

REPUBLIC OF SOUTH AFRICA

CHILDREN'S BILL

*(As reintroduced in the National Assembly as a section 75 Bill; explanatory summary of
Bill published in Government Gazette No. 25346 of 13 August 2003)
(The English text is the official text of the Bill)*

(MINISTER OF SOCIAL DEVELOPMENT)

[B 70—2003 (Reintroduced)]

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GENERAL EXPLANATORY NOTE:

***** Areas marked with five asterisks indicate omitted provisions which will be inserted by way of an Amendment Bill. That Bill will be dealt with in terms of the procedure prescribed by section 76 of the Constitution — as explained in paragraph 1 of the Memorandum on the Objects of the Bill.

BILL

To define the rights and responsibilities of children; to define parental responsibilities and rights; to determine principles and guidelines for the protection of children and the promotion of their well-being; to regulate matters concerning the protection and well-being of children; to consolidate the laws relating to the welfare and protection of children; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

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CHAPTER 1

INTERPRETATION, OBJECTS, APPLICATION AND
IMPLEMENTATION OF ACT

Interpretation

1. (1) In this Act, unless the context indicates otherwise— 5

- “**abuse**”, in relation to a child, means any form of harm or ill-treatment deliberately inflicted on a child, and includes—
- (a) assaulting a child or inflicting any other form of deliberate injury on a child; 10
 - (b) sexually abusing a child or allowing a child to be sexually abused;
 - (c) bullying by another child;
 - (d) committing an exploitative labour practice in relation to a child; or
 - (e) exposing or subjecting a child to behaviour that may psychologically or emotionally harm the child;
- “**adopted child**” means a child adopted by a person in terms of this Act or any law 15
regulating the adoption of children before this Act took effect;
- “**adoption compliance certificate**”—
- (a) in relation to a convention country, means a certificate issued in terms of Article 23 of the Hague Convention on Inter-country Adoption; or
 - (b) in relation to a prescribed foreign jurisdiction, means a similar certificate 20
prescribed in the relevant bilateral or multilateral agreement;
- “**adoption registrar**” means the person designated by the Director-General in terms of section 247(1);
- “**adoption social worker**” means—
- (a) a social worker in private practice— 25
 - (i) who has a speciality in adoption services registered in terms of the Social Service Professions Act, 1978 (Act No. 110 of 1978); and
 - (ii) who is accredited in terms of section 251(1) to provide adoption services; or
 - (b) a social worker in the employ of a provincial department of social 30
development or a designated child protection organisation which is accredited in terms of section 251(1) to provide adoption services;
- “**adoption working agreement**”, for the purpose of Chapter 17, means a written agreement entered into by an accredited child protection organisation in the Republic with an equivalent organisation in another country to facilitate 35
inter-country adoptions between the Republic and the country in question;
- “**adoptive parent**” means a person who has adopted a child in terms of this Act or any law regulating the adoption of children before this Act took effect;
- “**alternative care**” means care of a child in accordance with section 167; 40

- “**artificial fertilisation**” means the introduction by other than natural means of a male gamete or gametes into the internal reproductive organs of a female person for the purpose of human reproduction, including—
- (a) the bringing together outside the human body of a male and a female gamete or gametes with a view to placing the product of a union of such gametes in 45
the womb of a female person; or
 - (b) the placing of the product of a union of male and female gametes which have been brought together outside the human body, in the womb of a female person;
- “**authorised officer**”, in relation to any specific act, means a person who has no 50
direct or indirect financial interest in the performance of that act and who is authorised in writing by the presiding officer of the children’s court to perform that act;
- “**Bill of Rights**” means the Bill of Rights contained in Chapter 2 of the Constitution; 55
- “**care**”, in relation to a child, includes—
- (a) within available means, providing the child with—
 - (i) a suitable place to live;

- (ii) living conditions that are conducive to the child’s health, well-being and development; and
 - (iii) the necessary financial support;
 - (b) safeguarding and promoting the well-being of the child;
 - (c) protecting the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation and any other physical and moral harm or hazards; 5
 - (d) respecting, protecting, promoting and securing the fulfilment of, and guarding against any infringement of, the child’s rights set out in the Bill of Rights and the rights set out in Chapter 3 of this Act;
 - (e) guiding and directing the child’s education and upbringing, including religious and cultural education and upbringing, in a manner appropriate to the child’s age, maturity and stage of development; 10
 - (f) guiding, advising and assisting the child in decisions to be taken by the child, taking into account the child’s age, maturity and stage of development;
 - (g) guiding the behaviour of the child in a humane manner; 15
 - (h) maintaining a sound relationship with the child; and
 - (i) generally, ensuring that the best interest of the child is the paramount concern in all matters affecting the child;
- “care-giver”** means any person other than the biological or adoptive parent who factually cares for a child, whether or not that person has parental responsibilities or rights in respect of the child, and includes— 20
- (a) a foster parent;
 - (b) a kinship care-giver;
 - (c) a family member who cares for a child in terms of an informal kinship care arrangement; 25
 - (d) a person who cares for a child whilst the child is in temporary safe care;
 - (e) a primary care-giver who is not the biological or adoptive parent of the child; or
 - (f) the child at the head of a child-headed household to the extent that that child has assumed the role of primary care-giver; 30
- “child”** means a person under the age of 18 years;
- *****
- “Child Care Act”** means the Child Care Act, 1983 (Act No. 74 of 1983);
- *****
- “clerk of the children’s court”** means the person appointed by the Director-General: Justice and Constitutional Development as the clerk of the children’s court of the relevant magistrate’s court; 35
- *****
- “commercial sexual exploitation”**, in relation to a child, means—
- (a) the procurement of a child to perform sexual activities for financial or other reward, including acts of prostitution or pornography, irrespective of whether that reward is claimed by, payable to or shared with the procurer, the child, the parent or care-giver of the child, or any other person; or 40
 - (b) trafficking in a child for use in sexual activities, including prostitution or pornography; 45
- “commissioning parent”** means a person who enters into a surrogate motherhood agreement with a surrogate mother;
- “contact”**, in relation to a child, means—
- (a) maintaining a personal relationship with the child; and
 - (b) if the child lives with someone else— 50
 - (i) communication on a regular basis with the child in person, including—
 - (aa) visiting the child; or
 - (bb) being visited by the child; or
 - (ii) communication on a regular basis with the child in any other manner, including— 55
 - (aa) through the post; or
 - (bb) by telephone or any other form of electronic communication;
- *****
- “convention country”** means, in accordance with Article 45 of the Hague Convention on Inter-country Adoption, any country in which the Convention has entered into force, except for a country against whose accession the Republic has raised an objection under Article 44 of the Convention; 60
- “court”** means—

- (a) a children’s court as provided for in section 42; and
 (b) for the purpose of Chapter 20, the High Court.

“**delegation**”, in relation to a duty, includes an instruction to perform the duty;
 “**Department**” means the national department responsible for the provision of social development services;

“**designated social worker**” means a social worker in the service of—
 (a) the Department or a provincial department of social development; or
 (b) a designated child protection organisation;

“**Director-General**” means the Director-General of the Department;

“**Divorce Act**” means the Divorce Act, 1979 (Act No. 70 of 1979);

“**divorce court**” means a divorce court established in terms of section 10 of the Administration Amendment Act, 1929 (Act No. 9 of 1929);

“**early childhood development programmes**” means programmes referred to in section 91(3);

“**early childhood development services**” means services referred to in section 91(2);

“**exploitation**”, in relation to a child, includes—

- (a) all forms of slavery or practices similar to slavery;
 (b) sexual exploitation;
 (c) servitude;
 (d) forced labour or services;
 (e) the worst forms of child labour; and
 (f) the removal of body parts;

“**family advocate**” means a family advocate appointed in terms of the Mediation in Certain Divorce Matters Act;

“**family member**”, in relation to a child, means—

- (a) a parent of the child;
 (b) any other person who has parental responsibilities and rights in respect of the child;
 (c) a primary care-giver of the child;
 (d) a grandparent, brother, sister, uncle, aunt or cousin of the child;
 (e) any other person with whom the child has developed a significant relationship, based on psychological or emotional attachment, which resembles a family relationship;

“**gamete**” means either of the two generative cells essential for human reproduction;

“**guardian**” means a parent or other person who has guardianship of a child;

“**guardianship**”, in relation to a child, means—

- (a) administering and safeguarding the child’s property and property interests;
 (b) assisting or representing the child in administrative, contractual and other legal matters; or
 (c) giving or refusing any consent required by law in respect of the child, including—
 (i) consenting to the child’s marriage;
 (ii) consenting to the child’s adoption;
 (iii) consenting to the child’s departure or removal from the Republic;
 (iv) consenting to the child’s application for a passport; and
 (v) consenting to the alienation or encumbrance of any immovable property of the child;

“**Hague Convention on Inter-country Adoption**” means the Hague Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption signed at the Hague on 29 May 1993, a copy of the English text of which is set out in Schedule 1 to this Act;

“**Hague Convention on International Child Abduction**” means the Hague Convention on the Civil Aspects of International Child Abduction signed at the Hague on 25 October 1980, a copy of the English text of which is set out in Schedule 2 to this Act;

- “**High Court**” means a High Court contemplated in section 166(c) of the Constitution;
- “**in need of care and protection**”, in relation to a child, means to be in a situation contemplated in section 150;
- ***** 5
- “**labour inspector**” means a labour inspector appointed under section 63 of the Basic Conditions of Employment Act, 1997 (Act No. 75 of 1997);
- “**Maintenance Act**” means the Maintenance Act, 1998 (Act No. 99 of 1998);
- “**marriage**” means a marriage—
- (a) recognised in terms of South African law or customary law; or 10
- (b) concluded in accordance with a system of religious law subject to specified procedures, and any reference to a husband, wife, widower, widow, divorced person, married person or spouse must be construed accordingly;
- “**MEC for social development**” means the Member of the Executive Council of a province who is responsible for social development in the province; 15
- “**Mediation in Certain Divorce Matters Act**” means the Mediation in Certain Divorce Matters Act, 1987 (Act No. 24 of 1987);
- “**medical practitioner**” means a person registered or deemed to be registered as a medical practitioner under the Health Professions Act, 1974 (Act No. 56 of 1974), and includes a dentist so registered or deemed to be so registered; 20
- “**mental illness**” means mental illness as defined in the Mental Health Act, 1973 (Act No. 18 of 1973);
- “**Minister**” means the Cabinet member responsible for social development;
- *****
- “**neglect**”, in relation to a child, means a failure in the exercise of parental responsibilities to provide for the child’s basic physical, intellectual, emotional or social needs; 25
- “**organ of state**” means an organ of state as defined in paragraphs (a) and (b) of section 239 of the Constitution;
- ***** 30
- “**parent**”, in relation to a child, includes the adoptive parent of a child, but excludes—
- (a) the biological father of a child conceived through the rape of or incest with the child’s mother;
- (b) any person who is biologically related to a child by reason only of being a 35 gamete donor for purposes of artificial fertilisation; and
- (c) a parent whose parental responsibilities and rights in respect of a child have been terminated;
- “**parental responsibilities and rights**”, in relation to a child, means the responsibility and the right— 40
- (a) to care for the child;
- (b) to have and maintain contact with the child; and
- (c) to act as the guardian of the child;
- “**parent-substitute**” means a person appointed in terms of section 26;
- “**partial care**” means care of a child in accordance with section 76; 45
- “**partial care facility**” means any premises or other place used partly or exclusively for the partial care of six or more children, which place may include—
- (a) a private home;
- (b) other privately owned or managed premises; or
- (c) a school, hospital or other state-managed premises where partial care is 50 provided by a person other than the school, hospital or other organ of state;
- “**party**”, in relation to a matter before a children’s court, means—
- (a) a child involved in the matter;
- (b) a parent of the child;
- (c) a person who has parental responsibilities and rights in respect of the child; 55
- (d) a primary care-giver of the child;
- (e) a prospective adoptive or foster parent or kinship care-giver of the child;
- (f) the department or the designated child protection organisation managing the case of the child; or
- (g) any other person admitted or recognised by the court as a party; 60
- *****

- “**police official**” means any member of the South African Police Service or a municipal police service appointed in terms of the South African Police Service Act, 1995 (Act No. 68 of 1995);
- “**prescribed**” means prescribed by regulation as contemplated in sections 75, 253, 279 and 299; 5
- “**presiding officer**” means a presiding officer of a children’s court designated in terms of section 42(2);

- “**primary care-giver**”, in relation to a child, means—
- (a) a person who has the parental responsibility and right in caring for the child and who exercises that responsibility and right; 10
 - (b) a person who cares for a child with the implied or express consent of a person referred to in paragraph (a);
 - (c) a foster parent or kinship care-giver;
 - (d) a child and youth care worker at a child and youth care centre where a child has been placed; or 15
 - (e) a person who cares for a child whilst the child is in temporary safe care, but excludes a person who receives remuneration other than a social security grant to care for the child;
- “**provincial department of social development**” means the department within a provincial administration responsible for social development in the province; 20
- “**provincial head of social development**” means the head of the provincial department of social development;
- “**psychologist**” means a psychologist registered or deemed to be registered as such in terms of the Health Professions Act, 1974 (Act No. 56 of 1974); 25

- “**regulation**” means a regulation made in terms of this Act;
- “**residential care programme**” means a programme described in section 191(2) which is or must be offered at a child and youth care centre; 30

- “**serve**”, in relation to any notice, document or other process in terms of this Act, means to serve such notice, document or other process in accordance with the procedure provided for the serving of process in terms of the Magistrates’ Courts Act, 1944 (Act No. 32 of 1944), and the rules applying to the proceedings of magistrates’ courts; 35
- “**sexual abuse**”, in relation to a child, means—
- (a) sexually molesting or assaulting a child or allowing a child to be sexually molested or assaulted;
 - (b) encouraging, inducing or forcing a child to be used for the sexual gratification of another person; 40
 - (c) using a child in or deliberately exposing a child to sexual activities or pornography; or
 - (d) procuring or allowing a child to be procured for commercial sexual exploitation or in any way participating or assisting in the commercial sexual exploitation of a child; 45
- *****
- “**social service professionals**” includes probation officers, development workers, child and youth care workers, youth workers and social security workers who are registered in terms of the Social Service Professions Act, 1978 (Act No. 110 of 1978), once a professional board has been established for a particular professional group; 50
- “**social worker**” means a person who is registered or deemed to be registered as a social worker in terms of the Social Service Professions Act, 1978 (Act No. 110 of 1978); 55

- “**surrogate mother**” means an adult woman who enters into a surrogate motherhood agreement with the commissioning parent or parents;
- “**surrogate motherhood agreement**” means an agreement between a surrogate mother and a commissioning parent or parents in which it is agreed that the surrogate mother will be artificially fertilised for the purpose of bearing a child for the commissioning parent or parents and in which the surrogate mother undertakes to hand over such a child to the commissioning parent or parents upon its birth, or 60

within a reasonable time thereafter, with the intention that the child concerned becomes the legitimate child of the commissioning parent or parents;

“**temporary safe care**”, in relation to a child, means care of a child in a child and youth care centre, shelter or private home or any other place of a kind that may be prescribed by regulation, where the child can safely be accommodated pending a decision or court order concerning the placement of the child, but excludes care of a child in a prison or police cell; 5

“**this Act**” includes—

- (a) any regulation made in terms of this Act;
- (b) the rules regulating the proceedings of the children’s courts in terms of section 52(1) or (2); 10

“**traditional authority**” means any authority which in terms of indigenous law or any other law administers the affairs of any tribe or group of indigenous people or any other persons resident within an area under the control of a traditional leader;

“**traffic**”, in relation to a child, means the recruitment, transportation, transfer, harbouring or receipt of children by means of the threat or use of force or other forms of coercion or by means of abduction, of fraud, of deception, of the abuse of power or a position of vulnerability or of giving or receiving payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation; 15 20

“**UN Protocol to Prevent Trafficking in Persons**” means the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the UN Convention against Transnational Organised Crime, 2000, a copy of the English text of which is set out in Schedule 3. 25

(2) In this Act, a word or expression derived from a word or expression defined in subsection (1) has a corresponding meaning unless the context indicates that another meaning is intended.

Objects of Act 30

2. The objects of this Act are—

- (a) to make provision for structures, services and means for promoting and monitoring the sound physical, intellectual, emotional and social development of children;
- (b) to strengthen and develop community structures which can assist in providing care and protection for children; 35
- (c) to protect children from maltreatment, abuse, neglect, degradation, discrimination, exploitation and any other physical and moral harm or hazards;
- (d) to provide care and protection to children who are in need of care and protection; 40
- (e) to give effect to the Republic’s obligations concerning the well-being of children in terms of international instruments binding on the Republic; and
- (f) generally, to promote the protection, development and well-being of children.

Conflicts with other legislation

3. (1) In the event of a conflict between a section of this Act and— 45

- (a) other national legislation relating to the protection and well-being of children, the section of this Act prevails;
- (b) provincial legislation relating to the protection and well-being of children, the conflict must be resolved in terms of section 146 of the Constitution; and
- (c) a municipal by-law relating to the protection and well-being of children, the conflict must be resolved in terms of section 156 of the Constitution. 50

(2) In the event of a conflict between a regulation made in terms of this Act and—

- (a) an Act of Parliament, the Act of Parliament prevails;
- (b) provincial legislation, the conflict must be resolved in terms of section 146 of the Constitution; and 55
- (c) a municipal by-law, the conflict must be resolved in terms of section 156 of the Constitution.

