommended that either the government should sign and ratify the Convention or rephrase the provisions in the draft Child Care and Protection Bill to include inter-country adoptions.

Recommendation on article 21: Procedures and legislations on the adoption of children

21.1 The Namibian government has not yet signed the Hague Convention on the Protection of Children and Cooperation in respect of Inter-country Adoption. This is an international regulatory instrument that applies to inter-country adoptions. The Hague Convention requires that States Parties create a Central Authority that will handle inter-country adoptions. This could be a government ministry, specific board or committee. The authority created would be responsible for implementing procedures listed in the Convention for inter-country adoptions.

It is recommended that the government should sign and ratify the Convention referred to in the preceding paragraph and rephrase the provisions in the draft Child Care and Protection Bill to include inter-country adoptions.

21.2 We recommend that Namibia establishes a State Authority to handle inter-country adoptions.

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.

The Namibian government signed the 1951 Convention Relating to the Status of Refugees. It has however, neither acceded to the 1967 Protocol relating to the Status of Refugees nor signed the 1969 Organisation of African Unity Convention Governing the Specific aspects of Refugee Problems in Africa.

The Constitution of Namibia in Article 97 deals with the granting of asylum by the State. It states as follows:

“The State shall, where it is reasonable to do so, grant asylum to persons who reasonably fear persecution on the grounds of their political beliefs, race, religion or membership of a particular social group.”

The domestic legislation on Refugees in Namibia is the Namibia Refugees (Recognition and Control) Act 2 of 1999. This Act specifically contains the provisions for the application of refugee status in Namibia. The Act however, does not expressly contain separate provisions for the conferring of refugee status on children. Section 13(1) of the Act states that:

“Notwithstanding the provisions of the Immigration Control Act, any person other than a Namibian citizen who is in Namibia, whether such person has entered Namibia lawfully or unlawfully, and who wishes to remain in Namibia as a refugee in terms of this Act, shall, within 30 days from the date on which he or she entered Namibia apply in writing to an authorised officer for the granting to him or her of the refugee status.”

The Act does not contain any age restriction for the application for refugee status. It is therefore submitted that it leaves the provisions open for children to make applications. In cases where refugee children are unaccompanied (not with a parent or guardian) and find themselves in Namibia the Social workers at the Osire Refugee camp are obliged to assist the children concerned to obtain refugee status, be temporarily placed in the care of other refugee families or groups and have their families or relatives traced.

Where the children are in the company of a parent or guardian the Act makes provision for the “family of the recognised refugee” to enter, and remain in Namibia.²⁴ A child ceases to be a part of the refugee family in terms of the Act, when he or she attains the age of 18 or has no dependence on a refugee family.²⁵ It is argued by the Legal Assistance Centre that:

²⁴ Section 17(1) Namibia Refugee Recognition and Control Act

²⁵ Section 17 (3)

“Member of the family”, in relation to any refugee (whether recognised or not), means –

- a) any spouse of such refugee; or*
- b) any unmarried child of such refugee under the age of 18 years; or*
- c) any person who is related to such refugee by affinity or consanguinity and who is dependent upon such refugee.²⁶*

This does not mention children expressly except where they are referred to as family members of persons seeking refugee status or recognized refugees.

One of the major problems of refugee children born in Namibia is obtaining Namibian birth certificates. Article 4 of the Namibian Constitution grants Namibian citizenship to children born in Namibia. However, when a refugee child is born in Namibia the Ministry of Home Affairs will not issue a Namibian birth certificate to the parents of such a child. The parents are given a confirmation of birth certificate. This document basically confirms that the child was born in a certain place in Namibia. It is assumed by the Ministry of Home Affairs that the country of origin of the parents will grant the child a birth certificate. Some countries are reluctant to grant birth certificates to children who were born outside their borders. Some refugee parents have managed to take the confirmation of birth certificate back to their home countries and be issued with birth certificates. This practice has the potential of rendering certain refugee children stateless.

The Namibian Recognition and Control Act should be amended to specifically state the age at which one may apply for refugee status. The Act must then outline the procedures that will be used in order for a child to apply and list factors which the committee granting refugee status will consider in relation to children whether accompanied or unaccompanied by a parent or guardian. In cases where the child is unaccompanied it should be the duty of a social worker or adult to explain the application process to the child and act on behalf of the child.

Recommendation on article 22: Protection and assistance of refugee children

22.1 The Namibian Recognition and Control Act should be amended to specifically state the age at which one may apply for refugee status. The Act must then outline the procedures that will be used in order for a child to apply and list factors which the committee granting refugee status will consider in relation to children whether accompanied or unaccompanied by a parent or guardian. In cases where the child is unaccompanied it should be the duty of a

²⁶ Dianne Hubbard,

social worker or adult to explain the application process to the child and act on behalf of the child

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.

The National Assembly adopted the National Policy on Disability in 1997. This policy embodies the guidelines of the United Nations World Programme of Action Concerning Disabled Persons and the Standard Rules on the Equalisation of Opportunities for Persons with Disabilities. The policy aims to remove barriers of persons with disabilities by making accessible various systems of society and environment such as services, activities, information and documentation and by allowing them to directly participate in the planning, implementation and evaluation of such activities.

Children with disabilities are specifically listed as one of the target groups of this policy.

The policy states the following:

“The State shall ensure that children with disabilities have equal opportunities and equal access to education, sports and recreation, and all other services in the community such as health care. Boys and girls shall have equal rights.”

The policy also states that parents of children with disabilities will be provided with information about services available for their children so that they can make decisions on the needs of their children. And that early intervention and education will be provided to children in order to prevent developmental disabilities.

The provisions of the policy that directly mention the needs of children with disabilities are those on education, social welfare and housing. With regards to the provision on education, the policy basically states that the Government will ensure inclusive education where all children will be taught together taking into consideration the needs of the children. The placing of children in special schools will only be done once a child has shown an inability to cope in a regular school.

According to this policy, a proposed Act on the Establishment of the National Council of Disability that would be responsible to monitor and evaluate the National Policy on Disability and be a consultative body to ensure that all legislation drafted met the needs of persons with disabilities was to be enacted. As indicated elsewhere in this review, this legislation has not yet been enacted.

The policy does not mention the creation of a body that would be responsible for the evaluation of the situation of disabled children, nor provide for a system of identifying and monitoring the needs and difficulties of these children. It further does not clearly state whether any of the services that will be provided shall be free of charge. Although we are aware that some parents of children with disabilities are not poor, the policy should never the less, take into account the situation where parents of children with disabilities may not have the financial resources to access the services provided. The service providers should also be educated on the special needs and development of disabled children.

Some of the legislations that have been enacted contain provisions that deal with the needs of persons with disabilities.

In the National Pensions Act 1992 (Act 10 of 1992), the definitions of blind persons and disabled persons respectively are:

1. “ any person who has been registered as a blind person under any law or is deemed to have been registered as such under subsection (2) and has attained the age of 16 years.”

2. “disabled person” -any person who is, owing to any physical or any mental disability, incapable to obtain from any employment or the practising of any profession or trade, or from the rendering of any service, the means needed to enable him or her to adequately provide for his or her own maintenance, and has attained the age of 16 years .”

The Act does not cater for children who are under the age of 16 years to apply for disability pensions. This is obviously an oversight on the part of the Act as children under 16 would also need to be provided for.

The National Vocational Training Act, No. 18 of 1994 which regulates the training and apprentices, vocational trainees does not have specific provisions dealing with children or people with disabilities. This Act in section 18 (2) makes provision for a parent or guardian of a minor child to assist the child to enter into a contract of apprenticeship. If there is no parent or guardian then the Magistrates Court of the district where the contract of is executed would act on behalf of the child. This Act should also have dealt with the special institutions for training of children with disabilities.

The draft Labour bill that is currently before Parliament prohibits discrimination on the basis of any degree of physical or mental disability. A person with disability is defined as “an individual who suffers from any persistent physical or mental limitation that restricts that individual’s preparation for, entry into or participation or advancement in, employment or an occupation.”²⁷ The bill clearly states that it is not discrimination to take into account affirmative action measures when employing women and persons with disability so that they can have equitable representation on the workforce and enjoy equal employment opportunities at all levels of employment.²⁸

The Combating of Domestic Violence Act, No. 4 of 2003 makes provision for the application and granting of protection orders by the Magistrates court in cases where a person is a victim of domestic violence. In terms of the Act a complainant or a person on behalf of the complainant can apply for a protection order with the consent of the complainant. There are however, certain exceptions to obtaining the consent of the complainant. One such situation is where the complainant is mentally incapacitated.²⁹ The Act does not specifically mention mentally incapacitated children. It can however be argued that it generally protects any mentally incapacitated persons.