(3) For the proper application of subsection (2)(b) the Minister must in terms of section 146(6) of the Constitution submit all regulations made in terms of this Act and which affect a province, to the National Council of Provinces for approval.

(4) In this section “regulation” means—

- (a) a regulation made in terms of this Act; and 5
- (b) a rule regulating the proceedings of children’s courts in terms of section 52(1).

Implementation of Act

4. (1) This Act must be implemented in an integrated, co-ordinated and uniform manner by organs of state in the national, provincial and, where applicable, local spheres of government subject to any specific section of this Act and regulations allocating roles and responsibilities. 10

(2) Recognising that competing social and economic needs exist, the state must, in the implementation of this Act, take reasonable measures within its available resources to achieve the progressive realisation of the objects of this Act.

CHAPTER 2 15

GENERAL PRINCIPLES

General principles

5. (1) The general principles set out in this section guide—

- (a) the passing of all provincial legislation, municipal by-laws and subordinate national legislation to the extent that such legislation and by-laws are applicable to children; 20
- (b) the implementation of all legislation applicable to children, including this Act; and
- (c) all proceedings, actions and decisions by any organ of state in any matter concerning a child or children in general. 25

(2) All proceedings, actions or decisions in a matter concerning a child must—

- (a) respect, protect, promote and fulfil the child’s rights set out in the Bill of Rights and the rights set out in Chapter 3 of this Act, subject to any lawful limitation;
- (b) respect the child’s inherent dignity; 30
- (c) treat the child fairly and equitably; and
- (d) protect the child from unfair discrimination on any ground, including on the grounds of the health status of the child or a family member of the child.

(3) If a matter concerning a child involves a selection between one parent and the other, or between one care-giver or person and another, there should be no preference in favour of any parent, care-giver or person solely on the basis of that parent, care-giver or person’s gender. 35

(4) If it is in the best interest of the child, the child’s family must be given the opportunity to express their views in any matter concerning the child.

(5) In any matter concerning a child— 40

- (a) an approach which is conducive to conciliation and problem solving should be followed and a confrontational approach should be avoided; and
- (b) a delay in any action or decision to be taken must be avoided as far as possible.

(6) A person who has parental responsibilities and rights in respect of a child and the child, where this is appropriate having regard to the age, maturity and stage of development of the child, must be informed of any action or decision taken in a matter concerning the child which significantly affects the child. 45

Best interest of child standard

6. (1) Whenever a provision of this Act requires the best interest of the child standard to be applied, the following factors must be taken into consideration where relevant: 50

- (a) The nature of the personal relationship between—
 - (i) the child and the parents, or any specific parent; and
 - (ii) the child and any other care-giver or person relevant in those circumstances;

- (b) the attitude of the parents, or any specific parent, towards—
 - (i) the child; and
 - (ii) the exercise of parental responsibilities or rights in respect of the child;
 - (c) the capacity of the parents, or any specific parent, or of any other care-giver or person, to provide for the needs of the child, including emotional and intellectual needs; 5
 - (d) the likely effect on the child of any change in the child’s circumstances, including the likely effect on the child of any separation from—
 - (i) both or either of the parents; or
 - (ii) any brother or sister or other child, or any other care-giver or person, with whom the child has been living; 10
 - (e) the practical difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child’s right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis; 15
 - (f) the need for the child—
 - (i) to remain in the care of his or her parent, family and extended family; and
 - (ii) to maintain a connection with his or her family, extended family, tribe, culture or tradition;
 - (g) the child’s — 20
 - (i) age, maturity and stage of development;
 - (ii) gender; and
 - (iii) background and any other relevant characteristics of the child;
 - (h) the child’s physical and emotional security and his or her intellectual, emotional, social and cultural development; 25
 - (i) the need for a child to be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment;
 - (j) the need to protect the child from any physical or psychological harm that may be caused by— 30
 - (i) subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour; or
 - (ii) exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards another person; 35
 - (k) any family violence involving the child or a family member of the child; and
 - (l) which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child.
- (2) In this section “parent” includes any person who has parental responsibilities and rights in respect of a child. 40

CHAPTER 3

CHILDREN’S RIGHTS

Application

7. (1) The rights which a child has in terms of this Chapter supplement the rights which a child has in terms of the Bill of Rights. 45
- (2) All organs of state in any sphere of government and all officials, employees and representatives of an organ of state must respect, protect and promote the rights of children contained in this Chapter.
- (3) A provision of this Chapter binds a natural or a juristic person, if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right. 50

Provisions of Chapter take precedence over other law

8. In the event of a conflict between a provision of this Chapter and any other legislation, the provision of this Chapter prevails except— 55
- (a) to the extent that such other legislation is or could be interpreted as a limitation of general application on such provision, which is reasonable and justifiable in an open and democratic society based on human dignity, equality

- and freedom, taking into account all relevant factors, including those listed in section 36(1)(a) to (e) of the Constitution; or
 (b) as otherwise provided in section 3.

Best interests of child paramount

9. In all matters concerning a child the standard referred to in section 28(2) of the Constitution and section 6 of this Act that the child's best interest is of paramount importance, must be applied. 5

Child participation

10. Every child capable of participating meaningfully in any matter concerning that child has the right to participate in those proceedings in an appropriate way and views expressed by the child must be given due consideration. 10

Rights of children

11. (1) Every child has the right—
- (a) to a name and a nationality from birth;
 - (b) to family care or parental care, or to appropriate alternative care when removed from the family environment; 15
 - (c) to basic nutrition, shelter, basic health care services and social services;
 - (d) to be protected from maltreatment, neglect, abuse or degradation;
 - (e) to be protected from exploitative labour practices;
 - (f) not to be required or permitted to perform work or provide services that— 20
 - (i) are inappropriate for a person of that child's age; or
 - (ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;
 - (g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35 of the Constitution, the child may be detained only for the shortest appropriate period of time, and has the right to be— 25
 - (i) kept separately from detained persons over the age of 18 years; and
 - (ii) treated in a manner, and kept in conditions, that take account of the child's age; 30
 - (h) to have a legal practitioner assigned to the child by the State, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and
 - (i) not to be used directly in armed conflict, and to be protected in times of armed conflict. 35
- (2) A child's best interest is of paramount importance in every matter concerning the child.

Harmful social and cultural practices

12. (1) Every child has the right not to be subjected to harmful social and cultural practices that affect the well-being, health or dignity of the child. 40
- (2) Every child—
- (a) below the minimum age set by law for a valid marriage has the right not to be given out in marriage or engagement; and
 - (b) above that minimum age has the right not to be given out in marriage or engagement without his or her consent. 45
- (3) Female genital mutilation or the circumcision of female children as a cultural practice is prohibited.
- (4) Taking into consideration the child's age, maturity and stage of development, every male child has the right—
- (a) to refuse circumcision; and 50
 - (b) not to be subjected to unhygienic circumcision.
- (5) Every child has the right—
- (a) to refuse to be subjected to virginity testing, including virginity testing as part of a cultural practice; and
 - (b) not to be subjected to unhygienic virginity testing. 55

Information on health care

- 13.** Every child has the right to—
- (a) have access to information on health promotion, sexuality, reproduction and the prevention of ill-health and disease; and
 - (b) confidentiality regarding his or her health status and the health status of a parent, care-giver or family member, except when maintaining such confidentiality is not in the best interest of the child. 5

Access to courts

- 14.** Every child has the right to bring, and to be assisted in bringing, a matter to a court, provided that matter falls within the jurisdiction of that court. 10

Enforcement of rights

- 15.** (1) Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights or this Chapter has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights.
- (2) The persons who may approach a court, are: 15
- (a) Anyone acting in their own interest;
 - (b) anyone acting on behalf of another person who cannot act in their own name;
 - (c) anyone acting as a member of, or in the interest of, a group or class of persons;
 - (d) anyone acting in the public interest; and
 - (e) an association acting in the interest of its members. 20

Responsibilities of children

- 16.** Every child has responsibilities appropriate to the child's age and ability towards his or her family, community and the state.

Age of majority

- 17.** A child, whether male or female, becomes a major upon reaching the age of 18 years. 25

CHAPTER 4**PARENTAL RESPONSIBILITIES AND RIGHTS***Part 1**Acquisition and loss of parental responsibilities and rights* 30**Parental responsibilities and rights**

- 18.** A person may have either full or specific parental responsibilities and rights in respect of a child.

Parental responsibilities and rights of mothers

- 19.** (1) The biological mother of a child, whether married or unmarried, has full parental responsibilities and rights in respect of the child. 35
- (2) If the biological mother of the child is an unmarried child and the child's father does not have full parental responsibilities and rights or has no parental responsibilities and rights in respect of the child, the guardian of that mother has those parental responsibilities and rights in respect of the child which that guardian has in respect of that mother. 40
- (3) This section does not apply in respect of a child who is the subject of a surrogacy agreement.

Parental responsibilities and rights of married fathers

20. The biological father of a child has full parental responsibilities and rights in respect of the child—
- (a) if he is married to the child’s mother; or
 - (b) if he was married to her at—
 - (i) the time of the child’s conception;
 - (ii) the time of the child’s birth; or
 - (iii) any time between the child’s conception and birth.

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Parental responsibilities and rights of unmarried fathers

21. (1) The biological father of a child who does not have parental responsibilities and rights in respect of the child in terms of section 20, acquires full parental responsibilities and rights in respect of the child—
- (a) if at any time after the child’s birth he has lived with the child’s mother—
 - (i) for a period of no less than 12 months; or
 - (ii) for periods which together amount to no less than 12 months;
 - (b) if he, regardless of whether he has lived or is living with the mother, has cared for the child with the mother’s informed consent—
 - (i) for a period of no less than 12 months; or
 - (ii) for periods which together amount to no less than 12 months.
- (2) This section does not affect the duty of a father of a child to contribute towards the maintenance of the child.

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Parental responsibilities and rights agreements

22. (1) Subject to subsection (2), the biological father of a child who does not have parental responsibilities and rights in respect of the child in terms of either section 20 or 21 may enter into an agreement with the mother or other person who has parental responsibilities and rights in respect of the child, providing for the acquisition by the father of such parental responsibilities and rights in respect of the child as are set out in the agreement.
- (2) The mother or other person who has parental responsibilities and rights in respect of the child may only confer by agreement upon the biological father of the child those parental responsibilities and rights which she or that other person has in respect of the child at the time of the conclusion of such agreement.
- (3) Only the High Court may confirm a parental responsibilities and rights agreement that relates to the guardianship of a child.
- (4) A parental responsibilities and rights agreement must be in the format and contain the particulars prescribed by regulation.
- (5) Subject to subsection (3), a parental responsibilities and rights agreement—
- (a) takes effect only if—
 - (i) registered with the family advocate; or
 - (ii) made an order of the High Court, a divorce court in a divorce matter or the children’s court on application by the parties to the agreement; and
 - (b) may be amended or terminated only by an order of the High Court, a divorce court or a children’s court on application—
 - (i) by a person having parental responsibilities and rights in respect of the child;
 - (ii) by the child, acting with leave of the court; or
 - (iii) in the child’s interest by any other person, acting with leave of the court.

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Assignment of parental responsibilities and rights by order of court

23. (1) Any person having an interest in the care, well-being or development of a child may apply to the High Court, a divorce court in divorce cases or the children’s court for an order assigning to the applicant full or any specific parental responsibilities and rights in respect of the child.
- (2) Only the High Court may issue an order that relates to the guardianship of a child.
- (3) When considering an application the court must take into account—
- (a) the relationship between the applicant and the child, and any other relevant person and the child;

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- (b) the degree of commitment that the applicant has shown towards the child;
 - (c) the extent to which the applicant has contributed towards expenses in connection with the birth and maintenance of the child;
 - (d) the best interest of the child; and
 - (e) any other fact that should, in the opinion of the court, be taken into account. 5
- (4) If in the course of the court proceedings it is brought to the attention of the court that an application for the adoption of the child has been made by another applicant, the court—
- (a) must request a family advocate, social worker or psychologist to furnish it with a report and recommendations as to what is in the best interest of the child concerned; and 10
 - (b) may suspend the first-mentioned application on any conditions it may determine.
- (5) The assignment of parental responsibilities and rights to a person in terms of this section does not affect the parental responsibilities and rights that any other person may have in respect of the same child. 15

Certain applications regarded as inter-country adoptions

24. When application is made in terms of section 23(1) by a non-South African citizen for the assignment of full parental responsibilities and rights in respect of a child or to act as guardian of a child, the application must be regarded as an inter-country adoption for the purposes of the Hague Convention on Inter-country Adoption and Chapter 17 of this Act. 20

Persons claiming paternity

- 25.** (1) A person who is not married to the mother of a child and who is or claims to be the biological father of the child may— 25
- (a) apply for an amendment to be effected to the registration of birth of the child in terms of section 11(4) of the Births and Deaths Registration Act, 1992 (Act No. 51 of 1992), identifying him as the father of the child, if the mother consents to such amendment; or
 - (b) apply to a court for an order confirming his paternity of the child, if the mother— 30
 - (i) refuses to consent to such amendment;
 - (ii) is incompetent to give consent due to mental illness;
 - (iii) cannot be located; or
 - (iv) is deceased. 35
- (2) This section does not apply to—
- (a) the biological father of a child conceived through the rape of or incest with the child's mother; or
 - (b) any person who is biologically related to a child by reason only of being a gamete donor for purposes of artificial fertilisation. 40

Assignment of parental responsibilities and rights to parent-substitutes

- 26.** (1) A parent who is the sole natural guardian and who has parental responsibilities and rights in respect of a child may appoint a suitable person as a parent-substitute and assign to that person his or her parental responsibilities and rights in respect of the child in the event of his or her death. 45
- (2) An appointment in terms of subsection (1)—
- (a) must be in writing and signed by the parent;
 - (b) may form part of the will of the parent;
 - (c) replaces any previous appointment, including any such appointment in a will, whether made before or after this section took effect; and 50
 - (d) may at any time be revoked by the parent by way of a written instrument signed by the parent.
- (3) A parent-substitute appointed in terms of subsection (1) acquires parental responsibilities and rights in respect of a child—
- (a) after the death of the parent; and
 - (b) upon the parent-substitute's express or implied acceptance of the appointment. 55

- (4) If two or more persons are appointed as parent-substitutes, any one or more or all of them may accept the appointment except if the appointment provides otherwise.
- (5) A parent-substitute acquires only those parental responsibilities and rights—
- (a) which the parent had at his or her death; or
 - (b) if the parent died before the birth of the child, which the parent would have had had the parent lived until the birth of the child. 5
- (6) The assignment of parental responsibilities and rights to a parent-substitute does not affect the parental responsibilities and rights which another person has in respect of the child.
- (7) In this section “parent” includes a person who has acquired parental responsibilities and rights in respect of a child. 10

Termination, extension, suspension or restriction of parental responsibilities and rights

27. (1) A person referred to in section 28 may apply to the High Court, a divorce court in a divorce matter or a children’s court for an order— 15
- (a) suspending for a period, or terminating, any or all of the parental responsibilities and rights which a specific person has in respect of a child; or
 - (b) extending or circumscribing the exercise by that person of any or all of the parental responsibilities and rights that person has in respect of a child.
- (2) An application in terms of subsection (1) may be combined with an application in terms of section 23 for the assignment of responsibilities and rights in respect of the child to the applicant in terms of that section. 20

Who may approach court

28. (1) An application for an order referred to in section 27 may be brought—
- (a) by a co-holder of parental responsibilities and rights in respect of the child; 25
 - (b) by any other person having a sufficient interest in the care, protection, well-being or development of the child;
 - (c) by the child, acting with leave of the court;
 - (d) in the child’s interest by any other person, acting with leave of the court; or
 - (e) by a family advocate or the representative of any interested organ of state. 30
- (2) When considering an application referred to in section 27 the court must take into account—
- (a) the relationship between the child and the person whose parental responsibilities and rights are being challenged;
 - (b) the degree of commitment that the person has shown towards the child; 35
 - (c) the best interest of the child; and
 - (d) any other fact that should, in the opinion of the court, be taken into account.

Court proceedings

29. (1) An application in terms of section 22(5)(a)(ii) or (b), 23(1), 25(1)(b) or 27(1) may be brought before the High Court, a divorce court in a divorce matter or a children’s court within whose area of jurisdiction the child concerned is ordinarily resident. 40
- (2) An application in terms of section 23(1) for the assignment of full parental rights and responsibilities or to act as guardian of a child must contain reasons as to why the applicant is not applying for the adoption of the child.
- (3) The court hearing an application contemplated in subsection (1) may grant the application unconditionally or on such conditions as it may determine, or may refuse the application, but an application may be granted only if it is in the best interest of the child. 45
- (4) When considering an application contemplated in subsection (1) the court must be guided by the principles set out in Chapters 2 and 3 to the extent that those principles are applicable to the matter before it. 50
- (5) The court may for the purposes of the hearing order that—
- (a) a report and recommendations of a family advocate, a social worker or other professional person be submitted to the court;
 - (b) a matter specified by the court be investigated by a person designated by the court; 55
 - (c) a person specified by the court appear before it to give or produce evidence; or

- (d) the applicant or any party opposing the application pay the costs of any such investigation or appearance.
- (6) The court may—
- (a) appoint a legal practitioner to represent the child at the court proceedings; and
- (b) order the parties to the proceedings, or any one of them, or the state if substantial injustice would otherwise result, to pay the costs of such representation. 5
- (7) If it appears to a court in the course of any proceedings before it that a child involved in or affected by those proceedings is in need of care and protection, the court must order that the question whether the child is in need of care and protection be referred to a children's court for decision. 10

Part 2

Co-exercise of parental responsibilities and rights

Co-holders of parental responsibilities and rights

- 30.** (1) More than one person may hold parental responsibilities and rights in respect of the same child. 15
- (2) When more than one person holds the same parental responsibilities and rights in respect of a child, each of the co-holders may act without the consent of the other co-holder or co-holders when exercising those responsibilities and rights, except where this Act or an order of court provides otherwise. 20
- (3) A co-holder of parental responsibilities and rights may not surrender or transfer those responsibilities and rights to another co-holder or any other person, but may by agreement with that other co-holder or person allow the other co-holder or person to exercise any or all of those responsibilities and rights on his or her behalf.
- (4) An agreement in terms of subsection (3) does not divest a co-holder of his or her parental responsibilities and rights and that co-holder remains competent and liable to exercise those responsibilities and rights. 25
- (5) Except where this Act or an order of court provides otherwise, the following acts may not be concluded without the consent of all persons holding parental responsibilities and rights in respect of those acts: 30
- (a) The contracting of a marriage by the child;
- (b) the adoption of the child;
- (c) the departure or removal of the child from the Republic;
- (d) the application for a passport by or on behalf of the child; or
- (e) the alienation or encumbrance of immovable property belonging to the child, including any right to or interest in immovable property. 35

Major decisions involving child

- 31.** (1) Before a person holding parental responsibilities and rights in respect of a child takes any decision contemplated in subsection (2) involving the child, that person must give due consideration to any views and wishes expressed— 40
- (a) by the child, bearing in mind the child's age, maturity and stage of development; and
- (b) by any co-holder of parental responsibilities and rights in respect of the child.
- (2) A decision referred to in subsection (1) is, for purposes of— 45
- (a) subsection (1)(a), any decision— 45
- (i) in connection with a matter listed in section 30(5);
- (ii) affecting contact between the child and a co-holder of parental responsibilities and rights;
- (iii) regarding the assignment of parental responsibilities and rights in respect of the child to a parent-substitute in terms of section 26; or 50
- (iv) which is likely to change significantly, or to have an adverse effect on, the child's living conditions, education, health, personal relations with a parent or family member or, generally, the child's well-being; and
- (b) subsection (1)(b), any decision which is likely to change significantly, or to have a significant adverse effect on, the co-holder's exercise of parental responsibilities and rights in respect of the child. 55

Care of child by persons not holding parental responsibilities and rights

- 32.** (1) A person who has no parental responsibilities and rights in respect of a child but who voluntarily cares for the child either indefinitely, temporarily or partially, including a care-giver who otherwise has no parental responsibilities and rights in respect of a child, must, whilst the child is in that person's care— 5
- (a) safeguard the child's health, well-being and development; and
 - (b) protect the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation and any other physical or mental harm or hazards.
- (2) A person referred to in subsection (1) may exercise any parental responsibilities and rights reasonably necessary to comply with subsection (1), including the right to consent to any medical examination or treatment of the child if such consent cannot reasonably be obtained from the parent or primary care-giver of the child. 10
- (3) A court may limit or restrict the parental responsibilities and rights which a person may exercise in terms of subsection (2).
- (4) A person referred to in subsection (1) may not— 15
- (a) hold himself or herself out as the biological or adoptive parent of the child; or
 - (b) deceive the child or any other person into believing that that person is the biological or adoptive parent of the child.

Part 3

Parenting plans 20

Contents of parenting plans

- 33.** (1) If the co-holders of parental responsibilities and rights in respect of a child are experiencing difficulties in exercising their responsibilities and rights, those persons, before seeking the intervention of a court, must first seek to agree on a parenting plan determining the exercise of their respective responsibilities and rights in respect of the child. 25
- (2) A parenting plan may determine any matter in connection with parental responsibilities and rights, including—
- (a) where and with whom the child is to live;
 - (b) the maintenance of the child; 30
 - (c) contact between the child and—
 - (i) any of the parties; and
 - (ii) any other person; and
 - (d) the schooling and religious upbringing of the child.
- (3) A parenting plan must comply with the best interest of the child standard as set out in section 6. 35
- (4) In preparing a parenting plan the parties must seek—
- (a) the assistance of a family advocate, social worker or psychologist; or
 - (b) mediation through a social worker or other appropriate person.

Formalities 40

- 34.** (1) A parenting plan—
- (a) must be in writing and signed by the parties to the agreement; and
 - (b) subject to subsection (2), may be registered with a family advocate or made an order of court.
- (2) An application for registration of a parenting plan must— 45
- (a) be in the format and contain the particulars prescribed by regulation; and
 - (b) be accompanied by—
 - (i) a copy of the plan; and
 - (ii) a statement by—
 - (aa) a family advocate, social worker or psychologist contemplated in section 33(4)(a) that the plan was prepared after consultation with such family advocate, social worker or psychologist; or 50
 - (bb) a social worker or other appropriate person contemplated in section 33(4)(b) that the plan was prepared after mediation by such social worker or person. 55

Amendment or termination of registered parenting plans

- 35.** (1) A registered parenting plan may be amended or terminated only by an order of court on application—
- (a) by the co-holders of the parental responsibilities and rights;
 - (b) by the child, acting with leave of the court; or
 - (c) in the child’s interest, by any other person acting with leave of the court.
- (2) Section 29 applies to an application in terms of subsection (1).

Part 4

Miscellaneous

Presumption of paternity in respect of child born out of wedlock 10

- 36.** If in any legal proceedings in which it is necessary to prove that any particular person is the father of a child born out of wedlock it is proved that that person had sexual intercourse with the mother of the child at any time when that child could have been conceived, that person is, in the absence of evidence to the contrary which raises a reasonable doubt, presumed to be the biological father of the child. 15

Refusal to submit to taking of blood samples

- 37.** If a party to any legal proceedings in which the paternity of a child has been placed in issue has refused to submit himself or herself, or the child, to the taking of a blood sample in order to carry out scientific tests relating to the paternity of the child, the court must warn such party of the effect which such refusal might have on the credibility of that party. 20

Effect of subsequent marriage of parents on children

- 38.** (1) A child born of parents who marry each other after the birth of the child must for all purposes be regarded as a child born of parents married at the time of his or her birth. 25
- (2) Subsection (1) applies despite the fact that the parents could not have legally married each other at the time of conception or birth of the child.

Rights of children born of voidable marriages

- 39.** (1) The rights of a child conceived or born of a voidable marriage shall not be affected by the annulment of that marriage. 30
- (2) No voidable marriage may be annulled until the relevant court has inquired into and considered the safeguarding of the rights and interests of a child of that marriage.
- (3) Section 6 of the Divorce Act and section 4 of the Mediation in Certain Divorce Matters Act apply with the necessary changes required by the context in respect of such a child as if the proceedings in question were proceedings in a divorce action and the annulment of the marriage were the granting of a decree of divorce. 35
- (4) Section 8(1) and (2) of the Divorce Act, with the necessary changes as the context may require, applies to the rescission or variation of a maintenance order, or an order relating to the care or guardianship of, or access to, a child, or the suspension of a maintenance order or an order relating to access to a child, made by virtue of subsection (3) of this section. 40
- (5) A reference in any legislation—
- (a) to a maintenance order or an order relating to the custody or guardianship of, or access to, a child in terms of the Divorce Act must be construed as a reference also to a maintenance order or an order relating to the care or guardianship of, or access to, a child in terms of that Act as applied by subsection (3); 45
 - (b) to the rescission, suspension or variation of such an order in terms of the Divorce Act must be construed as a reference also to the rescission, suspension or variation of such an order in terms of that Act as applied by subsection (4). 50

(6) For purposes of this Act, the father of a child conceived in a voidable marriage where such marriage has been annulled is regarded to be in the same position as the father of a child who has divorced the mother of that child.

Rights of children conceived by artificial fertilisation

40. (1) (a) Whenever the gamete or gametes of any person other than a married person or his or her spouse have been used with the consent of both such spouses for the artificial fertilisation of one spouse, any child born of that spouse as a result of such artificial fertilisation must for all purposes be regarded to be the child of those spouses as if the gamete or gametes of those spouses were used for such artificial fertilisation.

(b) For the purpose of paragraph (a) it must be presumed, until the contrary is proved, that both spouses have granted the relevant consent.

(2) Subject to section 290, whenever the gamete or gametes of any person have been used for the artificial fertilisation of a woman, any child born of that woman as a result of such artificial fertilisation must for all purposes be regarded to be the child of that woman.

(3) No right, responsibility, duty or obligation arises between a child born of a woman as a result of artificial fertilisation and any person whose gamete or gametes have been used for such artificial fertilisation and the blood relations of that person, except when—

- (a) that person is the woman who gave birth to that child; or
- (b) that person was the husband of such woman at the time of such artificial fertilisation.

Access to information concerning genetic parents

41. (1) A child born as a result of artificial fertilisation or surrogacy is entitled to have access to—

- (a) any medical information concerning that child's genetic parents;
- (b) any other information concerning the child's genetic parents but not before the child reaches the age of 18 years.

(2) Information disclosed in terms of subsection (1) may not reveal the identity of the person whose gamete or gametes have been used for such artificial fertilisation or the identity of the surrogate mother.

(3) The Director-General for Health or any other person specified by regulation may require a person to receive counselling before any information in terms of subsection (1) is disclosed.

CHAPTER 5

CHILDREN'S COURTS

Part 1

Establishment, status and jurisdiction

Children's courts and presiding officers

42. (1) For the purposes of this Act, every magistrate's court, as defined in the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), must be a children's court and must have jurisdiction on any matter arising from the application of this Act for the area of its jurisdiction.

(2) Every magistrate is a presiding officer of a children's court and every additional magistrate is an assistant presiding officer of a children's court for the district of which he or she is magistrate, additional magistrate or assistant magistrate.

(3) The presiding officer of the children's court is subject to the administrative control of the head of an administrative region, defined in section 1 of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944).

(4) The presiding officer of the children's court must perform such functions as may be assigned to him or her under this Act or any other law.

(5) For purposes of giving full effect to this Act, magistrates or additional magistrates may be designated as presiding officers for one or more children's courts.

- (6) The Minister for Justice and Constitutional Development may, after consultation with the head of an administrative region as mentioned in subsection (3), by notice in the *Gazette* define the area of jurisdiction of each children's court and increase or reduce the area of jurisdiction of each children's court.
- (7) Children's court hearings must, as far as is practicable, be held in a room which— 5
- (a) is furnished and designed in a manner aimed at putting children at ease;
 - (b) is conducive to the informality of the proceedings and the active participation of all persons involved in the proceedings without compromising the prestige of the court; and
 - (c) is not ordinarily used for the adjudication of criminal trials. 10
- (8) A children's court sits at a place within the district or province designated by the Minister for Justice and Constitutional Development as a magistrate's court.
- (9) The publication of a notice referred to in subsection (6) does not affect proceedings which have been instituted but not yet completed at the time of such publication. 15

Status

43. A children's court is a court of record and has a status similar to that of a magistrate's court at district level.

Jurisdiction of children's courts

44. (1) A children's court has jurisdiction in respect of— 20
- (a) all matters that a children's court may adjudicate mentioned in section 45(1) and (2); and
 - (b) all matters in which application is made for an order mentioned in section 46.
- (2) The children's court that has jurisdiction in a particular matter is— 25
- (a) the court of the area in which the child involved in the matter is ordinarily resident; or
 - (b) if more than one child is involved in the matter, the court of the area in which any of those children is ordinarily resident.
- (3) Where it is unclear which court has jurisdiction in a particular matter, the children's court before which the child is brought has jurisdiction in that matter. 30

Matters children's courts may adjudicate

45. (1) For purposes of this Act, a children's court may adjudicate any matter involving—
- (a) the protection and well-being of a child;
 - (b) the care of, or contact with, a child; 35
 - (c) paternity of a child;
 - (d) support of a child;
 - (e) the provision of—
 - (i) early childhood development services; or
 - (ii) prevention or early intervention services; 40
 - (f) maltreatment, abuse, neglect, degradation or exploitation of a child, except criminal prosecutions in this regard;
 - (g) the temporary safe care of a child;
 - (h) alternative care of a child;
 - (i) the adoption of a child, including an inter-country adoption; 45
 - (j) a child and youth care centre, a partial care facility or a shelter or drop-in centre, or any other facility purporting to be a care facility for children; or
 - (k) any other matter relating to the care, protection or well-being of a child provided for in this Act.
- (2) A children's court — 50
- (a) may try and convict a person for non-compliance with an order of a children's court or contempt of such a court;
 - (b) may not try or convict a person in respect of a criminal charge other than in terms of paragraph (a); and
 - (c) is bound by the law applicable to magistrates' courts when exercising criminal 55 jurisdiction in terms of paragraph (a).

(3) Pending the establishment of family courts by an Act of Parliament, the High Courts and divorce courts have exclusive jurisdiction over the following matters contemplated in this Act:

- (a) The guardianship of a child;
- (b) artificial fertilisation of a child; 5
- (c) the appointment of a parent-substitute;
- (d) the departure, removal or abduction of a child from the Republic;
- (e) applications requiring the return of a child to the Republic from abroad;
- (f) the age of majority or the contractual or legal capacity of a child; and
- (g) the safeguarding of a child's interest in property. 10

(4) Nothing in this Act shall be construed as limiting the inherent jurisdiction of the High Courts as upper guardians of all children.

Orders children's courts may make

46. (1) A children's court may make the following orders:

- (a) An alternative care order, which includes an order placing a child— 15
 - (i) in the care of a person designated by the court to be the foster parent of the child;
 - (ii) in the care of a family member designated by the court to be the kinship care-giver of the child;
 - (iii) in the care of a child and youth care centre; or 20
 - (iv) in temporary safe care;
- (b) an order placing a child in a child-headed household in the care of the child heading the household under the supervision of an adult person designated by the court;
- (c) an adoption order, which includes an inter-country adoption order; 25
- (d) a partial care order instructing the parent or care-giver of the child to make arrangements with a partial care facility to take care of the child during specific hours of the day or night or for a specific period;
- (e) a shared care order instructing different care-givers or child and youth care centres to take responsibility for the care of the child at different times or periods; 30
- (f) a supervision order, placing a child, or the parent or care-giver of a child, or both the child and the parent or care-giver, under the supervision of a social worker or other person designated by the court;
- (g) an order subjecting a child, a parent or care-giver of a child, or any person 35 holding parental responsibilities and rights in respect of a child, to—
 - (i) early intervention services;
 - (ii) a family preservation programme; or
 - (iii) both early intervention services and a family preservation programme;
- (h) a child protection order, which includes an order— 40
 - (i) that a child remains in, be released from, or returned to the care of a person, subject to conditions imposed by the court;
 - (ii) giving consent to medical treatment of, or to an operation to be performed on, a child;
 - (iii) instructing a parent or care-giver of a child to undergo professional counselling or to participate in mediation, a family group conference, or other appropriate problem-solving forum; 45
 - (iv) instructing a child or other person involved in the matter concerning the child to participate in a professional assessment;
 - (v) instructing a hospital to retain a child who on reasonable grounds is suspected of having been subjected to abuse or deliberate neglect, pending further inquiry; 50
 - (vi) instructing a person to undergo a specified skills development, training, treatment or rehabilitation programme where this is necessary for the protection or well-being of a child; 55
 - (vii) instructing a person who has failed to fulfil a statutory duty towards a child to appear before the court and to give reasons for the failure;
 - (viii) instructing an organ of state to assist a child in obtaining access to a public service to which the child is entitled, failing which, to appear through its representative before the court and to give reasons for the failure; 60

- (ix) instructing that a person be removed from a child's home;
- (x) limiting access of a person to a child or prohibiting a person from contacting a child; or
- (xi) allowing a person to contact a child on the conditions as specified in the court order; 5
- (i) a contribution order in terms of this Act;
- (j) an order instructing a person to carry out an investigation in terms of section 50;
- (k) any other order which a children's court may make in terms of any other provision of this Act. 10

(2) A children's court may withdraw, suspend or amend an order made in terms of subsection (1), or replace such an order with a new order.

Referral of children to children's court by other courts

47. (1) If it appears to any court in the course of proceedings that a child involved in or affected by those proceedings is in need of care and protection as is contemplated in section 150, the court must order that the question whether the child is in need of care and protection be referred to a children's court for decision. 15

(2) If it appears to a court in the course of any proceedings in terms of the Matrimonial Affairs Act, 1953 (Act No. 37 of 1953), the Divorce Act, the Maintenance Act or the Domestic Violence Act, 1998 (Act No. 116 of 1998), that allegations of abuse or neglect made in respect of a child of any of the parties to the proceedings are well-founded, the court— 20

- (a) may suspend the proceedings pending the outcome of an inquiry by the children's court into the question whether the child is in need of care and protection; and 25
- (b) must request a Director for Public Prosecutions to attend to the allegations of abuse or neglect.

(3) A court issuing an order in terms of subsection (1) or (2) may also order that the child be placed in temporary safe care if it appears to the court that this is necessary for the safety and well-being of the child. 30

Additional powers

48. (1) A children's court may—

- (a) grant interdicts and auxiliary relief;
- (b) extend, withdraw, suspend, vary or monitor any of its orders;
- (c) impose or vary time deadlines with respect to any of its orders; 35
- (d) make appropriate orders as to costs in matters before the court;
- (e) order the removal of a person from the court after noting the reason for the removal on the court record.