The Maintenance Act No.9 of 2003 contains very impressive provisions on the maintenance of children with disabilities. In making a maintenance order, the court must ascertain whether the beneficiary is a child, consider any special needs of the child, including but not limited to needs arising from a disability or

²⁷ Draft Labour Bill, Section 5 (1) (a)

²⁸ Draft Labour Bill, Section 5 (3) (b) (aa) (bb)

²⁹ The Combating of Domestic Violence Act, Section (4) (b)

special condition.³⁰ Where the child does have a disability the court will particularly consider the following:

1. the extent of the disability;
2. the life expectancy of the beneficiary;
3. the period that the beneficiary would in all likelihood require maintenance;
and
5. the costs of medical and other care incurred by the beneficiary as a result of the disability.³¹

Recommendations on article 23: Rights of children with disabilities

23.1 The national policy on disability neither mentions the creation of a body that would be responsible for the evaluation of the situation of disabled children, nor provides for a system of identifying and monitoring the needs and difficulties of these children. It further does not clearly state whether any of the services that will be provided shall be free of charge. Because of all these limitations in the policy, we recommend that it be amended to take into account the situation where parents of children with disabilities may not have the financial resources to access the services provided. The service providers should also be educated on the special needs and development of disabled children.

23.2 We recommend that unless they are covered in legislations we are unaware of, the National Pensions act of 1992 should be amended to include disability grants for children with disabilities that are younger than 16 years of age.

23.3 We recommend that the National Vocational Training Act number 18 of 1994 should be amended to cover and deal with Special Institutions for the training of children with disabilities.

23.4 We recommend that as is the case in the Maintenance Act No.9 of 2003, the Education act of 2001 should be amended to include educational provisions offered to children with disabilities that should be based on the extent of the children's disability and the costs of medical and other kinds of care.

23.5 The Combating of Domestic Violence Act, No. 4 of 2003 makes provision for the application and granting of protection orders by the Magistrate's court in cases where a person is a victim of domestic

³⁰ Section 16 (3) (d)

³¹ Section 16 (4) (a-d)

violence. In terms of the Act a complainant or a person on behalf of the complainant can apply for a protection order with the consent of the complainant. There are however, certain exceptions to obtaining the consent of the complainant. One such situation is where the complainant is mentally incapacitated. Because the Act does not specifically mention mentally incapacitated children, we recommend that it be amended to cater for this.

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.

3. 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.

Although we have not come across recent Namibian laws regulating health matters, it is difficult for us to say that Namibia has complied with article 24 of the CRC. We say this notwithstanding the fact that the country has put in place and operates a national-wide Primary Health Care programme. This programme, although operating in the absence of a legal framework, has, since independence, reduced child mortality rates and improved the health of mothers and their children. What we have decided to do is describe some legal instruments that seem to relate to the health of children in general ways. The purpose of doing this is to demonstrate the need to put in place relevant and current legislations in this area.

Article 95 (e) and (j) of Principles of State Policy that are statements of government policy and not non-actionable rights, state that:

“the state shall actively promote and maintain the welfare of the people by adopting, inter alia, policies aimed at :

- (e) ensurance that every citizen has a right to fair and reasonable accesss to public facilities and services in accordance with the law;
- (j) consistent planning to raise and maintain an acceptable level of nutrition and standard of living of the Namibian people and to improve public health.”

The international health regulation Act 28 of 1974 and the World Health Assembly regulations adopted in 1969 were made applicable to South West Africa. Whereas section 1 of the 1974 Act includes, “the territory of South West Africa”, the International Health instrument regulates the notification to the World Health organisation, and control of the spread of diseases between countries. It refers specifically to health administration at ports and airports. Section 14 (2) and (3) state as follows:

- 2. “Every port and airport shall be provided with pure drinking water and wholesome food supplied from sources approved by the health administration for public use and consumption on the premises or**

on board ships or aircraft. The drinking-water and food shall be stored and handled in such a manner as to ensure their protection against contamination. The health authority shall conduct periodic inspections of equipment, installations and premises, and shall collect samples of water and food for laboratory examinations to verify the observance of this article.”

- 3. *“Every port and airport shall also be provided with an effective system for the removal and safe disposal of excrement, refuse, waste water, condemned food, another matter dangerous to health.”***

The International Health regulation makes a general provision for all people. This Act is not specific to preservation of children’s the health. The definition of infected person is “a person who is suffering from a disease subject to the regulations or who is subsequently shown to have been incubating such a disease”.

The Ordinance for Prevention and Combating of Alcoholism and Anti-Social Conduct 11 of 1965 provides for the certification of institutions and retreats for certain purposes; for the approval of institutions as hostels for certain purposes; for the committal of certain persons to and their detention in certified retreats, retreats and rehabilitation centres and to provide for other incidental matters.

In section 1 an inmate is defined as “any person who under this Ordinance was sent to or admitted to a certified retreat, retreat or rehabilitation centre, and includes any such person who had been released on licence or granted leave of absence from a certified retreat, or who is deemed to have been released on licence form a certified retreat, or who is still under the control or supervision of the management of a certified retreat, or who is liable to be brought back to a certified retreat.

The ordinance applies to persons who are eighteen and older. Section 2 states that:

“No person who has not attained the age of eighteen years shall be committed or transferred, or admitted as a voluntary inmate to a certified retreat, retreat or rehabilitation centre.”

In cases where authorities may not be sure as to the age of a person. Section 21 provides for the estimation of the age of an inmate. It states that:

“whenever in connection with any proceedings in terms of this ordinance the age of any person is a relevant fact of which no evidence or insufficient evidence is available, the officer presiding at those proceedings may estimate the age of that person by his appearance or from any information which is available, and the age

so estimated shall for the purposes of this ordinance, be deemed to be the true age of that person.”

The purpose of the detention in the retreats is to:

- (a) develop and improve people’s physical conditions by means of physical training suited to their particular capacities and needs, and, where necessary, by appropriate medical and mental treatment;
- (b) correct, under suitable medical, psychiatric, social or psychological supervision, behaviour, disabilities, including alcoholism, which impede proper social adjustment;
- (c) apply any further measures which may be necessary to remove or overcome particular disabilities; and
- (d) generally, train people in habits of social adaptation in the community and of good citizenship.

The Public Health Act 36 of 1919 which is still applicable to Namibia is an outdated piece of legislation that makes provision for the prevention and control of infectious diseases. The Act provides for the establishment of the department of Public Health in Chapter 1 section 2. In section 13 it grants every medical officer or health official in a local authority the duty to keep properly informed at all times as to the public health and sanitary circumstances in his district and carry out inspections and enquiries.

Section 36 gives the minister powers to make regulations to close a school or any public entertainment, to prevent the spread of infectious disease, and to restrict school attendance and gives duties of parents or guardians of school children who are suffering or have recently suffered from or been exposed to the infection of any infectious disease, and the duties of persons in charge of schools in respect of such children.

Section 49 of the act states that the administration of every Province in which no special provision exists under an Ordinance of the provincial council thereof for the maintenance of destitute children shall be responsible for the maintenance, up to the age of sixteen, of every child whose parents, parent or guardian has, whilst resident in that Province, died of a formidable epidemic disease and left such child destitute, and the administrator shall have the power to place or apprentice such children with persons and institutions on conditions to be fixed by the Minister by regulation.

Section 56 of the act states that:

- (1) Every parent or guardian of a child who knows or has reason to believe that such child is suffering from any venereal disease shall cause such child to be treated for such disease by a medical practitioner until such child is cured or free from such disease in a communicable form.
- (2) Every parent or guardian of any such child who fails or neglects to have that child treated as aforesaid shall be guilty of an offence.

In terms of section 57 (2) it is an offence to employ someone who suffers from a venereal disease and by reason of such employment ...”such person is required or is permitted to have the care of children or to handle any food or food utensil intended for consumption or use by any person...”

Section 92 of the act deals with the duties of parents or guardians to submit infants for vaccination. The parent or guardian is given a certificate that the child has been vaccinated. It is compulsory for every parent or child that enters the country to be vaccinated within twelve months of entry into the country in terms of section 98.

A child in terms of section 103 could not be admitted to school unless there was production of a certificate or satisfactory evidence that the provisions of the Act had been complied with. The Minister of public health had to keep numbers of and particulars of unvaccinated children attending schools in the province.

As can be noticed a number of the above provisions contained in the Public Health Act 36 of 1919 are out of date and not in touch with contemporary children’s health issues in Namibia.