(2) A children's court may for the purposes of this Act estimate the age of a person who appears to be a child in the prescribed manner. 40

Lay forum hearings

49. (1) A children's court may, before it decides a matter or an issue in a matter, order a lay forum hearing in an attempt to settle the matter or issue out of court, which may include—

- (a) mediation by a family advocate, social worker, social service professional or other professionally qualified person; 45
- (b) a family group conference contemplated in section 70; or
- (c) mediation contemplated in section 71.

(2) Before ordering a lay forum hearing, the court must take into account all relevant factors, including— 50

- (a) the vulnerability of the child;
- (b) the ability of the child to participate in the proceedings;
- (c) the power relationships within the family; and
- (d) the nature of any allegations made by parties in the matter.

Investigations

- 50.** (1) A children's court may, before it decides a matter, order any person—
- (a) to carry out an investigation or further investigation that may assist the court in deciding the matter; and
 - (b) to furnish the court with a report and recommendation thereon. 5
- (2) An investigation or further investigation must be carried out—
- (a) in accordance with any procedures prescribed by regulation; and
 - (b) subject to any directions and conditions determined in the court order.
- (3) The court order may authorise a designated social worker or any other person authorised by the court to conduct the investigation or further investigation to enter any premises mentioned in the court order, either alone or in the presence of a police official, and on those premises— 10
- (a) remove a child in terms of section 47;
 - (b) investigate the circumstances of the child;
 - (c) record any information; and 15
 - (d) carry out any specific instruction of the court.
- (4) In addition to the powers a police official has in terms of the South African Police Service Act, 1995 (Act No. 68 of 1995), the police official accompanying the designated social worker or other person authorised to conduct the investigation or further investigation may— 20
- (a) enter the premises mentioned in the court order and conduct any search;
 - (b) question any person;
 - (c) request the name, address and identification details of any person on or residing or suspected to be residing on those premises;
 - (d) record any information; and 25
 - (e) carry out any specific instruction of the court.
- (5) A police official referred to in subsection (4) may use such force as may be reasonably necessary to overcome any resistance against the entry or search of the premises contemplated in subsection (4)(a), including the breaking of any door or window of such premises: Provided that such police official must first audibly demand admission to the premises and notify the purpose for which he or she seeks to enter such premises. 30

Appeals

- 51.** (1) Any party involved in a matter before a children's court may appeal against any order made or any refusal to make an order, or against the variation, suspension or rescission of such order of the court to the High Court having jurisdiction. 35
- (2) An appeal in terms of subsection (1) must be noted and prosecuted as if it were an appeal against a civil judgment of a magistrate's court, subject to section 45(2)(c).

Part 2

Court proceedings 40

Rules and court proceedings

- 52.** (1) Except as is otherwise provided in this Act, the provisions of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), and of the rules made in terms thereof as well as the rules made under the Rules Board for Courts of Law Act, 1985 (Act No. 107 of 1985), apply, with the necessary changes required by the context, to the children's court in so far as these provisions relate to— 45
- (a) the issue and service of process;
 - (b) the appearance in court of advocates and attorneys;
 - (c) the execution of court orders;
 - (d) contempt of court; and 50
 - (e) penalties for—
 - (i) non-compliance with court orders;
 - (ii) obstruction of the execution of judgments; and
 - (iii) contempt of court.
- (2) Rules made in terms of subsection (1) must be designed to avoid adversarial procedures and include rules concerning— 55

- (a) appropriate questioning techniques for—
 - (i) children in general;
 - (ii) children with intellectual or psychiatric difficulties or with hearing or other physical disabilities which complicate communication;
 - (iii) traumatised children; and
 - (iv) very young children; and
- (b) the use of suitably qualified or trained interpreters.

Who may approach court

53. (1) Except where otherwise provided in this Act, any person listed in this section may bring a matter which falls within the jurisdiction of a children's court to a clerk of the children's court for referral to a children's court. 10

(2) The persons who may approach a court are:

- (a) A child who is affected by or involved in the matter to be adjudicated;
- (b) anyone acting in the interest of the child;
- (c) anyone acting on behalf of a child who cannot act in his or her own name; 15
- (d) anyone acting as a member of, or in the interest of, a group or class of children;
- (e) anyone acting in the public interest.

Legal representation

54. A person who is a party in a matter before a children's court is entitled to appoint a legal practitioner of his or her own choice and at his or her own expense. 20

Legal representation of children

55. (1) Notwithstanding the provisions of section 54, a child involved in a matter before a children's court is entitled to legal representation.

(2) (a) A child may request the court to appoint a legal practitioner to represent him or her in such matter. 25

(b) If a legal practitioner appointed in terms of paragraph (a) does not serve the interests of the child in the matter, the court may terminate the appointment.

(3) If no legal practitioner is appointed in terms of subsection (2)(a), the court must inform the parent or care-giver of the child or a person who has parental responsibilities and rights in respect of the child, if present at the proceedings, and the child, if the child is capable of understanding, of the child's right to legal representation. 30

(4) If no legal practitioner is appointed in terms of subsection (2)(a) after the court has complied with subsection (3), or if the court has terminated the appointment of a legal practitioner in terms of subsection (2)(b), the court may order that a legal practitioner be assigned to the child by the state, and at state expense, if substantial injustice would otherwise result. 35

(5) The court must record its reasons if it declines to issue an order in terms of subsection (4).

(6) If the court makes an order in terms of subsection (4), the clerk of the children's court must request the Legal Aid Board to instruct a legal practitioner to represent the child. 40

Attendance at proceedings

56. Proceedings of a children's court are closed and may be attended only by—

- (a) a person performing official duties in connection with the work of the court or whose presence is otherwise necessary for the purpose of the proceedings; 45
- (b) the child involved in the matter before the court and any other party in the matter;
- (c) a person who has been instructed in terms of section 57 by the clerk of the children's court to attend those proceedings;
- (d) the legal representative of a person who is entitled to legal representation; 50
- (e) a person who obtained permission to be present from the presiding officer of the children's court; and
- (f) the designated social worker managing the case.

Compulsory attendance of persons involved in proceedings

57. (1) The clerk of the children's court may, by written notice in the prescribed manner, request a party in a matter before a children's court, a family member of a child involved in the matter or a person who has another interest in the matter, to attend the proceedings of the children's court. 5

(2) The person in whose physical control the child is must ensure that the child attends those proceedings except if the clerk of the children's court or the court directs otherwise.

Rights of persons to adduce evidence, question witnesses and produce argument

58. The following persons have the right to adduce evidence in a matter before a children's court and, with the permission of the presiding officer of the children's court, to question or cross-examine a witness or to address the court in argument: 10

- (a) A child involved in the matter;
- (b) a parent of the child;
- (c) a person who has parental responsibilities and rights in respect of the child; 15
- (d) a care-giver of the child;
- (e) a person whose rights may be affected by an order that may be made by the court in those proceedings; and
- (f) a person who the court decides has a sufficient interest in the matter.

Witnesses 20

59. (1) The clerk of the children's court must, in the prescribed manner, summons a person to appear as a witness in a matter before the court to give evidence or to produce a book, document or other written instrument on request by—

- (a) the presiding officer in the matter;
- (b) the child or a person whose rights may be affected by an order that may be made by the court in those proceedings; or 25
- (c) the legal representative of a person mentioned in paragraph (b).

(2) A summons mentioned in subsection (1) must be served on the witness as if it were a summons to give evidence or to produce a book, document or other written instrument at a criminal trial in a magistrate's court. 30

(3) Sections 188 and 189 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), read with such changes as the context may require, apply to a person who has been summonsed in terms of subsection (1) or required by the presiding officer to give evidence.

(4) A person summonsed in terms of subsection (1)(a) and who complied with the summons, is entitled to an allowance from state funds equal to that determined for witnesses summonsed to appear in criminal trials in a magistrate's court. 35

(5) A person summonsed in terms of subsection (1)(b) or (c) is not entitled to an allowance from state funds except if the presiding officer so orders.

Conduct of proceedings 40

60. (1) The presiding officer in a matter before a children's court controls the conduct of the proceedings, and may—

- (a) call any person to give evidence or to produce a book, document or other written instrument;
- (b) question or cross-examine that person; or 45
- (c) to the extent necessary to resolve any factual dispute which is directly relevant in the matter, allow that person to be questioned or cross-examined by—
 - (i) the child involved in the matter;
 - (ii) the parent of the child;
 - (iii) a person who has parental responsibilities and rights in respect of the child; 50
 - (iv) a care-giver of the child;
 - (v) a person whose rights may be affected by an order that may be made by the court in those proceedings; or
 - (vi) the legal representative of a person who is entitled to legal representation 55 in those proceedings.

(2) If a child is present at the proceedings, the court may order any person present in the room where the proceedings take place to leave the room if such order would be in the best interest of that child.

(3) Children's court proceedings must be conducted in an informal manner and, as far as possible, in a relaxed and non-adversarial atmosphere which is conducive to attaining the co-operation of everyone involved in the proceedings. 5

Participation of children

61. (1) The presiding officer in a matter before a children's court must—
 (a) allow a child involved in the matter to express a view and preference in the matter if the court finds that the child, given the child's age, maturity and stage of development, is able to participate meaningfully in the proceedings and the child chooses to do so; 10

(b) record the reasons if the court finds that the child is unable to participate meaningfully in the proceedings or is unwilling to express a view or preference in the matter; and 15

(c) intervene in the questioning or cross-examination of a child if the court finds that this would be in the best interest of the child.

(2) A child who is a party or a witness in a matter before a children's court may be questioned through an intermediary as provided for in section 170A of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), if the court finds that this would be in the best interest of that child. 20

(3) The court—

(a) may, at the outset or at any time during the proceedings, order that the matter, or any issue in the matter, be disposed of separately and in the absence of the child, if it is in the best interest of the child; and 25

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

Professional reports ordered by court

62. (1) A children's court, for the purposes of deciding a matter before it or any issue in the matter, may order, if necessary, that a designated social worker, family advocate, psychologist, medical practitioner or other suitably qualified person carry out an investigation to establish the circumstances of— 30

(a) the child;

(b) the parents or a parent of the child;

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

(d) a care-giver of the child; 35

(e) the person in whose control the child is; or

(f) any other relevant person.

(2) A person referred to in subsection (1) may, subject to section 63(1) and (2)—

(a) obtain supplementary evidence or reports from other suitably qualified persons; 40

(b) be required by the court to present the findings of the investigation to the court by—

(i) testifying before the court; or

(ii) submitting a written report to the court.

Evidence 45

63. (1) A written report, purported to be compiled and signed by a medical practitioner, psychologist, family advocate, designated social worker or other professional person who on the face of the report formed an authoritative opinion in respect of a child or the circumstances of a child involved in a matter before a children's court, or in respect of another person involved in the matter or the circumstances of such other person, is, subject to the decision of the presiding officer, on its mere production to the children's court hearing the matter admissible as evidence of the facts stated in the report. 50

(2) The written report contemplated in subsection (1) must be submitted to the children's court within the prescribed period prior to the date of the hearing of the matter. 55

- (3) If a person's rights are prejudiced by a report referred to in subsection (1) the court must—
- (a) disclose the relevant parts of the report to that person within the prescribed period prior to the date of the hearing of the matter if that person is a party to the proceedings; and 5
 - (b) give that person the opportunity—
 - (i) to question or cross-examine the author of the report in regard to a matter arising from the report; or
 - (ii) to refute any statement contained in the report.

Adjournments 10

- 64.** (1) The proceedings of a children's court may be adjourned only—
- (a) on good cause shown, taking into account the best interest of the child;
 - (b) for a period of not more than 30 days at a time.
- (2) A presiding officer of a children's court may excuse any person from appearing at adjournment proceedings. 15

Monitoring of court orders

- 65.** (1) A children's court may monitor—
- (a) compliance with an order made by it in a matter; or
 - (b) the circumstances of a child following an order made by it.
- (2) For purposes of monitoring compliance with an order made by a children's court or the circumstances of a child following an order, the court— 20
- (a) when making that order, may order—
 - (i) any person involved in the matter to appear before it at any future date; or
 - (ii) that reports by a designated social worker be submitted to the court within a specified period or from time to time as specified in the order; 25
 - (b) at any time after making an order or when a report of non-compliance mentioned in subsection (4) is referred to it, may call or recall any person involved in the matter to appear before it.
- (3) When a person appears before the court in terms of subsection (2) the court may— 30
- (a) inquire whether the order has been or is being complied with, and if not, why the order has not been complied with or is not being complied with;
 - (b) confirm, vary or withdraw the order; or
 - (c) enforce compliance with the order, if necessary through a criminal prosecution in a magistrate's court or in terms of section 45(2). 35
- (4) Any person may report any alleged non-compliance with an order of a children's court, or any alleged worsening of the circumstances of a child following a court order, to the clerk of the children's court, who must refer the matter to a presiding officer for a decision on possible further action.

Protection of court case records 40

- 66.** Subject to the provisions of the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000), no person has access to children's court case records, except—
- (a) for the purpose of performing official duties in terms of this Act;
 - (b) in terms of an order of court if the court finds that such access would not compromise the best interest of the child; 45
 - (c) for the purpose of a review or appeal; or
 - (d) for the purpose of bona fide research or the reporting of cases in law reports, provided the provisions of section 74 are complied with.

Part 3

Clerks of children's courts 50

Appointment or designation of clerks of children's courts

- 67.** (1) Subject to the laws governing the public service, the Director-General: Justice and Constitutional Development may, for every children's court, appoint or designate

one or more officers in the Department, or may appoint one or more persons in the prescribed manner and on the prescribed conditions, as clerks of the children's court, who must generally assist the court to which they are attached in performing its functions and who must perform the functions as may be prescribed in this Act or by way of regulation or in any other law. 5

(2) If a clerk of the children's court is for any reason unable to act as such or if no clerk of the children's court has been appointed or designated for any children's court under subsection (1), the presiding officer of the children's court may designate any competent officer in the Department to act as a clerk of the children's court for as long as the said clerk of the children's court is unable to act or until a clerk of the children's court is appointed or designated under subsection (1), as the case may be. 10

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

Referral of matters to children's court by clerk of children's court

68. If a clerk of the children's court is of the opinion that any child is in need of care and protection, the clerk of the children's court must, in the prescribed manner, cause that child to be brought before the children's court of the district in which the child resides by any police official, designated social worker, social service professional, authorised officer or by a parent, guardian or other person caring for the child. 15

Pre-hearing conferences 20

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

- (a) mediate between the parties;
- (b) settle disputes between the parties to the extent possible; and 25
- (c) define the issues to be heard by the court.

(2) Pre-hearing conferences may not be held in the event of a matter involving the alleged abuse or sexual abuse of a child.

(3) The child involved in the matter may attend and may participate in the conference unless the children's court decides otherwise. 30

(4) The court may—

- (a) prescribe how and by whom the conference should be set up, conducted and by whom it should be attended; and
- (b) prescribe the manner in which a record is kept of any agreement or settlement reached between the parties and any fact emerging from such conference 35 which ought to be brought to the notice of the court;
- (c) consider the report on the conference when the matter is heard.

Family group conferences

70. (1) The children's court may cause a family group conference to be set up with the parties involved in a matter brought to or referred to a children's court, including any other family members of the child, in order to find solutions for any problem involving the child. 40

(2) The children's court must—

- (a) appoint a suitably qualified person or organisation to facilitate at the family group conference; 45
- (b) prescribe the manner in which a record is kept of any agreement or settlement reached between the parties and any fact emerging from such conference which ought to be brought to the notice of the court; and
- (c) consider the report on the conference when the matter is heard.

Other lay forums 50

71. (1) The children's court may, where circumstances permit, refer a matter brought or referred to a children's court to any appropriate lay forum, including a traditional authority, in an attempt to settle the matter by way of mediation out of court.

(2) Lay forums may not be held in the event of a matter involving the alleged abuse or sexual abuse of a child. 55

- (3) The children's court may—
- (a) prescribe the manner in which a record is kept of any agreement or settlement reached between the parties and any fact emerging from such conference which ought to be brought to the notice of the court; and
 - (b) consider a report on the proceedings before the lay forum to the court when the matter is heard. 5

Settling of matters out of court

72. (1) If a matter is settled out of court and the settlement is accepted by all parties involved in the matter, the clerk of the children's court must submit the settlement to the children's court for confirmation or rejection. 10

(2) The court must consider the settlement and, if it is in the best interest of the child, may—

- (a) confirm the settlement and make it an order of court;
- (b) before deciding the matter, refer the settlement back to the parties for reconsideration of any specific issues; or 15
- (c) reject the settlement.