The Education Act 2001 (No. 16 of 2001) in Section 65 states that:

- (1) the minister, after consultation with the Minister of Health and Social Services and after notification of school parents, may cause medical and dental examinations and inspections to be carried out in respect of learners and staff at any school or hostel.
- (2) subject to section 64(5) the Minister may, after consultation with the Minister of Health and Social Services, cause an inspection and examination of the premises, buildings and accessories of any school or hostel to be carried out regarding any health hazard.
- (3) subject to subsection (4) the Minister may in consultation with the Minister of health and social services, take such measures as may be necessary –
 - (a) for the improvement of the physical and mental well-being of learners and staff referred to in subsection (1)

(b) for the promotion and preservation of hygienic conditions in, at or on the buildings and premises referred to in subsection (2)

The Namibian Water Corporation Act 1997 (Act No 12 1997) regulates the efficient use and control of water resources. The Corporation has a duty to conserve and protect water resources. It must also take appropriate steps to ensure that the water is protected from pollution caused by its operations.

Given all this, we can say that Namibia is doing many things to protect the health of its children. Our broad suggestion is that all these actions should be organized in a legal framework or instrument.

Recommendation on article 24: Children's right to health services

24.1 We recommend that the Public Health Act 36 of 1919 should be repealed and replaced with one that would speak to issues contained in article 24 of the CRC. In addition, the new health act should contain contemporary health matters that affect Namibians. We feel that the new law should be put in place without delay as it is long over due. Ministries of Health and Social Services, Basic Education, Sport and Culture, Women Affairs and Child Welfare and Justice should collaborate when promulgating the new law.

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.

The current Children's Act, No. 33 of 1960 in section 46 (a) (b) provides for periodic review of treatment. It states as follows:

"While any child is in any custody (other than the custody of his parents or guardian) in which he has lawfully been placed by any authority, the Secretary shall ensure that a report in connection with that child is furnished to the Minister by a probation officer on the expiration of the first two years of such custody and on the expiration of every succeeding year of such custody."

In section 52, the Draft Child Care and Protection Bill also makes provision for the periodical review of a child placed outside his or her usual home. The conditions of the child are reviewed by the Children's court not later than three months after the first placement and thereafter at least once every six months, then after every two years. The purpose of the review is to evaluate whether the

placement is in the best interests of the child. Social workers are supposed to assist and prepare the parents for the return of the child to the usual home. The court may request that the child attend the review enquiry and be given an opportunity to speak. We endorse these provisions.

Recommendation on article 25: Children’s right to periodic review of the treatment and care offered in environments of placement

25.1 While endorsing the provision in the Draft Childcare and Protection Bill that calls for the periodic review of a child placed outside his or her home, we strongly recommend that existing measures to monitor and evaluate services provided to children in need of care and support in various centres and institutions should be strictly enforced. This should be done to protect these children from mediocre and harmful care.

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.

Section 89 of the Children’s Act of 1960 makes provision for maintenance and foster grants to be granted to any person or association that protects, cares and controls a child.

The Social Security Act, No. 34 of 1994, deals with maternity, sick leave and death benefits. In cases where a mother on maternity leave dies and leaves her child, the maternity leave benefits will be paid to the person taking care of the child.³²

³² Section 29 (3), “if a female member dies while receiving or being entitled to receive maternity leave benefits, such benefits shall, subject to the provisions of this act on such conditions as the commission may determine, be payable to the person in whose care the child concerned of such member is left or placed or any other person who is considered by the commission to be a fit and proper person to administer such benefits on behalf of such child.”

Section 31 (2) of the Social Security Act stipulates that death benefits payable to a dependent by virtue of the death of a member be paid to his or her guardian or to any other person who is considered by the Social Security Commission to be a fit and proper person to administer such benefits on behalf of the dependant, if such a dependent is a minor.

The regulations under the draft Basic State Grants Bill of 2000 make provision for children who are unable to support themselves and are older than six years to be eligible for a grant.

Recommendations on article 26: Children's right to social security and insurance

26.1 We recommend that the regulations under the draft Basic State Grants Bill of 2000 should make all children who are unable to support themselves eligible for State grants. Currently the Bill restricts these grants only to children who are older than six years. We make this recommendation because there are in the country many children aged 0-6 years who are in need of financial and other support.

26.2 We strongly endorse the Ministry of Women Affairs and Child Welfare's proposal that the State should consider providing grants to children who are orphaned by the HIV/AIDS pandemic.

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.

The new Maintenance Act was enacted in 2003. It came into force on 11 November 2003. The Act clearly states that the primary responsibility to maintain a child lies with the parents of the child. This duty is applicable to parents who are married under both the civil and customary law. This Act was enacted to create a more efficient mechanism to obtain maintenance monies from the parents. The duty to maintain is reciprocal in that children also have a duty to maintain their parents if they are in need.

The Reciprocal Enforcement of Maintenance Orders Act 1995 (Act No.3 1995) provides for the reciprocal enforcement of maintenance orders. The Ministry of Justice is responsible for entering into international agreements with foreign states to enforce its maintenance orders. Namibia currently only has an agreement with the Republic of South Africa. When pursuing the recovery of maintenance money from a parent who has moved or fled to another country the Ministry of Justice depends on the principle of comity in Public International law to enforce their maintenance orders.

Recommendation on article 27: Children's right to a standard of living adequate for their physical, mental, spiritual, moral and social development

27.1 To more effectively enforce the Maintenance Act of 2003 and the Reciprocal Enforcement of Maintenance Orders Act No. 3 of 1995, we recommend that the Ministry of Justice should enter into agreements for this purpose with more foreign countries. This should be done to facilitate the process of obtaining child maintenance money from parents who reside in foreign countries.

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.

Legally, it would appear as though Namibia has largely complied with article 28 (1) of the CRC. This would be so because of the provisions contained in article 20 (1) (2) (3) of the Namibian Constitution and in the Education Act of 2001. In addition to this, several policies have been put in place to promote compliance with article 28(1) of the CRC. Although some of these have been referred to earlier in this review, these policies are the *National Gender Policy*, *National Policy Options for Educationally Marginalized Children*, *National Early Childhood Development Policy*, *National Policy on HIV/AIDS for the Education Sector*, *School Health Policy*, *Policy on Teenage Pregnancies*, *Language Policy in Education and National Policy on Disability* (GRN, UNESCO, UNDP, UNICEF & UNFPA, 2001, p. 21). As may be noticed from this list of policies, Namibia has sought to provide equal educational opportunity to boys and girls (including girls who may fall pregnant during the course of their education), marginalized children, children with disabilities and children infected and affected by HIV/AIDS. To reinforce this, article 20 of the Namibian Constitution and article 53 of the Education Act of 2001 provides for compulsory free primary education.

In addition to comments that were made with respect to article 2 of the CRC, it is important to highlight that notwithstanding the apparent compliance with article 28 (1) of the CRC, there are a number of issues that need to be paid attention to. These are:

1. In general, the number of boys and girls in school is roughly equal, with 50.8% girls and 49.2% boys. However, whereas in the Kavango Region, this parity ends at grade 7, it ends at grade 10 in the Caprivi and Kunene Regions. Concretely, the situation is that there are significantly more boys than girls in school in the Kavango Region after Grade 7. This is also the case in Caprivi and Kunene Regions after grade 10.
2. Although 2001 statistics showed that 89% of children aged 7-13 were in school, 66% of those in Grade 6 could not read proficiently. Disparities in re-sourcing of schools have been used to explain this situation. Schools

- that lacked basic resources and were largely staffed with either under-qualified or unqualified teachers yielded poor reading proficiency amongst learners.
3. Although the Primary School enrolment of the majority of language groups was over 80%, it was only about 20% for San children (UNICEF, 2004).
 4. Due to lack of teaching material and the employment of unqualified teachers, the quality of education offered to Ovahimba children through mobile schools is not as high as it should (Tjahikika, Tjizu, Shimhopileni and Villet, 1999).

The four issues just presented communicate the message that although there is legislation to promote compliance with article 28 (1) of the CRC, there is still need to work at reducing or eliminating some lingering gender, regional, and re-sourcing of schools disparities in the education system. Moreover, efforts to enable more San children access to education and to provide quality education to Ovahimba children should be increased.

There exists in Namibia general and vocational Secondary Education. However, there is a limited number of technical Secondary Schools to meet the high demand for vocational education. Largely because of limited capacity, the Vocational Training Centres that are available after Secondary School education are also unable to absorb the majority of the youth wishing to obtain vocational skills.

Although according to article 38 (1) of the Education Act of 2001, the State in Namibia pays for all Primary school and Special Education school learners' tuition, school supplies and, in some cases, hostel boarding fees, parents or guardians whose children attend Secondary School are, according to article 38 (2) of the same Act, required to pay these fees. In addition, all parents are required to buy school uniforms, school supplies not supplied by the State, pay school development fund fees and where applicable, pay boarding fees. Whereas article 25 (9) (10) (11) of the Education Act of 2001 provides for the mechanism of exempting parents who are unable to pay from paying School Development fund fees, article 39 of the same Act empowers the Minister to partially or fully exempt any learner or any category of learners from payment of tuition, boarding or any other fees. As was alluded to earlier in the review, notwithstanding legislation on these exemptions, a number of learners are unable to attend school due to the failure to pay the various fees. Some parents of such learners are either unaware of the exemptions or are unable to follow the rather cumbersome application procedures for exemption (Zimba and Nuujoma-Kalomo, 2002). One way out of this situation would be to implement the establishment and use by poor parents or guardians of the national Education Development Fund as provided for in articles 26, 27, 28 and 29 of the Education Act of 2001.

The requirement in article 28 of the CRC of making higher education accessible to all on the basis of capacity has not yet been complied with by Namibia due to a lack of financial resources. This is the case because the demand for loans to study at tertiary institutions outstrips the number of loans the State is able to provide.

It is unclear whether or not Namibia has complied with the requirement of making educational and vocational information and guidance available and accessible to all children. We say this because the position of guidance teachers was abolished from school establishments and the majority of schools do not use the services of Counselling and Guidance teachers.

In compliance with article 28 (1e) of the CRC, attendance at primary school in Namibia is compulsory. However, according to article 53 of the Education Act of 2001, attendance at Secondary School is not compulsory. Parents can legally prevent their children from attending secondary school education. For instance, parents can opt to have their children help them on a family farm or in a family business instead of sending them to school. In addition, Secondary school learners can drop out of school without incurring any legal or other consequences. We suggest that to discourage learners from dropping out of secondary school, the Education Act should include an article on attendance.

Whereas article 56 of the Education Act of 2001 enables Namibia to comply with article 28 (2) of the CRC, its collaborative education projects with several international partners and agencies such as USAID, SIDA, UNICEF, UNDP, UNESCO, UNFPA, and the EU enables it to comply with article 28 (3) of the CRC.

Recommendations on article 28: The children's right to education

28.1 To remove the payment of various kinds of school fees as a barrier to poor children's access to education, we recommend that the establishment of the National Education Development Fund as provided for in articles 26, 27, 28 and 29 of the Education Act of 2001 be implemented. Once implemented, poor children should have access to this fund. In addition, poor parents and guardians should be made aware of the existence of this fund.

28.2 To comply more adequately with article 28 of the CRC, we recommend that Namibia should make available and accessible to all learners in school educational and vocational guidance information. This means that the Educational System should utilize the services of more qualified guidance and counselling teachers.

28.3 We recommend that to discourage learners from **dropping out of secondary school**, the Education Act of 2001 should be amended to include a provision on mandatory school attendance.

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 principles 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.***

Some of the information on Namibia related to this article was covered earlier in this review and in the consideration of article 28 of the CRC. At the moment, we can highlight the following points:

2. With its goals of access, equity, quality and democracy, Namibia's policy of Education for All enables it to comply with article 29 (1) of the CRC as it covers aims of education that promote learner wholesome development and understanding and the respect for human rights (Ministry of Education and Culture, 'MEC', 1993). Subjects of Life Skills and Moral and Religious Education endeavour to prepare children to practice ideals of understanding, peace, tolerance and equality amongst all peoples. Furthermore, articles 4, 5, 16-25 and 60 of the Education Act of 2001 that are on the establishment and functioning of Regional Educational Forums, School Boards and Learners' Representative

Councils provide a legal framework in which these ideals can be developed, used and advanced in educational settings.

3. Whereas article 19 of the Namibian Constitution gives all persons the right to enjoy, practise, profess, maintain and promote any culture, article 68 of the Education Act of 2001 provides for the promotion and practice of culture in educational settings. Moreover, the Education for All Policy that was referred to earlier gives the theoretical basis for the promotion and practice of culture in Namibian schools (MEC, 1993, pp. 45-51). Although all this is in compliance with article 29 (1c) of the CRC, one aspect that does not come through very well is the children's respect for their parents. This, we think, should be taken up in the draft Childcare and Protection Act under parents' rights.
4. To promote respect for the natural environment amongst children, environmental education issues in Namibia have been infused in various subjects taught in Primary and Secondary Schools (Imene, 1999). To ensure that this practice has legal backing, the Ministry of Basic Education, Sport and Culture should, in collaboration with the Ministry of Environment and Tourism, design and implement a policy on environmental education.
5. In compliance with article 29 (2) of the CRC, article 20(4) of the Namibian Constitution and articles 41-52 of the Education Act 16 of 2001 allow for the establishment and functioning of private educational institutions.

Recommendations on article 29: The direction of children's education towards the development of respect for human rights, parents, cultural identities, language and values.

29.1 We recommend that under parents' rights, the draft Child Care and Protection Bill should include an article on children's respect for their parents.

29.2 To promote respect for the environment amongst children the Ministry of Basic Education, Sport and Culture and the Ministry of Environment and Tourism should design and implement a policy on environmental education.

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 process and practice his or her own religion, or to use his or her own language.

As was covered under article 29 of the CRC, article 19 of the Namibian Constitution gives **all** persons the right to enjoy, practise, profess, maintain and promote any culture, article 21 (1) (c) of the Constitution gives all persons the freedom to practice any religion and to manifest such practice and article 68 of the Education Act 16 of 2001 provides for the promotion and practice of culture in educational settings. Moreover, the Educational for All Policy that was referred to earlier gives the theoretical basis for the promotion and practice of culture in Namibian schools (MEC, 1993, pp. 45-51). All this is in compliance with article 30 of the CRC. However, the following difficulties with respect to children belonging to indigenous minorities such as the San and the Ovahimba should be noted:

- Although the national Educational Language Policy allows for the use of the mother tongue as a medium of instruction from Grades 1 to 3, this is not possible for a number of San children as their languages are not available in a codified/written form. This situation is exacerbated by the fact that there are several San languages that are not mutually intelligible (MBESC, 2000, p. 11).
- There is research evidence to indicate that some San children chose to separate themselves from other groups in school due to discrimination. This was manifested when San children were called derogatory names and regarded as less human (Zimba and Nuujoma-Kalomo, 2002). Because of this maltreatment some San children ran away from school, walked long distances to their parents who worked at farms far away from schools. Sometimes some of the children escaped the mistreatment at night, risking being abducted, kidnapped, sexually abused, raped or even being killed. Furthermore, some San children fought against the discrimination by denying their heritage and culture and by choosing to assume ethnic identities of other groups such as the Damara or the Nama. Unfortunately, doing this hides them from help and support.
- Because the Ovahimba culture and language are similar to those of the Herero people, the Ovahimba are subjected to less discrimination than the San people. However, because they are semi-nomadic, the Ovahimba children's access to mainstream societal services such as education poses difficulties that were dealt with above under article 28 of the CRC.

Recommendation on article 30: Promotion of the culture of children from indigenous groups such as the San and the Ovahimba

30.1 We recommend that the use of languages of the San people as media of instruction be promoted in practice in Namibia's Primary schools.

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.

To promote their rest, children in Namibia spend half of the time of each day, from Monday to Friday in school. Part of the afternoons in each school day are spent on extra-curricular activities. More time for rest is given to children during public holidays and when schools are not in session. Furthermore, article 3 (c) of the Labour Bill prohibits the employment of children between the hours of 20h00 and 07h00. Although it is difficult to ascertain the amount of time children spend doing their homework, Namibian children seem to have enough time to rest. Notwithstanding this situation, there is need to promulgate or enforce existing legislation on children's access to cinema facilities and night clubs late at night.

In terms of play and recreation activities that children have access to, there are disparities. Primary school and Secondary school learners in urban areas have, in the main, access to sport and other recreation facilities. In the majority of schools in rural areas such facilities are unavailable to children. This is also the case for children out of school in many parts of Namibia. For young children the situation is even more dire. Because the majority of them do not attend pre-schools and early childhood development centres, they do not have access to organized play and recreation facilities that are appropriate for their developmental stages (ADEA, 2001). Although there is a Directorate of Sport in the Ministry of Basic Education, Sport and Culture, the Education Act of 2001 is silent on matters pertaining to children's sport and other leisure activities. We suggest that this Act be amended to make explicit provision for the availability of differentiated play and recreational facilities for young children, mid-aged children and older children in school. In addition, we propose that local authorities and Regional Councils all over the country have in their establishments functioning departments in charge of recreation facilities for children and the youth. The after school centres in some urban areas are inadequate to cater for the recreation needs of the majority of the country's children and youth.