Other functions

73. The clerk of the children's court—

- (a) may attend every children's court hearing; and
- (b) must, when ordered by the court in terms of section 55, arrange legal representation for a child before the court. 20

Part 4

Miscellaneous matters

Publication of information relating to proceedings

74. No person may, without the permission of a court, in any manner publish any information relating to the proceedings of a children's court which reveals or may reveal the name or identity of a child who is a party or a witness in the proceedings. 25

Regulations

75. (1) The Minister for Justice and Constitutional Development, after consultation with the Minister, may make regulations concerning— 30

- (a) the procedures to be followed at or in connection with the proceedings of children's courts;
- (b) the form of any application, authority, certificate, consent, notice, order, process, register or subpoena to be made, given, issued or kept;
- (c) the carrying out and monitoring of investigations in terms of section 50(2), procedures regulating such investigations and the gathering of evidence; 35
- (d) the holding of pre-hearing conferences in terms of section 69, procedures regulating such conferences and information that must be submitted to a children's court;
- (e) the holding and monitoring of family group conferences or other lay forums in terms of sections 70 and 71, procedures regulating such conferences and other lay forums and information that must be submitted to a children's court; 40
- (f) the qualifications and experience of persons facilitating family group conferences, including special requirements that apply to persons facilitating in matters involving the alleged abuse of children; 45
- (g) documents in connection with matters brought to a children's court and records of the proceedings of children's courts, including regulations determining—
 - (i) the person by whom, the period for which and the manner in which those documents and records must be kept; and 50
 - (ii) access to those documents and records;
- (h) the keeping of records with regard to matters brought to and dealt with by the children's court;

- (i) the submission of court statistics and progress reports on those matters to the Magistrates' Commission established by section 2 of the Magistrates Act, 1993 (Act No. 90 of 1993);
 - (j) the payment of remuneration to persons who are not in the employ of the State as contemplated in sections 49, 50, 62, 69, 70 and 71; 5
 - (k) any other matter required or permitted to be prescribed by regulations under this Act.
- (2) Section 299(2) and (3), read with such changes as the context may require, applies to the making of regulations in terms of subsection (1) of this section.

CHAPTER 6 10

PARTIAL CARE

Partial care

76. Partial care is provided when a person, whether for or without reward, takes care of more than six children on behalf of their parents or care-givers during specific hours of the day or night, or for a temporary period, in terms of a private arrangement between the parents or care-givers and the provider of the service, but excludes the taking care of a child— 15

- (a) by a school as part of tuition, training and other activities provided by the school;
- (b) as a boarder in a school hostel or other residential facility managed as part of a school; or 20
- (c) by a hospital or other medical facility as part of the treatment provided to the child.

CHAPTER 7 25

EARLY CHILDHOOD DEVELOPMENT

Early childhood development

91. (1) Early childhood development, for the purposes of this Act, means the process of emotional, mental, spiritual, moral, physical and social development of children from birth to school-going age. 30

(2) Early childhood development services means services—

- (a) intended to promote early childhood development; and
- (b) provided by a person, other than a child's parent or primary care-giver, on a regular basis to children up to school-going age.

(3) Early childhood development programmes means programmes structured to provide early childhood development services. 35

CHAPTER 10

CHILD IN NEED OF CARE AND PROTECTION

Part 1 40

Identification of child in need of care and protection

Child in need of care and protection

150. A child is in need of care and protection if, at the time of referral in terms of section 47, the child—

- (a) has been abandoned or orphaned or is without any visible means of support; 45
- (b) displays behaviour which cannot be controlled by the parent or care-giver;
- (c) lives or works on the streets or begs for a living;

- (d) is addicted to a dependence-producing substance and is without any support to obtain treatment for such dependency;
- (e) has been exploited or lives in circumstances that expose the child to exploitation;
- (f) lives in or is exposed to circumstances which may seriously harm that child's physical, mental or social well-being; 5
- (g) may be at risk if returned to the custody of the parent, guardian or care-giver of the child as there is reason to believe that he or she will live in or be exposed to circumstances which may seriously harm the physical, mental or social well-being of the child; 10
- (h) is in a state of physical or mental neglect; or
- (i) is being maltreated, abused, deliberately neglected or degraded by a parent, a care-giver, a person who has parental responsibilities and rights or a family member of the child, or by a person under whose control the child is.

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CHAPTER 12

CHILDREN IN ALTERNATIVE CARE

Alternative care

- 167.** A child is in alternative care if the child has been placed—
- (a) in foster care; 20
 - (b) in court-ordered kinship care;
 - (c) in the care of a child and youth care centre following an order of a court in terms of this Act or the Criminal Procedure Act, 1977 (Act No. 51 of 1977); or
 - (d) in temporary safe care. 25

CHAPTER 16

ADOPTION

Adoption

228. A child is adopted if the child has been placed in the permanent care of a person who is not the parent or guardian of the child as a result of a court order that has the effects contemplated in section 240. 30

Purposes of adoption

- 229.** The purposes of adoption are to—
- (a) protect and nurture children by providing a safe, healthy environment with positive support; 35
 - (b) promote the goals of permanency planning by connecting children to other safe and nurturing family relationships intended to last a lifetime; and
 - (c) respect the individual and family by demonstrating respect for cultural, ethnic and community diversity. 40

Children who may be adopted

- 230.** Any child may be adopted provided—
- (a) the adoption is in the best interest of the child; and
 - (b) the provisions of this Chapter are complied with.

Persons who may adopt child 45

- 231.** (1) A child may be adopted—
- (a) jointly by—

- (i) a husband and wife;
- (ii) partners in a permanent domestic conjugal life-partnership; or
- (iii) other persons sharing a common household and forming a family unit;
- (b) by a widower, widow, divorced or unmarried person;
- (c) by a married person whose spouse is the parent of the child or by a person 5
whose permanent domestic conjugal life-partner is the parent of the child;
- (d) by the biological father of a child born out of wedlock;
- (e) by the foster parent or parents of the child; or
- (f) by the kinship care-giver of the child.
- (2) A prospective adoptive parent or parents must be— 10
 - (a) fit and proper to be entrusted with full parental responsibilities and rights in respect of the child;
 - (b) willing and able to undertake, exercise and maintain those responsibilities and rights;
 - (c) over the age of 18 years; and 15
 - (d) properly assessed by an adoption social worker for compliance with paragraphs (a) and (b).
- (3) A person may not be disqualified from adopting a child based on his or her financial status.
- (4) Any person who adopts a child may apply for means-tested social assistance 20
where applicable.
- (5) A person unsuitable to work with children is not a fit and proper person to adopt a child.
- (6) (a) The foster parent or kinship care-giver of a child has the right to be considered as a prospective adoptive parent when the child becomes available for adoption. 25
- (b) The foster parent or kinship care-giver of a child must be regarded as having elected not to apply for the adoption of the child if that foster parent or kinship care-giver fails to apply for the adoption of the child within 30 days after a notice calling on that foster parent or kinship care-giver to do so has been served on that foster parent or kinship care-giver by the clerk of the children's court or the sheriff. 30
- (7) A family member of a child other than a kinship care-giver who, prior to the adoption, has given notice to the clerk of the children's court that he or she is interested in adopting the child has the right to be considered as a prospective adoptive parent when the child becomes available for adoption.

Consent to adoption 35

- 232.** (1) A child may be adopted only if consent for the adoption has been given by —
- (a) each parent of the child, whether the parents are married or not; and
 - (b) any other person who holds guardianship in respect of the child.
- (2) Subsection (1) excludes a parent or person referred to in section 234 and a child 40
may be adopted without the consent of such a parent or person.
- (3) If the parent of a child wishes the child to be adopted by a particular person or persons the parent must state the name of that person or persons in the consent.
- (4) The eligibility of the particular person or persons contemplated in subsection (3) as an adoptive parent or parents must be determined by the court in terms of section 231(2). 45
- (5) Consent referred to in subsection (1) and given—
- (a) in the Republic, must be—
 - (i) signed by the person consenting in the presence of a clerk of the children's court;
 - (ii) verified by the clerk of the children's court in the manner prescribed by 50
regulation; and
 - (iii) filed by the clerk of the children's court pending an application for the adoption of the child; or
 - (b) outside the Republic, must be—
 - (i) signed by the person consenting in the presence of a person prescribed by 55
regulation;
 - (ii) verified in a manner and by a person prescribed by regulation; and
 - (iii) submitted to and filed by a clerk of the children's court pending an application for the adoption of the child.
- (6) The court may on good cause shown condone any deficiency in the provision of 60
a consent given outside the Republic in that the consent—

- (a) was not signed in the presence of a person prescribed by regulation; or
- (b) was not verified in a manner or by a person prescribed by regulation.

(7) A parent of a child or a person referred to in subsection (1)(b) who has consented to the adoption of the child may withdraw the consent within 60 days after having signed the consent, after which the consent is final.

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Freeing orders

233. (1) The court, on application by the Department, a provincial department of social development, a designated child protection organisation or an adoption social worker may issue an order freeing a parent or person whose consent to the adoption of the child is required in terms of section 232 from parental responsibilities and rights in respect of the child pending the adoption of the child.

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(2) The parent or person whose consent to the adoption of the child is required in terms of section 232 must support an application for a freeing order in terms of subsection (1).

(3) A freeing order in terms of subsection (1) must authorise a designated child protection organisation or a person to exercise parental responsibilities and rights in respect of the child pending the adoption of the child.

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(4) A freeing order lapses if—

- (a) the court refuses to grant an application in terms of section 237 for the adoption of the child;
- (b) the order is terminated by the court on the ground that it is no longer in the best interest of the child; or
- (c) the child, parent or person who gave consent withdraws consent for the adoption of the child in terms of section 232(6).

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(5) A freeing order relieves a parent or person from the duty to contribute to the maintenance of the child pending the adoption, unless otherwise ordered by the court.

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When consent not required

234. (1) The consent of a parent of the child or any other person who has parental responsibilities or rights in respect of the child is not necessary for the adoption of the child, if that parent or person—

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- (a) is incompetent to give consent due to mental illness;
- (b) has abandoned the child, or if the whereabouts of that parent or person cannot be established, or if the identity of that parent or person is unknown;
- (c) has abused or deliberately neglected the child, or has allowed the child to be abused or deliberately neglected;
- (d) has consistently failed to fulfil his or her parental responsibilities towards the child during the last 12 months;
- (e) has been divested by an order of court of the right to consent to the adoption of the child; or
- (f) has failed to respond to a notice of the proposed adoption referred to in section 236 within 30 days of service of the notice.

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(2) If the parent referred to in subsection (1) is the biological father of the child, consent for the adoption is also not necessary if—

- (a) that person is not married to the child's mother or was not married to her at the time of conception or at any time thereafter, and has not acknowledged in a manner set out in subsection (3) that he is the biological father of the child; or
- (b) the child was conceived from an incestuous relationship between that person and the mother;
- (c) the child was conceived as a result of the rape of the mother for which that person was convicted.

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(3) A person referred to in subsection (2)(a) can for the purposes of that subsection acknowledge that he is the biological father of a child in any of the following ways:

- (a) by giving a written acknowledgment that he is the biological father of the child either to the mother or the clerk of the children's court before the child reaches the age of six months;

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- (b) by voluntarily paying maintenance in respect of the child;
- (c) by paying damages in terms of customary law; or
- (d) by causing particulars of himself to be entered in the registration of birth of the child in terms of section 10(1)(b) or section 11(4) of the Births and Deaths Registration Act, 1992 (Act No. 51 of 1992). 5

(4) A children's court may on a balance of probabilities make a finding as to the existence of a ground on which a parent or person is excluded in terms of this section from giving consent for the adoption of a child.

Gathering of information for proposed adoptions

235. (1) When a child becomes available for adoption, the clerk of the children's court must take all reasonable steps to establish— 10

- (a) the name and address of each person whose consent for the adoption is required in terms of section 232; and
- (b) the name and address of any person whose consent would have been necessary had it not been for section 234, and the grounds on which such person's consent is not required. 15

(2) A person who has consented to the adoption of a child in terms of section 232 and who wants the court to dispense with any other person's consent on a ground set out in section 234 must submit a statement to that effect to the clerk of the children's court.

(3) A clerk of the children's court may request the Director-General: Home Affairs to disclose any information contained in the registration of birth of a child, including the identity and other particulars of a person who has acknowledged being the father or the mother of the child. 20

(4) If an adoption social worker involved in the proposed adoption of a child obtains information regarding the identity and whereabouts of a person whose consent for the adoption is necessary in terms of section 232 or whose consent for the adoption would have been necessary had it not been for section 234, that social worker must without delay submit a report containing that information to the clerk of the children's court. 25

Notice to be given of proposed adoptions

236. (1) When a child becomes available for adoption, the clerk of the children's court must without delay serve a notice on each person whose consent is required for the adoption in terms of section 232.

(2) The notice must—

- (a) inform the person whose consent is sought of the proposed adoption of the child; and 35
- (b) request that person either to consent to or to withhold consent for the adoption, or, if that person is the biological father of the child with whom the mother is not married, request him to consent to or withhold consent for the adoption, or to apply in terms of section 237 for the adoption of the child.

(3) If a person on whom a notice in terms of subsection (1) has been served fails to comply with a request contained in the notice within 30 days, that person must be regarded as having consented to the adoption. 40

Application for adoption orders

237. (1) An application for the adoption of a child must—

- (a) be made to a children's court in a manner prescribed by regulation; 45
- (b) be accompanied by an assessment referred to in section 231(2)(d); and
- (c) contain such particulars as may be prescribed by regulation.

(2) When an application for the adoption of a child is brought before a children's court, the clerk of the children's court must submit to the court—

- (a) any consents for the adoption of the child filed with a clerk of the children's court in terms of section 232(5); 50
- (b) any information established by a clerk of the children's court in terms of section 235(1);
- (c) any written responses to requests in terms of section 236(2);
- (d) a report on any failures to respond to those requests; and 55

- (e) any other information that may assist the court or as may be prescribed by regulation.

(3) An applicant has no access to any documents lodged with the court by other parties except with the permission of the court.

Consideration of adoption applications 5

238. (1) When considering an application for the adoption of a child, the court must take into account all relevant factors, including—

- (a) the religious and cultural background of—
 - (i) the child;
 - (ii) the child's parent or parents; and 10
 - (iii) the prospective adoptive parent or parents;
- (b) all reasonable preferences expressed by a parent and stated in the consent; and
- (c) a report in a format prescribed by regulation on the proposed adoption by an adoption social worker.

(2) A children's court considering an application may make an order for the adoption of a child only if— 15

- (a) the adoption would be in the best interest of the child;
- (b) the prospective adoptive parent or parents comply with section 231;
- (c) consent for the adoption has been given in terms of section 232, subject to section 239; 20
- (d) no such consent has been withdrawn in terms of section 232(7); and
- (e) section 231(6) has been complied with, in the case of an application for the adoption of a child in foster care or kinship care by a person or persons other than the child's foster parent or kinship care-giver.

Unreasonable withholding of consent 25

239. (1) If a parent or person referred to in section 232(1) withholds consent for the adoption of a child a children's court may, despite the absence of such consent, grant an order for the adoption of the child if the court finds that—

- (a) consent has unreasonably been withheld; and
- (b) the adoption is in the best interest of the child. 30

(2) In determining whether consent is being withheld unreasonably, the court must take into account all relevant factors, including—

- (a) the nature of the relationship during the last two years between the child and the person withholding consent and any findings by a court in this respect; and
- (b) the prospects of a sound relationship developing between the child and the person withholding consent in the immediate future. 35

Effects of adoption orders

240. (1) An adoption order, except when otherwise provided in the order, terminates—

- (a) all parental responsibilities and rights any person, including a parent, step-parent or partner in a domestic conjugal life-partnership, had in respect of the child immediately before the adoption;
- (b) all claims to contact with the child by any family member of a person referred to in paragraph (a);
- (c) all rights and responsibilities the child had in respect of a person referred to in paragraph (a) or (b) immediately before the adoption; and 45
- (d) any previous order made in respect of the placement of the child.

(2) An adoption order—

- (a) confers full parental responsibilities and rights in respect of the adopted child upon the adoptive parent or parents as contemplated in section 231(1); 50
- (b) confers the surname of the adoptive parent on the adopted child, except when otherwise provided in the order;
- (c) does not permit any marriage or sexual intercourse between the child and any other person which would have been prohibited had the child not been adopted; 55
- (d) does not affect any rights to property the child acquired before the adoption.

(3) An adopted child must for all purposes be regarded as the child of the adoptive parent and an adoptive parent must for all purposes be regarded as the parent of the adopted child.

Rescission of adoption orders

- 241.** (1) A High Court or children's court of competent jurisdiction may rescind an adoption order on application by— 5
- (a) the adopted child;
 - (b) a parent of the adopted child or other person who had parental responsibilities or rights in respect of the child immediately before the adoption; or
 - (c) the adoptive parent or parents of the child. 10
- (2) Any application in terms of subsection (1) must be lodged within a reasonable time not exceeding two years from the date of the adoption.