As pointed out when discussing material related to article 29 of the CRC, article 68 (b) of the Education Act of 2001 makes provision for the exercise of culture in educational institutions. It specifically states that the Minister may "cause cultural activities to take place at schools to enable the practice, maintenance and promotion of any culture, language or tradition". This is in compliance with the provisions of article 31 (2) of the CRC.

Recommendations on article 31: Children's right to rest and leisure

31.1 Although Namibian children seem to have enough time to rest, we recommend that existing legislation on children's access to cinema

facilities and night clubs should be more strictly enforced to protect them from physical harm, HIV/AIDS infection, moral decadence and death.

31.2 Because it is silent on children's sport and other leisure activities, we recommend that the Educational Act of 2001 should be amended to make explicit provision for the availability of differentiated play and recreational facilities for young children, mid-aged children and other children in and out of school.

31.3 We recommend that the Local Authorities Act of 1992 and the Regional Councils Act of 1992 be amended to make provision for the establishment of functioning departments in charge of recreation facilities for children and youth. This should be done because the after school centres in some urban areas are inadequate in catering for the recreation needs of the majority of the country's children and youth.

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.

The Labour Act 1992 (Act No. 6 of 1992) section 42 prohibits the employment of children who are under the age of 14 years. According to this act, children aged 14 to 16 years are prohibited from being employed in mines or industries.

The Labour Bill of 2003, that is currently under discussion in the National Assembly goes further in protecting children from economic exploitation. Children who are under the age of 14 years are prohibited from being employed at all. Those children who are between the ages of 14 and 16 years may be employed. Their employment conditions are however, regulated. They, for example, may not be employed between the hours of 20H00 and 07H00, work underground or in a mine, where demolition or construction takes place, where goods are

manufactured, where electricity is generated, transformed or distributed, where machinery is installed or dismantled or be engaged in any work-related activities where their health, safety, or physical, mental, spiritual, moral or social development may be put at risk.³³

The Minister of Labour is however, given the power to make regulations to permit children to work in the above mentioned prohibited places of employment. The Minister may also, by regulation, prohibit the employment of children between the ages of 14 to 16 years at any place or in respect of any type of work.

There has been some criticism against some of the provisions of the Labour Bill. One of these is that there should not be a restriction of the working hours of children who are aged 16 to 18 years. Most children in this age group usually work as waiters and waitresses. The nature of such work is that a child will most likely than not have to work between 20H00 and 07H00. Prohibiting these working hours for such children would leave some of them without means to earn money for school fees.³⁴

The Education Act of 2001 protects children from being employed during normal hours of school. It is an offence in terms of section 77(g) of this Act to employ a child, whether for remuneration or otherwise, or harbour the child who is supposed to be in school. The culprit is liable to a penalty not exceeding N\$6000-00 or two years imprisonment, or both.

In 2000, the Namibian government ratified the International Labour Organisation Convention 182 on the Worst Forms of Child Labour.

Because of the provisions just described, we would say that Namibia is largely in compliance with Article 32.

Recommendations on Article 32: Children's right to protection from economic exploitation

32.1 We recommend that the Labour Bill of 2003 should allow children between the ages of 16 and 18 years to work between 20h00 and 22h00 to earn some income that could be used to pay for educational-related expenses.

³³ Section 3(c)(d) of the Labour Bill 2003

³⁴ Comment on the Draft Labour Bill, Looking at the Bill from a Gender Perspective, Gender Research and Advocacy Project, Legal Assistance Centre 2004

32.2 We recommend that the powers of the Minister to put in place regulations to permit child labour be subjected to some control. As currently stipulated in the Labour Bill, the Minister is at liberty to make any regulations permitting the employment of children. There is potential here for the Minister to make regulations that may be in conflict with children's best interests.

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.

There are very few pieces of legislation that deal directly with the protection of children from the illicit use of narcotic drugs and psychotropic substances in Namibia.

The Liquor Act, (No. 6 of 1998) relates to the control of the sale and supply of liquor. The only provision that is relevant to children in this Act is section 56 that prohibits the sell of alcohol to a person under the age of 18.

Section 56 states that:

"No licensee, or manager or employee of such licensee, shall, in the course of business conducted in terms of a licence, sell to any person under the age of 18 years, or supply such person with, any drink or substance which contains more than three per cent of alcohol by volume."

Similarly, according to section 71 (s) of this Act, it is a criminal offence for any person, whether they are a license holder or not to sell, supply or deal in liquor with someone under the age of 18.

The Abuse of Dependence – Producing Substances and Rehabilitation Centres Act 1971 (Act No 41 of 1971) does not directly deal with children who abuse dependence producing substances. The Act only mentions children specifically in section 38 and 39 that is dealing with the transfer of persons from children's home, school or industry or reform school to rehabilitations centres. There is no specific prohibition on the sell of dependence producing substances to children. There is a general provision in section 2 on the dealing, using or possession of dangerous dependence-producing drugs.

The Medicines and related Substance Control Act 1965 (Act No 101 of 1965) Act is also silent on children's issues. The Act merely prohibits the sale of medicines which are subject to registration and are not so registered. The legislations

currently in our statute books in Namibia do not address the problem of children who may be using cocaine, cannabis or any psychotropic drugs that may be harmful not only to their health but also to their social well-being, as some of these drugs are addictive. Legislation needs to be enacted that will prohibit the use of children to traffic and produce drugs for adults. The legislations already in place should be amended to include a list of drugs that should not be sold to children. Moreover, the law must list substances that can only be bought by children with parental authorization.

Recommendations on Article 33: Children's protection from the illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties

33.1 We recommend that the Abuse of Dependence – Producing Substances and Rehabilitation Centres Act 1971 (Act No 41 of 1971) be either amended or repealed to make provisions for the prevention of the abuse of dependence producing substances by children.

33.2 We recommend that the Medicines and related Substances Control Act 1965 (Act No 101 of 1965) be either amended or repealed in order to:

- address the problem of children who may be using cocaine, cannabis or any psychotropic drugs that may be harmful not only to their health but also to their social-emotional well-being;
- prohibit the use of children to traffic and produce drugs for adults;
- provide a list of drugs that should not be sold to children;
- list substances that can only be bought by children with parental authorization.

33.3 We recommend that the Liquor Act, 1998 (No. 6 of 1998) be amended to include mechanisms of preventing children from abusing alcohol. We make this recommendation because the Act is currently only limited to the prohibition of the sell of liquor to children.

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.

The legislation that currently protects children in Namibia from sexual exploitation and sexual abuse is contained in a few statutes.

According to the Children Act 1960 (Act No 33 of 1960), it is an offence for a parent, guardian or any other person having the custody of a child to cause, conduce to the seduction, abduction or prostitution of the child or the commission by the child of immoral acts.

Under the Combating of Immoral Practices Act 1980 (Act No 21 of 1980), it is illegal for a person to “procure” any female to have unlawful carnal intercourse with another person, to become a prostitute, or to “become an inmate of a brothel”, to entice a female to a brothel for the purpose of prostitution, or to conceal a female who has been enticed to a brothel. The wording of the provisions in the Act, seem to only contain prohibitions with regards to sexual activities with a female person. It does not expressly refer to males. These provisions would therefore only afford protection to female children and not males. The Act should therefore be amended and drafted in a gender-neutral manner.

The Combating of Immoral Practices Act makes it an offence for any person to engage in sex contact with a boy or girl under the age of 16 if the sexual partner is more than three years older.

The Combating of Rape Act 2000 (Act 8 of 2000) provides a very broad definition of rape. Rape is defined as the intentional commission of a “sexual act under coercive circumstances”. Rape in terms of this Act is when a sexual act is committed with a person under the age of 14 years by a person who is more than three years older. The age of consent to sex has been raised to 14 years under this Act. The Act contains a list of coercive circumstances that are progressive for the protection of children. Coercive circumstances would arise, for example, where the complainant is physically or mentally disabled, drunk, drugged or asleep and cannot understand what is happening or is unable to communicate unwillingness. Evidence of physical and mental disability could be used in court to prove the coercive circumstances and ensure that the right of children with disabilities are protected.

The Namibian government has ratified the Optional Protocol to the Convention on the Right of the Child on the Sale of Children, Child Prostitution and Child Pornography. It came into force on 16 May 2002. In this Protocol, the government undertakes to criminalize “offering, obtaining, procuring and providing a child for child prostitution or sexual exploitation”.³⁵

The Hague Convention on Inter-country Abduction has unfortunately not yet been signed by the Namibian government. The signing and ratifying of this Convention would reinforce the laws that protect children from sexual exploitation as some of the children may be abducted for the purposes of child prostitution or pornography. Neither research findings nor statistics are available on the number of Namibian children who may have been abducted for purposes of sexual exploitation.

Recommendations on Articles 34 and 35: Protection of children from sexual abuse and exploitation

34.1 We recommend that the Combating of Immoral Practices Act 1980 (Act No 21 of 1980) be amended to include provisions that cover boys as well. As it stands, the Act seems to only contain prohibitions of sexual activities with a female person. It does not expressly refer to males. In this state, the Act only affords protection to female children .

34.2 We recommend that the Namibian Government should sign the Hague Convention on Inter-country Abduction. Doing this is important because the signing and ratifying of this Convention would reinforce the laws that protect children from sexual exploitation as some of the children may be abducted for the purposes of child prostitution or pornography.

Article 36

States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare.

According to the CRC implementation handbook, “other forms of exploitation”, include exploitation of gifted children, exploitation of children by the media, and exploitation of children by researchers or exploitation of children for the purposes of medical or scientific experimentation.

Exploitation of children in general

The Children’s Act 1960 protects children from being used to beg, trade or perform. The relevant section is Section 21 that prohibits the use of a child to beg, or take part in an unauthorized street trading or performance. An adult who induces or endeavours to do so to a child commits an offence.

³⁵ Article 3 of the Protocol

Local authorities may in terms of this Act enact by-laws to regulate street trading of children under 16.

Under section 23 of the Act, a child may perform upon application to the commissioner of child welfare. The commissioner must be satisfied:

1. that the child is physically and mentally fit to perform or be exhibited in the role so specified at the entertainment in question; and
2. that the performance or exhibition involves no risk of physical, mental or moral injury or detriment to the child; and
3. that the applicant for the licence is making proper provision for securing the health, education and kind treatment of all the children who are to take part in the said entertainment.

It is recommended that Section 23 be amended to provide for other requirements that the commissioner of child welfare should look at in assessing whether a child is fit to perform or not. For example, a provision that the commissioner may interview or speak to the child who is supposed to be performing could be included in the amended Act.

The corruption of children's morals by the media

The Namibian Communications Commission Act 1992 (No, 4 of 1992) deals with the issuing of broadcasting licences, the control and supervision of broadcasting. In deciding whom to issue the license to, the Commission must ensure that the licence holder shall serve the needs and interests of the Namibian people. The films shown on television must also reflect the circumstances and aspirations of Namibian men, women and children in a multi-cultural and multi-racial society. Unfortunately, the Namibian Communications Act of 1992 does not stipulate any guidelines on how children should be protected from audio, visual or electronic material that could corrupt their morals. In addition, the projection of films by NBC does not seem to be regulated by legal guidelines on what children should view with or without parental guidance.

Recommendations on Article 36: Protection of children from all other forms of exploitation prejudicial to any aspects of the children's welfare.

36.1 We recommend that to protect children from exploitation that is in the form of using them in begging, trading and performance, the Draft Childcare and Protection Bill should include provisions on this and require that children can only perform when the commissioner of child welfare is satisfied:

1. that the children are physically and mentally fit to perform or be exhibited in the role so specified at the entertainment in question; and

2. that the performance or exhibition involves no risk of physical, mental or moral injury or detriment to the children; and
3. that proper provision for securing the health, education and kind treatment of all the children who take part in the said entertainment is made.

36.2 The Namibian Communications Act of 1992 does not stipulate any guidelines on how children should be protected from audio, visual or electronic material that could corrupt their morals. In addition, the projection of films by NBC does not seem to be regulated by legal guidelines on what children should view with or without parental guidance. In order to ameliorate this situation, we recommend that the Namibian Communications Act of 1992 be amended.

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.

The Namibian Constitution guarantees that no child or adult person shall be subjected to cruel, inhuman or degrading treatment. Specifically, Article 8(2)(b) states that:

“No persons shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”

In the case of *In Ex Parte Attorney-General, Namibia: In re Corporal Punishment by Organs of the State 1991 (3) SA 76 (Nm)*, the Namibian Supreme Court expressly held that corporal punishment in schools was unconstitutional.

The right to life is also guaranteed in the Namibian Constitution. Capital punishment in the form of a death sentence is not part of the Namibian law. To this effect, Article 6 of the Constitution states that:

“The right to life shall be respected and protected. No law may prescribe death as a competent sentence. No Court or Tribunal shall have the power to impose a sentence of death upon any person. No executions shall take place in Namibia.”

In terms of Article 15(5) of the Namibian Constitution, no law authorising the preventative detention shall permit children under the age of sixteen years to be detained.

There is currently no legislation that is specifically drafted to deal with juveniles or children when they are arrested. Juveniles receive special treatment when being dealt with by the police under the Criminal Procedure Act 51 of 1977.

The Prisons Act 18 of 1998, in Section 56 (1), states that a child shall not be detained in a prison. It states the following:

“A juvenile who is awaiting trial or the conclusion of his or her trial shall not be detained in a prison, unless, in the opinion of the Commissioner, such detention is necessary and no suitable place of detention as defined in the Children’s Act, 1960 (Act No. 33 of 1960) is available for his or her detention.”

When deciding a suitable place for the juvenile to be detained the commissioner shall consider the juvenile’s age, sex, character and the nature of the offence.³⁶ In Section 51 of the Act it is stated that prisoners should be given accommodation according to their different categories. Juveniles form one category. This means that juveniles should be held separately from adults. However, due to lack of accommodation there are situations where juveniles are held together with adults. This arrangement is not advised as it exposes juveniles to hard-core criminals who might abuse them and also expose them to criminal activity in the prison itself.

³⁶ Section 56 (2) (a) (b)

The State assists in the maintenance of a child born to an inmate mother. For instance, a woman who gives birth while incarcerated may keep her infant in prison with her until the child reaches the age of two years.³⁷ During the incarceration, the state will supply clothing and other necessities to the child, until a friend or relative can take the child out of prison.

The draft Child Justice Bill is a piece of legislation that will cater for child who have come into conflict with the law. Section 12(1) to (6) of this Bill deals with the arrest of a child. The Bill is in conformity with the provisions of the CRC in that it specifically states that police officers may not arrest a child for an offence that is committed and is listed in schedule 1³⁸. If the child commits an offence that is more serious than that child may be arrested. In arresting the child, the police must ensure that they consider the dignity and well-being of the child. The use of force in carrying out the arrest is limited only to situations where there is resistance from the child. The arrest however is only carried out as a last resort once the police officer has considered alternative methods of starting the criminal proceedings process. These alternative measures that are listed in section 11(2) of the Bill involve:

- (a) *instructing the child in a manner appropriate to his or her age and intellectual development to accompany the police official immediately to a place where his or her assessment can be made or, if an assessment of the child is for any reason not possible, to a place where the matter can be considered by prosecution or an inquiry magistrate;*
- (b) *giving the child and, if available, the parents or family of the child an attendance notice in the prescribed manner to appear at a preliminary inquiry at a place and time specified in the notice;*
- (c) *taking the child to the child's home, and giving the child and his or her parent or family an attendance notice...*
- (d) *taking the child who is under the age of ten years to a child worker for assessment and further action in terms of section 45.*

³⁷ Section 49 (1, 2)

³⁸ 1. Assault where grievous bodily harm has not been inflicted.
 2. Malicious injury to property where the damage does not exceed N\$500.
 3. Trespass.
 4. Any offence under law relating to the illicit possession of dependence producing drugs where the quantity involved does not exceed N\$500 in value.
 5. Theft where the value of the property involved does not exceed N\$500
 6. Any statutory offence where the maximum penalty determined by that statute is a fine of less than N\$1 500 or three months imprisonment.
 7. Conspiracy, incitement or attempt to commit any offence referred to in this Schedule.

- (e) *opening a docket for consideration by the Prosecutor General, or a prosecutor designated by the Prosecutor General, as to whether the matter should be set down for the holding of a preliminary inquiry.*

The Inspector General of the Namibian Police may issue directives on alternatives to arresting or starting proceedings against a child such as:

- (a) the administering of a caution to the child;
- (b) the referral of the child to an appropriate authority outside the criminal justice system;
- (c) giving an offer to the child and his or her parents or family of assistance for the child to undergo any treatment or attend any rehabilitation of similar programme as may be appropriate in the circumstances."³⁹

A child that has been arrested must be promptly taken to appear before the preliminary inquiry by no later than 48 hours after the arrest. There is a duty on the police to report to the magistrate on why the arrest and not the alternative methods were used.⁴⁰

The draft Child Justice bill does make provision for the separation of children from adults whilst in detention.⁴¹ The provisions of the bill are very progressive as the child has the right to adequate food and water, medical treatment, access to reasonable visits by parents, guardians, legal representatives, child workers, social workers, and many other professionals.⁴² The bill also makes provision for the access to reading and educational material, adequate exercise, clothing and bedding.⁴³ In considering the rights of the child, he or she must be respected and treated in a humane manner.