Grounds for rescission of adoption orders

- 242.** (1) An adoption order may be rescinded only if—
- (a) rescission of the order is in the best interest of the child; or 15
 - (b) subsection (2) applies.
- (2) An adoption order may be rescinded if—
- (a) the applicant is the parent of the child whose consent was required for the adoption order to be made, but whose consent was not obtained; or
 - (b) at the time of making the adoption order the adoptive parent or parents did not qualify in terms of section 231 for obtaining the order of adoption. 20

Notice of application for rescission

- 243.** Notice of an application for rescission of an adoption order must be given to—
- (a) the adoptive parent or parents of that child, if any other person brings the application; 25
 - (b) all persons who have consented or objected to the adoption in terms of section 232, if the child or the adoptive parent or parents bring the application;
 - (c) the Central Authority of the Republic as contemplated in section 256 in the case of an inter-country adoption; and
 - (d) any other person who the court finds has a sufficient interest in the matter. 30

Effects of rescission

- 244.** (1) As from the date on which the rescission of an adoption order takes effect—
- (a) the effects of the adoption order as determined in section 240(2) and (3) no longer apply in respect of the child concerned; and
 - (b) all responsibilities, rights and other matters terminated by section 240(1) in respect of the child are restored. 35
- (2) When rescinding an adoption order the court may—
- (a) make an appropriate placement order in respect of the child concerned; or
 - (b) order that that child be kept in temporary safe care until an appropriate placement order can be made. 40

Recording of adoption in births register

- 245.** (1) After an adoption order has been made by a children's court in respect of a child whose birth has been registered in the Republic, the adoptive parent or parents of the child must apply in terms of the applicable legislation to the Director-General: Home Affairs to record the adoption and any change of surname of the child in the births register. 45
- (2) An application in terms of subsection (1) must be accompanied by—
- (a) the relevant adoption order as registered by the adoption registrar;
 - (b) the birth certificate of the child;
 - (c) the prescribed birth registration form; and
 - (d) a fee prescribed in terms of any applicable legislation, if any. 50

Registration of birth and recording of adoption of child born outside Republic

246. (1) After an adoption order has been made by a children's court in respect of a child born outside the Republic, the adoptive parent or parents of the child must apply in terms of any applicable legislation to the Director-General: Home Affairs to register the birth of the child and to record the adoption of the child in the birth register. 5

- (2) An application in terms of subsection (1) must be accompanied by—
- (a) the relevant adoption order as registered by the adoption registrar;
 - (b) the birth certificate of the adopted child or, if the birth certificate is not available—
 - (i) other documentary evidence relating to the date of birth of the child; or 10
 - (ii) a certificate signed by a presiding officer of a children's court specifying the age or estimated age of the child;
 - (c) the birth registration form prescribed by regulation, completed as far as possible and signed by the adoptive parent or parents; and
 - (d) a fee prescribed in terms of any applicable legislation, if any. 15

Adoption register

247. (1) A person designated by the Director-General as the adoption registrar must, in the prescribed manner, record information pertaining to and keep a register of—

- (a) the registration numbers allocated to records of adoption cases;
 - (b) the personal details of adopted children, of their biological parents and of their adoptive parents; 20
 - (c) particulars of successful appeals against and rescissions of adoption orders; and
 - (d) all other information in connection with adoptions as may be prescribed by regulation. 25
- (2) A clerk of the children's court must—
- (a) keep record of all adoption cases by a children's court, including all adoption orders issued by the court, in the manner prescribed by regulation;
 - (b) as soon as is practicable after an adoption order has been issued, forward the adoption order, a copy of the record of the adoption inquiry and other 30 documents relating to the adoption as may be prescribed by regulation to the adoption registrar; and
 - (c) in the case of an inter-country adoption, forward copies of the documents referred to in paragraph (b) to the Central Authority of the Republic as contemplated in section 256. 35

Access to adoption register

248. (1) The information contained in the adoption register may not be disclosed to any person, except—

- (a) to an adopted child after the child has reached the age of 18 years;
- (b) to the adoptive parent of an adopted child after the child has reached the age of 18 years; 40
- (c) to the biological parent or a previous adoptive parent of an adopted child after the child has reached the age of 18 years, but only if the adoptive parent and the adopted child give their consent in writing;
- (d) for any official purposes subject to conditions determined by the Director-General; 45
- (e) by an order of court, if the court finds that such disclosure is in the best interest of the adopted child; or
- (f) for purposes of research provided that no information that would reveal the identity of an adopted child or his or her adoptive or biological parent is 50 revealed.

(2) The Director-General may require a person to receive counselling before disclosing any information contained in the adoptions register to that person in terms of subsection (1)(a), (b), (c) or (e).

No consideration in respect of adoptions 55

249. (1) No person may—

- (a) give or receive, or agree to give or receive, any consideration, in cash or in kind, for the adoption of a child in or outside the Republic; or
 - (b) induce a person to give up a child for adoption in or outside the Republic.
- (2) Subsection (1) does not apply to—
- (a) the biological mother of a child receiving compensation for—
 - (i) loss of earnings due to pregnancy; 5
 - (ii) medical expenses incurred in connection with her pregnancy, birth of the child and follow-up treatment;
 - (iii) expenses incurred for counselling; or
 - (iv) any other expenses as may be prescribed by regulation; 10
 - (b) a lawyer receiving reasonable fees and expenses for legal services provided in connection with an adoption;
 - (c) the Central Authority of the Republic as contemplated in section 256 receiving prescribed fees; 15
- *****
- (e) an organ of state; or
 - (f) any other persons as may be prescribed by regulation.

Only certain persons allowed to provide adoption services

- 250.** (1) No person may provide adoption services except—
- (a) a designated child protection organisation accredited in terms of section 251 to provide adoption services; 20
 - (b) an adoption social worker or a social worker accredited in terms of section 151(1)(c);
 - (c) the Central Authority of the Republic as contemplated in section 256 in the case of inter-country adoptions; or 25
 - (d) a designated child protection organisation accredited in terms of section 258 to provide inter-country adoption services.
- *****

Accreditation to perform adoption work

- 251.** (1) The Director-General may in terms of a process prescribed by regulation 30
accredit—
- (a) a social worker in private practice as an adoption social worker to provide adoption services;
 - (b) a designated child protection organisation to provide adoption services; and
 - (c) a social worker in the employ of a provincial department of social 35
development to provide adoption services.
- (2) The Director-General must keep a register of all adoption social workers and designated child protection organisations accredited to perform adoption services.

Advertising

- 252.** (1) No person may publish or cause to be published in any form or by any means 40
an advertisement dealing with the placement or adoption of a specific child.
- (2) Subsection (1) does not apply in respect of—
- (a) the publication of a notice in terms of this Act or a court order;
 - (b) an advertisement by a designated child protection organisation accredited to provide adoption services for purposes of recruitment, according to prescribed 45
guidelines; or
 - (c) other forms of advertisements specified by regulation.

Regulations

- 253.** The Minister, after consultation with the Minister for Justice and Constitutional Development, where court orders are regulated, may make regulations in terms of 50
section 299—
- (a) prescribing procedures for determining whether a child has been abandoned by a parent or other person who has parental responsibilities and rights in respect of the child;

- (b) determining procedures to be followed to locate persons whose whereabouts are unknown for obtaining their consent to adoptions;
- (c) prescribing procedures for determining the age of a child;
- (d) determining procedures for payment for adoption services undertaken by persons or organisations to prevent conflict of interests from arising; 5
- (e) prescribing advertising guidelines for recruitment purposes;
- (f) prescribing any other matter that may be necessary to facilitate the implementation of this Chapter.

CHAPTER 17

INTER-COUNTRY ADOPTIONS 10

Purposes of Chapter

254. The purposes of this Chapter are—

- (a) to give effect to the Hague Convention on Inter-country Adoption;
- (b) to give effect to certain bilateral arrangements for inter-country adoption;
- (c) to provide for the recognition of certain foreign adoptions; and 15
- (d) generally to regulate inter-country adoptions.

Hague Convention on Inter-country Adoption to have force of law

255. (1) The Hague Convention on Inter-country Adoption is in force in the Republic and its provisions are law in the Republic.

(2) The ordinary law of the Republic applies to an adoption to which the Convention applies but, where there is a conflict between the ordinary law of the Republic and the Convention, the Convention prevails. 20

Central Authority

256. (1) For purposes of the Hague Convention on Inter-country Adoption, “Central Authority” — 25

- (a) in relation to the Republic, means the Director-General; or
- (b) in relation to a convention country, means a person or office designated by such convention country under Article 6 of the Hague Convention on Inter-country Adoption.

(2) The Director-General must perform the functions assigned by the Convention to Central Authorities. 30

Delegation of functions

257. (1) The Central Authority of the Republic may in terms of section 303 delegate any powers or duties of the Central Authority under the Hague Convention on Inter-country Adoption to an official in the Department. 35

(2) Any powers or duties of the Central Authority in terms of Articles 15 to 21 of the Convention may, to the extent determined by the Central Authority of the Republic, be performed by—

- (a) another organ of state; or
- (b) a designated child protection organisation accredited in terms of section 258 to perform inter-country adoption services. 40

Accreditation of child protection organisations for inter-country adoption

258. (1) The Central Authority of the Republic may, on application by a designated child protection organisation—

- (a) accredit the organisation to perform inter-country adoption services; and 45
- (b) approve adoption working agreements contemplated in section 259, provided the prescribed requirements are met.

(2) The Central Authority of the Republic may accredit a designated child protection organisation to perform inter-country adoption services for such period and on such conditions as may be prescribed. 50

- (3) A designated child protection organisation accredited in terms of this section to perform inter-country adoption services—
- (a) may receive the prescribed fees and make the necessary payments in respect of inter-country adoptions; and
 - (b) must annually submit audited financial statements to the Central Authority of the Republic of fees received and payments made. 5

Entering into adoption working agreements

- 259.** (1) A designated child protection organisation accredited in terms of section 258 to perform inter-country adoption services may enter into an adoption working agreement with an accredited adoption agency in another country. 10
- (2) A child protection organisation referred to in subsection (1)—
- (a) must provide the Central Authority of the Republic with certified copies of all adoption working agreements entered into by that child protection organisation for approval thereof; and
 - (b) may not act in terms of any such adoption working agreement before it has been approved by the Central Authority of the Republic. 15

Adoption of children from Republic by persons in convention countries

- 260.** (1) A person habitually resident in a convention country who wishes to adopt a child habitually resident in the Republic must apply to the Central Authority of the convention country concerned. 20
- (2) If the Central Authority of the convention country concerned is satisfied that the applicant is eligible and suitable to adopt, it shall prepare a report on that person in accordance with the requirements of the Hague Convention on Inter-country Adoption and any requirements as may be prescribed and transmit the report to the Central Authority of the Republic. 25
- (3) If a suitable child is available for adoption, the Central Authority of the Republic must prepare a report on the child in accordance with the requirements of the Hague Convention on Inter-country Adoption and any requirements as may be prescribed and transmit the report to the Central Authority of the convention country concerned.
- (4) If the Central Authority of the Republic and the Central Authority of the convention country concerned both agree on the adoption, the Central Authority of the Republic must refer the application for adoption together with all relevant documents and the reports contemplated in subsections (2) and (3) to the children's court for consideration in terms of section 238. 30
- (5) The court may make an order for the adoption of the child if the requirements of section 231 regarding persons who may adopt children are complied with, the application has been considered in terms of section 238 and the court is satisfied that— 35
- (a) the child is in the Republic;
 - (b) the child is not prevented from leaving the Republic— 40
 - (i) under a law of the Republic; or
 - (ii) because of an order of a court of the Republic;
 - (c) the arrangements for the adoption of the child are in accordance with the requirements of the Hague Convention on Inter-country Adoption and any requirements as may be prescribed;
 - (d) the Central Authority of the convention country has agreed to the adoption of the child; and 45
 - (e) the Central Authority of the Republic has agreed to the adoption of the child.
- (6) This section does not apply to a child habitually resident in the Republic and who is to be placed for adoption outside the Republic with a family member of that child or with a person who will become an adoptive parent jointly with the child's biological parent. 50

Adoption of children from Republic by persons in non-convention countries

- 261.** (1) A person habitually resident in a non-convention country who wishes to adopt a child habitually resident in the Republic must apply to the competent authority of the non-convention country concerned. 55
- (2) If the competent authority of the non-convention country concerned is satisfied that the applicant is eligible and suitable to adopt, it shall prepare a report on that person

in accordance with the prescribed requirements and transmit the report to the Central Authority of the Republic.

(3) If a suitable child is available for adoption, the Central Authority of the Republic must prepare a report on the child in accordance with the prescribed requirements and transmit it to the competent authority in the non-convention country concerned. 5

(4) If the Central Authority of the Republic and the competent authority in the non-convention country concerned both agree on the adoption, the Central Authority must refer the application for adoption together with all relevant documents and the reports contemplated in subsections (2) and (3) to the children's court for consideration in terms of section 238. 10

(5) The court may make an order for the adoption of the child if the requirements of section 231 regarding persons who may adopt children are complied with, the application has been considered in terms of section 238 and the court is satisfied that—

- (a) the child is in the Republic;
- (b) the child is not prevented from leaving the Republic— 15
 - (i) under a law of the Republic; or
 - (ii) because of an order of a court of the Republic;
- (c) the arrangements for the adoption of the child are in accordance with the prescribed requirements;
- (d) the competent authority of the non-convention country concerned has agreed 20
 - to the adoption of the child; and
- (e) the Central Authority of the Republic has agreed to the adoption of the child.

(6) This section does not apply to a child habitually resident in the Republic and who is to be placed for adoption outside the Republic with a family member of that child or with a person who will become an adoptive parent jointly with the child's biological parent. 25

Issue of adoption compliance certificate

262. If the children's court has approved the adoption of a child in terms of section 260 or 261, the Central Authority of the Republic may issue an adoption compliance certificate. 30

Adoption of children from convention countries by persons in Republic

263. (1) A person habitually resident in the Republic who wishes to adopt a child habitually resident in a convention country must apply to the Central Authority of the Republic.

(2) If the Central Authority of the Republic is satisfied that the applicant is eligible and suitable to adopt, it must prepare a report on that person in accordance with the requirements of the Hague Convention on Inter-country Adoption and any requirements as may be prescribed and transmit the report to the Central Authority of the convention country concerned. 35

(3) If a suitable child is available for adoption, the Central Authority of the convention country concerned must prepare a report on the child in accordance with the requirements of the Hague Convention on Inter-country Adoption and transmit it to the Central Authority of the Republic. 40

(4) If the Central Authority of the Republic and the Central Authority of the convention country concerned both agree on the adoption, the Central Authority in that country must refer the application for adoption for the necessary consent in that country. 45

Adoption of children from non-convention countries by persons in Republic

264. (1) A person habitually resident in the Republic who wishes to adopt a child habitually resident in a non-convention country must apply to the Central Authority of the Republic. 50

(2) If the Central Authority of the Republic is satisfied that the applicant is eligible and suitable to adopt, it must prepare a report on that person in accordance with the requirements of the non-convention country concerned and transmit the report to the competent authority of that country.

(3) If a suitable child is available for adoption, the competent authority of the non-convention country concerned must prepare a report on the child in accordance with the prescribed requirements and transmit it to the Central Authority of the Republic. 55

(4) If the Central Authority of the Republic and the competent authority of the non-convention country concerned both agree on the adoption, the competent authority of that country must refer the application for adoption for the necessary consent in that country.

Recognition of inter-country adoption of children from convention countries 5

265. (1) The adoption in a convention country of a child habitually resident in that convention country by a person habitually resident in the Republic must be recognised in the Republic if an adoption compliance certificate issued in that country is in force for the adoption.

(2) The adoption in a convention country of a child habitually resident in that convention country by a person habitually resident in another convention country must be recognised in the Republic if an adoption compliance certificate issued in the convention country where the adoption was granted is in force for the adoption.

(3) If an adoption compliance certificate was not issued in the relevant convention country, the Central Authority of the Republic may issue a declaration recognising the adoption.

(4) A declaration in terms of subsection (3) is, upon production by any person in a court, admissible as evidence in any proceedings before the court.

(5) The adoption of a child referred to in subsections (1) and (2) is not recognised if a declaration is made in terms of section 269 that an adoption or a decision in terms of article 27 of the Hague Convention on Inter-country Adoption has no effect in the Republic.

Evidential value of adoption compliance certificate of convention country

266. Subject to section 269 an adoption compliance certificate is evidence, for the purposes of the laws of the Republic, that the adoption to which the certificate relates—

- (a) was agreed to by the Central Authorities of the countries mentioned in the certificate; and
- (b) was carried out in accordance with the Hague Convention on Inter-country Adoption and the laws of the countries mentioned in the certificate.

Recognition of inter-country adoption of children from non-convention countries 30

267. The Central Authority of the Republic may issue a declaration recognising the adoption of a child in a non-convention country if—

- (a) the adoption is in accordance with and has not been rescinded under the law of the country in which the adoption order was made;
- (b) the adoption in that country has the same effect it would have if the order was made in the Republic.

Effect of recognition of inter-country adoption

268. If the adoption of a child is recognised in terms of section 265 or 267, the adoption has the effects as set out in section 240 in the Republic.

Refusal to recognise inter-country adoption or Article 27 decisions 40

269. (1) The Central Authority of the Republic may declare that an adoption to which section 265 or 267 applies or a decision made in terms of article 27 of the Hague Convention on Inter-country Adoption may not be recognised in the Republic if the adoption or decision is manifestly contrary to public policy in the Republic, taking into account the best interest of the relevant child.

(2) If the Central Authority of the Republic declares that an adoption or decision referred to in subsection (1) may not be recognised, the adoption or decision has no effect in the Republic.

Application to children’s court for inter-country adoption of children

270. (1) In the event of a refusal to recognise an inter-country adoption as contemplated in section 269, an application for the adoption of a child from a convention country or a non-convention country may be made to the children’s court.

(2) The provisions of Chapter 16, with the necessary changes which the context may require, apply to the adoption of a child referred to in subsection (1). 5

Access to information

271. Subject to the provisions of section 248 with regard to access to the adoption register, read with such changes as the context may require, the Central Authority of the Republic may disclose to a person older than 18 years who, as a child, was adopted in accordance with the Hague Convention on Inter-country Adoption, any information in the records of the Central Authority concerning that person’s origin. 10

Processing or facilitating inter-country adoption

272. No person may process or facilitate an inter-country adoption otherwise than in terms of this Chapter. 15

CHAPTER 18

CHILD ABDUCTION

Purposes of Chapter

273. The purposes of this Chapter are—

- (a) to give effect to the Hague Convention on International Child Abduction; and 20
- (b) to combat parental child abduction.