The draft Child Justice Bill in Section 99 allows a child the right to ask for legal representation by a legal practitioner of his or her choice. The child can, with the assistance of an interpreter, give instructions to a legal practitioner in a language of his or her choice. A parent of a child or the child may also appoint a legal practitioner of his or her choice at his or her own expense.⁴⁴ The child can also be provided with legal representation at the State's expense with the assistance of a police officer, child worker, or prosecutor if:

- (a) the child is remanded in detention pending a plea and trial in a court;

³⁹ Section 13 (1)

⁴⁰ Section 16 (1) (a) and (2)

⁴¹ section 21(1) (a)

⁴² section 21 (c) (i) (ii) and (iii)

⁴³ section 21 (c) (iv) (v) and (vi)

⁴⁴ section 99 (2) (3)

(b) the matter is remanded for plea and trial in a court in respect of any offence, and it is likely that a sentence involving a residential requirement may be imposed, or

(c) the child is ten years of age or more but under 14 years of age and a certificate has been issued in terms of section 6 (3) in respect of the child.⁴⁵

The section stating that if a parent of a child applies for legal aid and does not qualify for it then the expenses incurred by the state may be recovered from the parents could in practice cause problems. Parents might not want to apply for legal aid or assist their children in applying for legal aid for fear of being indebted to the state. The draft bill seems to imply that legal representation will be afforded to the child at all costs even when the child refuses.

Recommendation on Article 37: Protection of children from torture or other cruel, inhuman or degrading treatment or punishment.

37.1 In the draft Child Justice Bill, the section stating that if a parent of a child applies for legal aid and does not qualify for it then the expenses incurred by the state may be recovered from the parents could in practice cause problems. Parents might not want to apply for legal aid or assist their children in applying for legal aid for fear of being indebted to the state. To avoid this possibility, we recommend that legal aid should be availed to the child by the State in circumstances where his or her parents or guardians are unwilling to apply for it. The Child Justice Bill should make provision for this.

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.

⁴⁵ section 100(1) (a-c)

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.

Since 1990 when Namibia obtained its independence there have not been any armed conflicts in Namibia.

The Recruitment Policy 1991 of the Ministry of Defence sets the recruitment age of its privates and officers at 18 years. Section 9(a) (1) and (b)(1) provides for the age limits and the requirements for one to join the NDF as a private or officer. Section 9 (a) (1) states the following:

“Recruits are to be 18-25 years of age, by exception, there may be a need to induct older recruits who have specialist or technical qualifications which are required by the NDF.”

Children in Namibia who are under the age of 18 are prohibited by law from becoming members of the Namibian Defence Force.

Recommendation on Article 38: Protection of children affected by armed conflict

38.1 Although Namibia has not experienced armed conflict since 1990, we recommend that laws regulating the operations of armed forces in the country should make provisions for the humane treatment of children affected by any armed conflict. In addition, we recommend that the content of the curriculum for the training of personnel for the Namibia Defence Forces should include material on the humanitarian treatment and care of children in armed conflict that may occur not only in Namibia but elsewhere in the World.

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.

Whereas article 19 of the CRC deals with protecting children from all forms of violence and abuse, article 39 of the CRC is on children's right to be accorded services intended to promote their physical, psychological and emotional recovery from that violence and abuse. When discussing matters related to article 19 of the CRC, we indicated that Namibia had established, all over the country, Women and Child Protections Units and Places of Safety where abused women and children were taken to for treatment, counselling and support. Child line/life line, a telephone based NGO counselling service, also provides emotional healing services to some abused children. Because all these facilities are insufficient and do not cover children in most rural areas, our judgment is that several abused children have no access to services that could cater for their physical, psychological and emotional healing.

Another problem in this area is that legislations that have been promulgated and drafted to protect children from violence and abuse do not contain provisions for children's recovery and healing. Specifically, the Combating of Rape Act 8 of 2000, the Combating of Domestic Violence Act 4 of 2003, and the Childcare and Protection Bill do not contain articles legislating children's recovery and healing from effects of violence and various forms of abuse.

Recommendations on Article 39: Rehabilitation of child victims

39.1 We recommend that because several abused children (especially those in rural areas) have no access to services that could cater for their physical, psychological and emotional healing, more women and child protection units and places of safety be established where they may be accessed by the majority of children.

39.2 We recommend that the Combating of Rape Act 8 of 2000, the Combating of Domestic Violence Act 4 of 2003, and the Childcare and Protection Bill should contain articles legislating children's recovery and healing from effects of violence and various forms of abuse. Currently, these pieces of legislation do not make provision for this.

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.

In terms of our common law, a child who is under the age of seven (7) is regarded as *doli incapax*. This means that a child cannot be convicted of a crime because he or she lacks mental ability in law to be held responsible for unlawful conducts. Children between the ages of 7 and 14 years have a rebuttable presumption that they lack criminal capacity. The State in criminal cases involving children in this age range must prove that the children have criminal capacity beyond reasonable doubt.⁴⁶

In order for the evidence to be admissible against a child, the draft child justice bill provides that a child may not confess, make a statement, point out anything, or participate in an identification parade without the presence of a legal practitioner.⁴⁷ If a legal practitioner is not available then an independent observer must be appointed to attend proceedings with the child. Identification material may not be taken from the child unless the police officer has made an application in person or telephonically to a Magistrate or judge of the High Court. Any medical examination carried out on the child must be done by a medical practitioner. The parent of a child must be notified of the action taken as soon as possible.⁴⁸

Section 97 of the draft child justice bill specifically prohibits the publication of any information which reveals the identity of a child who appears as an accused or as a witness. The proceedings before court are in camera and are therefore not open to the public.

It is a criminal offence for any person to contravene these provisions.

⁴⁶ CR Snyman, Criminal Law, 3rd Edition, Butterworths, 1995

⁴⁷ section 18(1) (2) (3)

⁴⁸ section 19 (2) (3) (4) and (5)

The draft Child Justice Bill tries to incorporate provisions that will ensure that a child who is in conflict with the law receives proper treatment from the criminal justice system. The Bill also tries to divert the child from the formal criminal justice system by making provision for community based sentences, restorative justice systems such as going to a family group conference or victim-offender mediation.

Recommendation on Article 40: Administration of Juvenile Justice

40.1 We recommend that to be in compliance with the CRC, Namibia should, expeditiously, pass the Child Justice Bill.

THE STATUS, DIFFICULTIES AND CONSTRAINTS IN PASSING CHILDREN'S LAWS BEFORE PARLIAMENT, CHILDREN'S LAWS IN DRAFT FORM AND CHILDREN'S LAWS WHOSE CONSIDERATION HAS STALLED

We shall consider issues in this section as follows:

The status and constraints in passing children's laws before parliament

At the moment, there are two bills in this category. The first of these is the *Child Status Bill* and the second one is the *Labour Bill*.

After being tabled in Parliament, the *Child Status Bill* was referred to the Standing Committee on Human Resources, Social and Community Development. The committee held public hearings on the Bill throughout the country and it is now compiling a report on its findings. This report will be tabled during the next Parliamentary session in August 2004. In our judgment, the delay in passing this bill could have been avoided if the public hearings on it were conducted before it was tabled in Parliament.

Although the *Labour Bill* was passed by the National Assembly, it was taken to Regions for public hearings by the Constitutional and Legal Affairs Committee of the National Council. This committee has prepared a report on the public hearings which it will table in the National Council when it resumes business in August 2004. Two aspects of this report are of relevance to this review. The first aspect is the recommendation that the Bill should contain a *Family Responsibility Leave* that would be used by workers to attend to family duties such as looking after sick children. The second aspect is on the recommendation that fathers should not be granted *Paternity Leave* by the Bill. The main reason given for this is that the leave may reduce the country's economic productivity when fathers in polygamous relationships may father many children and claim several paternity leave benefits in a given year. Consistent with our comment in the preceding paragraph, to save time, the public hearings on this bill should have taken place

before it was tabled in Parliament. Following this procedure is important because to be proactive and effectively take their views, opinions, concerns, objections and reservations into account, the Namibian communities should be enabled to participate in the making of laws affecting children at earlier stages of the process.