Hague Convention on International Child Abduction to have force of law

274. The Hague Convention on International Child Abduction is in force in the Republic and its provisions are law in the Republic, subject to the provisions of this Act.

Central Authority 25

275. (1) For purposes of the Hague Convention on International Child Abduction, “Central Authority”—

- (a) in relation to the Republic, means the Chief Family Advocate appointed by the Minister for Justice and Constitutional Development in terms of the Mediation in Certain Divorce Matters Act; or 30
- (b) in relation to a convention country, means a person or office designated for such convention country under Article 6 of the Hague Convention on International Child Abduction;

(2) The Chief Family Advocate must perform the functions assigned by the Convention to Central Authorities. 35

Delegation of powers and duties

276. (1) The Central Authority of the Republic may, subject to such conditions as he or she may impose, delegate or assign any powers or duties conferred or imposed upon him or her under the Hague Convention on International Child Abduction to any Family Advocate appointed in terms of the Mediation in Certain Divorce Matters Act. 40

(2) The delegation, assignment and conditions imposed must be in writing.

Powers of court

277. (1) In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3 of the Hague Convention on International Child Abduction, a High Court may, prior to the making of an order for the return of the child, 45

request the Central Authority of the Republic to provide a report on the domestic circumstances of the child prior to the alleged abduction.

(2) The court may, prior to the making of an order for the return of the child, order interim protective relief for the child, the applicant or the defendant.

(3) The court must, in considering an application in terms of this Chapter for the return of a child, afford that child the opportunity to raise an objection to being returned and in so doing must give due weight to that objection, taking into account the age and maturity of the child. 5

Legal representation

278. A legal representative must represent the child, subject to section 55, in all applications in terms of the Hague Convention on International Child Abduction. 10

Regulations

279. (1) The Minister for Justice and Constitutional Development may make regulations—

(a) to give effect to any provisions of the Hague Convention on International Child Abduction; 15

(b) prescribing fees and providing for the recovery of any expenditure incurred in connection with the application of the Convention.

(2) A regulation made under subsection (1) may prescribe a penalty of a fine or of imprisonment for a period not exceeding 12 months for any contravention thereof or failure to comply therewith. 20

CHAPTER 19

TRAFFICKING IN CHILDREN

Purposes of Chapter

280. The purposes of this Chapter are— 25

(a) to give effect to the UN Protocol to Prevent Trafficking in Persons;

(b) to give effect to certain bilateral or multilateral agreements relating to trafficking in children; and

(c) generally to regulate trafficking in children.

UN Protocol to Prevent Trafficking in Persons to have force of law 30

281. The UN Protocol to Prevent Trafficking in Persons is in force in the Republic and its provisions are law in the Republic, subject to the provisions of this Act.

Assistance to children who are victims of trafficking

282. (1) The Director-General, without delay and with due regard to the safety of a child, must— 35

(a) facilitate and accept the return of a South African child who is a victim of trafficking;

(b) at the request of another state that is a party to the UN Protocol to Prevent Trafficking in Persons or to a bilateral or multilateral agreement relating to trafficking in children, verify whether a child who is a victim of trafficking is a national of the Republic or had the right of permanent residence in the Republic; 40

(c) issue such travel documents or other authorisations as may be needed to enable a child who is a victim of trafficking to travel to and re-enter the Republic. 45

(2) Subsection (1) applies to any child who, at the time of entry into the territory of the country to which the child had been trafficked, had permanent residence in South Africa.

Trafficking in children prohibited

283. (1) No person may traffic in children.

(2) The consent of a child who is a victim of trafficking to the intended exploitation is no defence to a charge of contravening subsection (1).

(3) If a court finds that the parent or care-giver of a child or any other person who has parental responsibilities and rights in respect of a child, has contravened subsection (1) in respect of that child, the court may—

- (a) suspend all parental responsibilities and rights of that parent, care-giver or person pending an inquiry by a children's court; and
- (b) put that child in temporary safe care pending the placement of the child in alternative care.

Victims of child trafficking found in Republic

284. (1) Any child who is the victim of trafficking and who is found under circumstances which indicate that he or she is a child contemplated in section 150—

- (a) must immediately be brought before the children's court for the district in which he or she was found in order to determine whether such child is a child in need of care and protection; and
- (b) may, pending such hearing, be placed in temporary safe care.

(2) The children's court may order that a child contemplated in subsection (1) be assisted in applying for asylum in terms of the Refugees Act, 1998 (Act No. 130 of 1998).

CHAPTER 20

SURROGATE MOTHERHOOD

Surrogate motherhood agreement must be in writing and confirmed by High Court

285. (1) No surrogate motherhood agreement is valid unless—

- (a) the agreement is in writing and is signed by all the parties thereto;
- (b) the agreement is entered into in the Republic;
- (c) at least one of the commissioning parents, or where the commissioning parent is a single person, that person, is at the time of entering into the agreement domiciled in the Republic;
- (d) the surrogate mother and her husband or partner, if any, are at the time of entering into the agreement domiciled in the Republic;
- (e) the agreement is confirmed by the High Court within whose area of jurisdiction the commissioning parent or parents are domiciled or habitually resident.

(2) A court may, on good cause shown, dispense with the requirement set out in subsection (1)(d).

Consent of husband, wife or partner

286. (1) Where a commissioning parent is married or involved in a permanent relationship, the court may not confirm the agreement unless the husband, wife or partner of the commissioning parent has given his or her written consent to the agreement and has become a party to the agreement.

(2) Where the surrogate mother is married or involved in a permanent relationship, the court may not confirm the agreement unless her husband or partner has given his or her written consent to the agreement and has become a party to the agreement.

(3) Where a husband or partner of a surrogate mother who is not the genetic parent of the child unreasonably withholds his or her consent, the court may confirm the agreement.

Genetic origin of child

287. No surrogate motherhood agreement is valid unless the conception of the child contemplated in the agreement is to be effected by the use of the gametes of both commissioning parents or, if that is not possible due to biological, medical or other valid reasons, the gamete of at least one of the commissioning parents or, where the commissioning parent is a single person, the gamete of that person.

Confirmation by court

- 288.** A court may not confirm a surrogate motherhood agreement unless—
- (a) the commissioning parent or parents are not able to give birth to a child and the condition is permanent and irreversible;
 - (b) the commissioning parent or parents— 5
 - (i) are in terms of this Act competent to enter into the agreement;
 - (ii) are in all respects suitable persons to accept the parenthood of the child that is to be conceived; and
 - (iii) understand and accept the legal consequences of the agreement and this Act and their rights and obligations in terms thereof; 10
 - (c) the surrogate mother—
 - (i) is in terms of this Act competent to enter into the agreement;
 - (ii) is in all respects a suitable person to act as surrogate mother;
 - (iii) understands and accepts the legal consequences of the agreement and this Act and her rights and obligations in terms thereof; 15
 - (iv) is not using surrogacy as a source of income;
 - (v) has entered into the agreement for altruistic reasons and not for commercial purposes;
 - (vi) has a documented history of at least one pregnancy and viable delivery; and 20
 - (vii) has a living child of her own;
 - (d) the agreement includes adequate provisions for the custody, care, upbringing and general welfare of the child that is to be born in a stable home environment, including the child's position in the event of the death of the commissioning parents or one of them, or their divorce or separation before the birth of the child; 25
 - (e) in general, having regard to the personal circumstances and family situations of all the parties concerned, but above all the interests of the child that is to be born, the agreement should be confirmed.

Artificial fertilisation of surrogate mother 30

- 289.** (1) No artificial fertilisation of the surrogate mother may take place—
- (a) before the surrogate motherhood agreement is confirmed by the court;
 - (b) after the lapse of 18 months from the date of the confirmation of the agreement in question by the court.
- (2) Any artificial fertilisation of a surrogate mother in the execution of an agreement contemplated in this Act must be done in accordance with the provisions of the National Health Act, 2003. 35

Effect of surrogate motherhood agreement on status of child

- 290.** (1) The effect of a valid surrogate motherhood agreement is that—
- (a) any child born of a surrogate mother in accordance with the agreement is for all purposes the child of the commissioning parent or parents from the moment of the birth of the child concerned; 40
 - (b) the surrogate mother is obliged to hand the child over to the commissioning parent or parents as soon as is reasonably possible after the birth;
 - (c) the surrogate mother or her husband, partner or relatives have no rights of parenthood or custody of the child; 45
 - (d) the surrogate mother or her husband, partner or relatives have no right of access to the child unless provided for in the agreement between the parties;
 - (e) subject to sections 291 and 293, the surrogate motherhood agreement may not be terminated after the artificial fertilisation of the surrogate mother has taken place; and 50
 - (f) the child will have no claim for maintenance or of succession against the surrogate mother, her husband or partner or any of their relatives.
- (2) Any surrogate motherhood agreement that does not comply with the provisions of this Act is invalid and any child born as a result of any action taken in execution of such an arrangement is for all purposes deemed to be the child of the woman that gave birth to that child. 55

Termination of surrogate motherhood agreement

- 291.** (1) A surrogate mother who is also a genetic parent of the child concerned may, at any time prior to the lapse of a period of sixty days after the birth of the child, terminate the surrogate motherhood agreement by filing written notice with the court.
- (2) The court must terminate the confirmation of the agreement in terms of section 285 upon finding, after notice to the parties to the agreement and a hearing, that the surrogate mother has voluntarily terminated the agreement and that she understands the effects of the termination, and the court may issue any other appropriate order if it is in the best interest of the child.
- (3) The surrogate mother incurs no liability to the commissioning parents for exercising her rights of termination in terms of this section, except for compensation for any payments made by the commissioning parents in terms of section 294.

Effect of termination of surrogate motherhood agreement

- 292.** The effect of the termination of a surrogate motherhood agreement in terms of section 291 is that—
- (a) where the agreement is terminated after the child is born, any parental rights established in terms of section 290 are terminated and vest in the surrogate mother and her husband or partner, if any, or if none, the commissioning father;
 - (b) where the agreement is terminated before the child is born, the child is the child of the surrogate mother and her husband or partner, if any, or if none, the commissioning father, from the moment of the child's birth;
 - (c) the surrogate mother and her husband or partner, if any, or if none, the commissioning father, are obliged to accept the obligation of parenthood;
 - (d) subject to paragraphs (a) and (b), the commissioning parents have no rights of parenthood and can only obtain such rights through adoption;
 - (e) subject to paragraphs (a) and (b), the child has no claim for maintenance or of succession against the commissioning parents or any of their relatives.

Abortion

- 293.** (1) A surrogate motherhood agreement is terminated by an abortion that may be carried out in terms of the Choice on Termination of Pregnancy Act, 1996 (Act No. 92 of 1996).
- (2) For the purposes of the Choice on Termination of Pregnancy Act, 1996, the decision to undergo an abortion lies with the surrogate mother, but the person carrying out the abortion procedure must inform the commissioning parents of the circumstances and allow them to consult with the surrogate mother before an abortion is carried out.
- (3) The surrogate mother incurs no liability to the commissioning parents for exercising her right to an abortion pursuant to this section except for compensation for any payments made by the commissioning parents in terms of section 294 where the decision to abort is taken for any reason other than on medical grounds.

Payments in respect of surrogacy prohibited

- 294.** (1) Subject to subsections (2) and (3), no person may in connection with a surrogate motherhood agreement give or promise to give to any person, or receive from any person, a reward or compensation in money or in kind.
- (2) No promise or agreement for the payment of any compensation to a surrogate mother or any other person in connection with a surrogate motherhood agreement or the execution of such an agreement is enforceable, except a claim for—
- (a) compensation for expenses that relate directly to the artificial fertilisation and pregnancy of the surrogate mother, the birth of the child and the confirmation of the surrogate motherhood agreement;
 - (b) loss of earnings suffered by the surrogate mother as a result of the surrogate agreement;
 - (c) insurance to cover the surrogate mother for anything that may lead to death or disability brought about by the pregnancy.
- (3) Any person who renders a bona fide professional legal or medical service with a view to the confirmation of a surrogate motherhood agreement in terms of section 288

or in the execution of such an agreement, is entitled to reasonable compensation therefor.

Identity of parties

295. (1) The identity of the parties to court proceedings with regard to a surrogate motherhood agreement may not be published without the written consent of the parties concerned. 5

(2) No person may publish any facts that reveal the identity of a person born as a result of a surrogate motherhood agreement.

Prohibition of certain acts

296. (1) No person may artificially fertilise a woman in the execution of a surrogate motherhood agreement or render assistance in such an artificial fertilisation, unless that artificial fertilisation is authorised by a court in terms of the provisions of this Act. 10

(2) No person may in any way for or with a view to compensation make known that any person is or might possibly be willing to enter into a surrogate motherhood agreement. 15

CHAPTER 21

ENFORCEMENT OF ACT

Inspection of child and youth care centres, partial care facilities, shelters and drop-in centres

297. (1) A person authorised by the Director-General, a provincial head of social development or a municipality may enter any child and youth care centre, partial care facility, shelter or drop-in centre or any place which on reasonable suspicion is being used as an unregistered child and youth care centre, partial care facility, shelter or drop-in centre, in order— 20

- (a) to inspect that centre, facility, shelter or place and its management; or 25
- (b) to observe or interview any child, or cause a child to be examined or assessed by a medical officer, social worker, psychologist or psychiatrist.

(2) (a) An identity card prescribed by regulation must be issued to each person authorised in terms of subsection (1).

(b) When inspecting such a centre, facility, shelter or place, a person authorised in terms of subsection (1) must, on demand, produce such an identity card. 30

(3) A person authorised in terms of subsection (1) may for the purposes of that subsection—

- (a) determine whether the centre, facility, shelter or place complies with— 35

(iii) any structural, safety, health and other requirements of the municipality; and

(iv) the provisions of this Act;

- (b) require a person to disclose information, either orally or in writing, and either alone or in the presence of a witness, about any act or omission which, on reasonable suspicion, may constitute an offence in terms of this Act, or a breach of a provision of this Act or of a condition of registration, and require that any disclosure be made under oath or affirmation; 40

(c) inspect, or question a person about, any record or document that may be relevant for the purpose of paragraph (b); 45

(d) copy any record or document referred to in paragraph (c), or remove such record or document to make copies or extracts;

(e) require a person to produce or deliver to a place specified by the authorised officer, any record or document referred to in paragraph (c) for inspection;

(f) inspect, question a person about and if necessary remove, any article or substance which, on reasonable suspicion, may have been used in the commission of an offence in terms of this Act or in the breaching of a provision of this Act or of a condition of registration; 50

(g) record information by any method, including taking photographs or making videos; or 55

- (h) exercise any other power or carry out any other duty that may be prescribed by regulation.
- (4) A person authorised in terms of subsection (1) must—
- (a) provide a receipt for any record, document, article or substance removed in terms of subsection (3)(d) or (f); and 5
- (b) return anything removed within a reasonable period unless seized for the purpose of evidence.
- (5) A person authorised in terms of subsection (1) must submit a report to the Director-General, the provincial head of social development or a municipality, as may be appropriate, on any inspection carried out by that person in terms of this section. 10

Offences

- 298.** (1) A person is guilty of an offence if that person—
- (a) commits an act in contravention of the prohibition set out in section 12(3);
- (b) contravenes a provision of section 32(4), 74, 249, 250(1), 252, 272, 283(1), 294, 295 or 296; 15
- *****
- (d) fails to comply with a request in terms of section 57(1);
- *****
- (k) knowing that a child in alternative care has absconded from or failed to return to that care, directly or indirectly counsels, induces or aids that child not to return to such care, or harbours or prevents the child from returning to that care; 20
- *****
- (m) hinders or interferes with a person in the execution of official duties in terms of section 297; 25
- (n) fails to comply with a request of a person in the execution of his or her official duties in terms of section 50(4) or section 297 or furnishes false or misleading information to such a person when complying with such a request;
- (o) falsely professes to be a person authorised in terms of section 50(4) or 297 or an assistant of such a person; 30
- *****
- (q) contravenes or fails to comply with an order of a High Court, divorce court in a divorce case or children's court issued in terms of this Act, or contravenes or fails to comply with any condition contained in such order.
- (2) A person unfit to work with children is guilty of an offence if that person— 35
- (a) operates or assists in any way in operating a partial care facility, child and youth care centre or a shelter or drop-in centre;
- (b) assumes the foster care, kinship care or temporary safe care of a child; or
- (c) applies for the foster care, kinship care, temporary safe care or adoption of a child. 40
- (3) A parent or care-giver of a child is guilty of an offence if that parent or care-giver—
- (a) abuses or deliberately neglects the child; or
- (b) abandons the child.
- (4) A person who is legally liable to maintain a child is guilty of an offence if that person, while able to do so, fails to provide the child with adequate food, clothing, lodging and medical aid. 45
- (5) A person who is the owner, lessor, manager, tenant or occupier of any premises on which the commercial sexual exploitation of a child has occurred is guilty of an offence if that person, within a reasonable period of gaining information of that occurrence, fails to report the occurrence to the South African Police Service. 50
- (6) A person convicted of an offence in terms of subsection (1), (2), (3), (4) or (5) is liable to a fine as may be determined in terms of applicable legislation, or to imprisonment for a period not exceeding ten years, or to both such fine and such imprisonment. 55