The status and constraints in processing children's laws in draft form

The *Childcare and Protection Bill*, the *Juvenile Justice Bill*, the *Vulnerable Witnesses Bill*, the *Divorce Bill*, the *Administration of Estates Bill* and the *Succession Bill* fall in this category of the present review.

The *Childcare and Protection Bill* has been under discussion for more than four years. After a workshop was held on it by the Ministry of Women Affairs and Child Welfare in early 2002, the Bill was sent to Legal Drafters. We have just ascertained that it is still being drafted. We have learnt that progress on drafting the Bill is being hampered by lack of clear policy decisions on some key child protection issues. These issues were not pointed out to us. We suggest that whatever is hindering the drafting of this bill should be shared with members of the Namibian communities so that it can be tabled before Parliament in the near future. As has been pointed out in several sections of this review, optimal protection of several Namibian children awaits the promulgation of this Bill into Law.

The *Juvenile Justice Bill* is currently being discussed by Stakeholders and a research project that includes child justice issues has just been proposed by UNICEF and its Namibian Development Partners. We suggest that members of the public at the grassroots level be actively engaged in the consultations that are taking place. This would avoid delays in passing the Bill when presented before Parliament and the National council.

We are not sure the stage at which the *Vulnerable Witnesses Bill* is. It has been pointed out that implementing this Bill will be costly as courts will have to establish new infrastructure, hire new personnel and reassign existing personnel. We agree with the suggestion that support from relevant donors should be sought to implement this Bill when it becomes law.

The *Divorce Bill* is with the Law Reform and Development Commission. We could not ascertain whether or not it was in a position to be sent to legal drafters for translation into a fully-fledged legal instrument. As long as it is in this form, it will not adequately protect children of divorced parents. To promote the well-being of these children, we urge that urgent attention be paid to this Bill. To facilitate the processing of this and other outstanding bills, the legal drafting unit of the Ministry of Justice should be strengthened.

The *Administration of Estates Bill*, as far as we are aware, is with the Law Reform and Development Commission. Although it was expected that it would be processed and drafted in 2003, we are unaware that this has taken place. Because passing this Bill would alleviate the administration of estates problems faced by thousands of orphans and other vulnerable children in Namibia, we urge that urgent attention be paid to it.

The *Succession Bill* is with the Law Reform and Development Commission. Its progress is being hampered by the difficulty of taking into account a variety of Customary Law succession traditions and by the difficulty of securing the services of legal drafters who are well versed in succession issues from the perspective of diverse Namibian communities. It is essential that this Bill be attended to quickly because its promulgation would protect many orphans and other vulnerable children from exploitation perpetrated by unscrupulous relatives.

Children's laws whose consideration has stalled

The *Abortion Bill* and the *Inheritance Bill* are in this category.

For intricate reasons, the passing of the *Abortion Bill* was abandoned. Because several girls are frequently put at risk of death due to unsafe abortions, we urge the Namibian society to reconsider its decision and confront the issue with fresh insights. The affected girls' best interests should be considered when doing this.

There is currently no draft legislation on *inheritance*. There is, however, a document on inheritance with the Law Reform and Development Commission. Consistent with our comments on the Administration of Estates Bill and the Succession Bill, we strongly urge that legislation on inheritance be promulgated without further delay as its existence would promote the welfare of several orphans and other vulnerable children.

PERCEPTIONS AND OPINIONS OF STAKEHOLDERS ON WHETHER CURRENT ACTS AND OUTSTANDING BILLS ARE RESPONSIVE TO THE PROTECTION OF NAMIBIAN CHILDREN'S RIGHTS

Perceptions and opinions of stakeholders on whether current Acts and outstanding Bills are responsive to the protection of Namibian Women's rights have been concisely captured by LeBeau and Spence (2004). We have not come across a similar record in one piece of writing on perceptions of stakeholders pertaining to the responsiveness of current or outstanding legislations intended to protect Namibian children's rights. However, what we have are comments of various stakeholders and researchers on various issues implicating the protection of children's rights. In this section, we present these perceptions, comments and opinions in the manner that follows.

Child sexual and economic exploitation

Although articles 32, 34, 35, 36 and 39 of the CRC provide a framework for the protection of children from sexual and economic exploitation, such protection is not as optimal as it should be under Namibian laws. For instance, although the Combating of Rape Act of 2000 stipulates that sexual acts committed with persons under the age of 14 years constitute rape, sexual acts that take place between willing child prostitutes and willing adult clients would not necessarily lead to criminal charges. This would be the case because the children involved are unlikely to take their clients to court (Legal Assistance Centre, 2002). In addition, as was reported elsewhere in this review, the legal system is sometimes unable to sufficiently protect children who are victims of sexual violence because their cases are withdrawn (Hubbard, 1999, pp. 33-34). Protecting such children is made even more difficult if they are forced into prostitution due to circumstances beyond their control. These could include orphan-hood and vulnerability arising from chronic poverty (Committee on the Rights of the Child, 2003). Furthermore, Damases, Bruhns and Sindano (1999, pp.16-18) point out the following problems that exacerbate the situation of protecting many children from sexual exploitation:

- *Because the majority of child sexual exploitation cases are unreported, the law is unable to protect the children involved in such cases.*
- *Ignorance of legal protection against child sexual exploitation prevents large numbers of children from seeking help when they are sexually abused.*
- *The unfriendliness of policemen and women in handling sexual exploitation cases turns away many children from help and support.*
- *The trauma of sexual abuse discourages many children from revealing sexual offences.*
- *The protection of the family name and reputation may conceal child sexual exploitation. This is that members of a family may remain silent about the prevalence of child sexual abuse in the family for fear of public exposure, embarrassment and possible ridicule.*
- *The definition of what constitutes child sexual abuse/exploitation and what does not is tenuous in some Namibian ethnic groups where, for instance, sexual intercourse between a young adolescent girl and her uncle is, by tradition, allowed.*

As can be noticed from the preceding problems, the law would not be sufficient to adequately protect several children from sexual exploitation. Because of this, we propose that 'safety net' types of programmes targeting children in this category should either be introduced or strengthened. Widely available in both urban and rural areas, such programmes should include the provision of counseling services and community awareness and sensitization about child sexual exploitation and abuse.

Children affected and orphaned by HIV/AIDS

The Committee on the Rights of the Child, recently underlined “the necessity of legal, economic and social protections for affected children to ensure their access to education, inheritance, shelter, health and social services...” (Committee on the Rights of the Child, 2003, p.10). Although we are aware that Namibia and its cooperating development partners have and continue to put in place educational and social mechanisms to protect OVC, legal matters pertaining to these children’s **succession, inheritance and estates administration** have yet to be adequately attended to. Our view is that this matter should be treated with utmost urgency as the vulnerability of several orphans, particularly those who head households and those who are under the care of unscrupulous relatives, is heightened due to the absence of legal protection.

Step-Children

In Namibia, as is the case in many countries, situations arise where men and women are biological parents of children from previous relationships but live with their children in new relationships with other partners. This implies that several children live with biological and step-parents. The issue is whether step-parents have legal obligations for their step-children. Do they have parental responsibilities when making decisions on matters such as specific childrearing regimes, choice of school, choice of church, authorization for medical treatment and appointment of guardianship? Should step-parents have these responsibilities? In Namibia, step-parents do not have legal powers over these issues. A number of childcare and maintenance complications have been raised due to this. Some of them involve whether or not a step-parent obtains automatic guardianship of a step child after the death of a biological parent, whether or not a step-parent has the duty to maintain a step-child, whether or not a step-parent has a right of access to a step-child after divorce, whether or not a step-child has the duty to maintain an elderly step-parent and whether or not a step-parent would bring a legal action of damages in the case of injury to a step-child. The current legislations on Namibian children are not responsive to all these queries. Because of this several step-children’s care, maintenance and protection, are diminished. We endorse the suggestion that the draft Childcare and Protection Bill should include the issue of step-parents and step-children.

Conclusion

Having undertaken the task we were asked to undertake, we now conclude that Namibia has made a lot of progress towards the goal of complying with the requirements of the Convention on the Rights of the Child. It has done this by putting in place legislations aimed at protecting its children and enhancing their well-being. Notwithstanding this, we have highlighted in this review areas requiring more legislative reform and development. Some of these are those of childcare and development, children’s health, the protection of orphans and other vulnerable children and child justice. Our hope is that the recommendations we

have made will be translated into actions aimed at improving Namibian children's welfare by either amending some relevant laws or by putting in place new laws to further protect these children. We urge that all these actions should be taken not only under the CRC framework but also under Namibia's social-cultural context.

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