CHAPTER 22

ADMINISTRATION OF ACT

Regulations

- 299.** (1) The Minister may make regulations prescribing—
- (a) any matter referred to in section 253; 5
 - (b) any matter that may be prescribed by the Minister by regulation in terms of this Act, after consultation with the Minister for Justice and Constitutional Development where courts, court orders and the review of decisions by the courts are regulated;
 - (c) codes of ethical practice for persons operating, and assisting in the operation of child and youth care centres, partial care facilities, shelters and drop-in centres; 10
 - (d) procedures for the interview of persons to be employed or engaged in child and youth care centres, partial care facilities, shelters and drop-in centres;
 - (e) any other matter that may facilitate the implementation of this Act. 15
- (2) Regulations made in terms of subsection (1) may—
- (a) apply—
 - (i) generally throughout the Republic or only in a specified area or category of areas;
 - (ii) generally to all persons or only to a specified category of persons; or 20
 - (iii) generally to all child and youth care centres, partial care facilities, shelters or drop-in centres or only to a specified category of such centres, facilities, shelters or drop-in centres; or
 - (b) differentiate between different—
 - (i) areas or categories of areas; 25
 - (ii) persons or categories of persons; or
 - (iii) child and youth care centres, partial care facilities, shelters or drop-in centres or categories of such centres, facilities, shelters or drop-in centres.
- (3) Regulations made in terms of subsection (1) may provide that any person who contravenes or fails to comply with a provision thereof is guilty of an offence and liable on conviction to—
- (a) imprisonment for a period not exceeding two years;
 - (b) an appropriate fine; or
 - (c) both a fine and imprisonment. 35

Delegation of powers and duties by Minister

- 300.** (1) The Minister may delegate any power conferred or duty assigned to the Minister in terms of this Act to—
- (a) the Director-General or an officer in the employ of the Department;
 - (b) an MEC responsible for social development, by agreement with the MEC; or 40
 - (c) any organ of state, by agreement with that organ of state.
- (2) A delegation in terms of subsection (1)—
- (a) is subject to any limitations, conditions and directions which the Minister may impose;
 - (b) must be in writing; 45
 - (c) may include the power to sub-delegate; and
 - (d) does not divest the Minister of the responsibility concerning the exercise of the power or the performance of the duty.
- (3) The Minister may confirm, vary or revoke any decision taken in consequence of a delegation or sub-delegation in terms of this section, subject to any rights that may have accrued to a person as a result of the decision. 50
- (4) The Minister may—
- (a) not delegate a power or duty—
 - (i) to make regulations; or
 - (ii) to publish notices in the *Government Gazette*; 55
 - (b) at any time withdraw a delegation.

Assignment of powers and duties by Minister

- 301.** (1) The Minister may confer any power or assign any duty conferred or assigned to the Minister in terms of this Act to an MEC responsible for social development, by agreement with the MEC.
- (2) An assignment in terms of subsection (1)— 5
- (a) is subject to any limitations, conditions and directions which the Minister may impose;
 - (b) must be in writing;
 - (c) may include the power to delegate; and
 - (d) does not divest the Minister of the responsibility concerning the exercise of 10 the power or the performance of the duty.
- (3) The Minister may confirm, vary or revoke any decision taken in consequence of an assignment in terms of this section, subject to any rights that may have accrued to a person as a result of the decision.
- (4) The Minister may— 15
- (a) not confer a power or assign a duty—
 - (i) to make regulations; or
 - (ii) to publish notices in the *Government Gazette*;
 - (b) at any time withdraw an assignment.

Delegation of powers and duties by MECs for social development 20

- 302.** (1) An MEC for social development may delegate any power conferred or duty assigned to the MEC in terms of this Act to—
- (a) the provincial head of social development or an officer in the employ of the province concerned; or
 - (b) any organ of state, by agreement with that organ of state. 25
- (2) A delegation in terms of subsection (1)—
- (a) is subject to any limitations, conditions and directions which the MEC may impose;
 - (b) must be in writing;
 - (c) may include the power to sub-delegate; and 30
 - (d) does not divest the MEC of the responsibility concerning the exercise of the power or the performance of the duty.
- (3) The MEC may confirm, vary or revoke any decision taken in consequence of a delegation or sub-delegation in terms of this section, subject to any rights that may have accrued to a person as a result of the decision. 35
- (4) The MEC may—
- (a) not delegate a power or duty to publish notices in the *Government Gazette*; and
 - (b) at any time withdraw a delegation.

Delegation of powers and duties by Director-General 40

- 303.** (1) The Director-General may delegate any power conferred or duty assigned to him or her in terms of this Act to—
- (a) an officer in the employ of the Department;
 - (b) any organ of state, by agreement with that organ of state.
- (2) A delegation in terms of subsection (1)— 45
- (a) is subject to any limitations, conditions and directions which the Director-General may impose;
 - (b) must be in writing;
 - (c) may include the power to sub-delegate, in the case of a delegation in terms of subsection (1)(b); and 50
 - (d) does not divest the Director-General of the responsibility concerning the exercise of the power or the performance of the duty.
- (3) The Director-General may—
- (a) confirm, vary or revoke any decision taken in consequence of a delegation or sub-delegation in terms of this section, subject to any rights that may have 55 accrued to a person as a result of the decision; and
 - (b) at any time withdraw a delegation.

Delegation of powers and duties by provincial heads of social development

- 304.** (1) The provincial head of social development may delegate any power conferred or duty assigned to him or her in terms of this Act to—
- (a) an officer in the employ of the province concerned;
 - (b) any organ of state, by agreement with that organ of state. 5
- (2) A delegation in terms of subsection (1)—
- (a) is subject to any limitations, conditions and directions which the provincial head may impose;
 - (b) must be in writing;
 - (c) may include the power to sub-delegate, in the case of a delegation in terms of subsection (1)(b); and 10
 - (d) does not divest the provincial head of the responsibility concerning the exercise of the power or the performance of the duty.
- (3) The provincial head may—
- (a) confirm, vary or revoke any decision taken in consequence of a delegation or sub-delegation in terms of this section, subject to any rights that may have accrued to a person as a result of the decision; and 15
 - (b) at any time withdraw a delegation.

Outsourcing of services

- 305.** (1) The Minister or an MEC for social development in a province may, subject to the departmental strategic plan, by agreement with a designated child protection organisation or other appropriate person, assign the provision of any service that may or must be provided in terms of this Act to that organisation or person. 20
- (2) The Minister or MEC may delegate to such organisation or person such powers and duties in terms of this Act as may be required for the proper performance of the service. 25
- (3) Section 300 or 302, as may be appropriate, and read with such changes as the context may require, applies in respect of any delegation in terms of subsection (2).

CHAPTER 23

MISCELLANEOUS MATTERS 30

Repeal of laws

306. The laws referred to in the second column of Schedule 4 are hereby amended to the extent indicated in the third column of the Schedule.

Transitional matters

307. Anything done in terms of legislation repealed in terms of section 306 which can be done in terms of a provision of this Act must be regarded as having been done in terms of that provision of this Act. 35

Short title and commencement

308. This Act is called the Children's Act, 2003, and takes effect on a date fixed by the President by proclamation in the *Gazette*. 40

SCHEDULE 1

HAGUE CONVENTION ON PROTECTION OF CHILDREN AND CO-OPERATION IN RESPECT OF INTER-COUNTRY ADOPTION (29 May 93)	5
(Table of Contents)	
<u>PREAMBLE</u>	
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<u>CHAPTER VII—FINAL CLAUSES</u>	15
The States signatory to the present Convention,	
Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding,	20
Recalling that each State should take, as a matter of priority, appropriate measures to enable the child to remain in the care of his or her family of origin,	
Recognizing that inter-country adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of origin,	
Convinced of the necessity to take measures to ensure that inter-country adoptions are made in the best interests of the child and with respect for his or her fundamental rights, and to prevent the abduction, the sale of, or traffic in children,	25
Desiring to establish common provisions to this effect, taking into account the principles set forth in international instruments, in particular the United Nations Convention on the Rights of the Child, of 20 November 1989, and the United Nations Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally (General Assembly Resolution 41/85, of 3 December 1986),	30
Have agreed upon the following provisions—	35

CHAPTER I—SCOPE OF THE CONVENTION

Article 1

The objects of the present Convention are—

- (a) to establish safeguards to ensure that inter-country adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognized in international law; 40
- (b) to establish a system of co-operation amongst Contracting States to ensure that those safeguards are respected and thereby prevent the abduction, the sale of, or traffic in children;
- (c) to secure the recognition in Contracting States of adoptions made in accordance with the Convention. 45

Article 2

(1) The Convention shall apply where a child habitually resident in one Contracting State ('the State of origin') has been, is being, or is to be moved to another Contracting State ('the receiving State') either after his or her adoption in the State of origin by spouses or a person habitually resident in the receiving State, or for the purposes of such an adoption in the receiving State or in the State of origin. 50

(2) The Convention covers only adoptions which create a permanent parent-child relationship.

Article 3

The Convention ceases to apply if the agreements mentioned in Article 17, sub-paragraph c, have not been given before the child attains the age of eighteen years.

CHAPTER II—REQUIREMENTS FOR INTER-COUNTRY ADOPTIONS 5**Article 4**

An adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin—

- (a) have established that the child is adoptable;
- (b) have determined, after possibilities for placement of the child within the State of origin have been given due consideration, that an inter-country adoption is in the child's best interests; 10
- (c) have ensured that
 - (1) the persons, institutions and authorities whose consent is necessary for adoption, have been counselled as may be necessary and duly informed of the effects of their consent, in particular whether or not an adoption will result in the termination of the legal relationship between the child and his or her family of origin, 15
 - (2) such persons, institutions and authorities have given their consent freely, in the required legal form, and expressed or evidenced in writing,
 - (3) the consents have not been induced by payment or compensation of any kind and have not been withdrawn, and 20
 - (4) the consent of the mother, where required, has been given only after the birth of the child; and
- (d) have ensured, having regard to the age and degree of maturity of the child, that
 - (1) he or she has been counselled and duly informed of the effects of the adoption and of his or her consent to the adoption, where such consent is required, 25
 - (2) consideration has been given to the child's wishes and opinions,
 - (3) the child's consent to the adoption, where such consent is required, has been given freely, in the required legal form, and expressed or evidenced in writing, and
 - (4) such consent has not been induced by payment or compensation of any kind. 30

Article 5

An adoption within the scope of the Convention shall take place only if the competent authorities of the receiving State—

- (a) have determined that the prospective adoptive parents are eligible and suited to adopt; 35
 - (b) have ensured that the prospective adoptive parents have been counselled as maybe necessary; and
 - (c) have determined that the child is or will be authorized to enter and reside permanently in that State. 40
-

CHAPTER III—CENTRAL AUTHORITIES AND ACCREDITED BODIES**Article 6**

(1) A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities.

(2) Federal States, States with more than one system of law or States having autonomous territorial units shall be free to appoint more than one Central Authority and to specify the territorial or personal extent of their functions. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which any communication may be addressed for transmission to the appropriate Central Authority within that State. 50

Article 7

(1) Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their States to protect children and to achieve the other objects of the Convention.

(2) They shall take directly all appropriate measures to— 5

- (a) provide information as to the laws of their States concerning adoption and other general information, such as statistics and standard forms;
- (b) keep one another informed about the operation of the Convention and, as far as possible, eliminate any obstacles to its application.

Article 8

10

Central Authorities shall take, directly or through public authorities, all appropriate measures to prevent improper financial or other gain in connection with an adoption and to deter all practices contrary to the objects of the Convention.

Article 9

Central Authorities shall take, directly or through public authorities or other bodies duly accredited in their State, all appropriate measures, in particular to— 15

- (a) collect, preserve and exchange information about the situation of the child and the prospective adoptive parents, so far as is necessary to complete the adoption; 20
- (b) facilitate, follow and expedite proceedings with a view to obtaining the adoption; 20
- (c) promote the development of adoption counselling and post-adoption services in their States;
- (d) provide each other with general evaluation reports about experience with inter-country adoption; 25
- (e) reply, in so far as is permitted by the law of their State, to justified requests from other Central Authorities or public authorities for information about a particular adoption situation.

Article 10

Accreditation shall only be granted to and maintained by bodies demonstrating their competence to carry out properly the tasks with which they may be entrusted. 30

Article 11

An accredited body shall—

- (a) pursue only non-profit objectives according to such conditions and within such limits as may be established by the competent authorities of the State of accreditation; 35
- (b) be directed and staffed by persons qualified by their ethical standards and by training or experience to work in the field of inter-country adoption; and
- (c) be subject to supervision by competent authorities of that State as to its composition, operation and financial situation. 40

Article 12

A body accredited in one Contracting State may act in another Contracting State only if the competent authorities of both States have authorized it to do so.

Article 13

The designation of the Central Authorities and, where appropriate, the extent of their functions, as well as the names and addresses of the accredited bodies shall be communicated by each Contracting State to the Permanent Bureau of the Hague Conference on Private International Law. 45

**CHAPTER IV—PROCEDURAL REQUIREMENTS IN INTER-COUNTRY
ADOPTION**

Article 14

Persons habitually resident in a Contracting State, who wish to adopt a child habitually resident in another Contracting State, shall apply to the Central Authority in the State of their habitual residence. 5

Article 15

(1) If the Central Authority of the receiving State is satisfied that the applicants are eligible and suited to adopt, it shall prepare a report including information about their identity, eligibility and suitability to adopt, background, family and medical history, social environment reasons for adoption, ability to undertake an inter-country adoption, as well as the characteristics of the children for whom they would be qualified to care. 10

(2) It shall transmit the report to the Central Authority of the State of origin.

Article 16

(1) If the Central Authority of the State of origin is satisfied that the child is adoptable, it shall— 15

- (a) prepare a report including information about his or her identity, adoptability, background, social environment, family history, medical history including that of the child's family, and any special needs of the child;
- (b) give due consideration to the child's upbringing and to his or her ethnic, religious and cultural background; 20
- (c) ensure that consents have been obtained in accordance with Article 4; and
- (d) determine, on the basis in particular of the reports relating to the child and the prospective adoptive parents, whether the envisaged placement is in the best interests of the child. 25

(2) It shall transmit to the Central Authority of the receiving State its report on the child, proof that the necessary consents have been obtained and the reasons for its determination on the placement, taking care not to reveal the identity of the mother and the father if, in the State of origin, these identities may not be disclosed.

Article 17

Any decision in the State of origin that a child should be entrusted to prospective adoptive parents may only be made if— 30

- (a) the Central Authority of that State has ensured that the prospective adoptive parents agree;
- (b) the Central Authority of the receiving State has approved such decision, where such approval is required by the law of that State or by the Central Authority of the State of origin; 35
- (c) the Central Authorities of both States have agreed that the adoption may proceed; and
- (d) it has been determined, in accordance with Article 5, that the prospective adoptive parents are eligible and suited to adopt and that the child is or will be authorized to enter and reside permanently in the receiving State. 40

Article 18

The Central Authorities of both States shall take all necessary steps to obtain permission for the child to leave the State of origin and to enter and reside permanently in the receiving State. 45

Article 19

(1) The transfer of the child to the receiving State may only be carried out if the requirements of Article 17 have been satisfied.

(2) The Central Authorities of both States shall ensure that this transfer takes place in secure and appropriate circumstances and, if possible, in the company of the adoptive or prospective adoptive parents.

(3) If the transfer of the child does not take place, the reports referred to in Articles 15 and 16 are to be sent back to the authorities who forwarded them.

5

Article 20

The Central Authorities shall keep each other informed about the adoption process and the measures taken to complete it, as well as about the progress of the placement if a probationary period is required.

Article 21

10

(1) Where the adoption is to take place after the transfer of the child to the receiving State and it appears to the Central Authority of that State that the continued placement of the child with the prospective adoptive parents is not in the child's best interests, such Central Authority shall take the measures necessary to protect the child, in particular—

- (a) to cause the child to be withdrawn from the prospective adoptive parents and to arrange temporary care;
- (b) in consultation with the Central Authority of the State of origin, to arrange without delay a new placement of the child with a view to adoption or, if this is not appropriate, to arrange alternative long-term care; an adoption shall not take place until the Central Authority of the State of origin has been duly informed concerning the new prospective adoptive parents;
- (c) as a last resort, to arrange the return of the child, if his or her interests so require.

(2) Having regard in particular to the age and degree of maturity of the child, he or she shall be consulted and, where appropriate, his or her consent obtained in relation to measures to be taken under this Article.

Article 22

(1) The functions of a Central Authority under this Chapter may be performed by public authorities or by bodies accredited under Chapter III, to the extent permitted by the law of its State.

30

(2) Any Contracting State may declare to the depositary of the Convention that the functions of the Central Authority under Articles 15 to 21 may be performed in that State, to the extent permitted by the law and subject to the supervision of the competent authorities of that State, also by bodies or persons who—

- (a) meet the requirements of integrity, professional competence, experience and accountability of that State; and
- (b) are qualified by their ethical standards and by training or experience to work in the field of inter-country adoption.

(3) A Contracting State which makes the declaration provided for in paragraph 2 shall keep the Permanent Bureau of the Hague Conference on Private International Law informed of the names and addresses of these bodies and persons.

40

(4) Any Contracting State may declare to the depositary of the Convention that adoptions of children habitually resident in its territory may only take place if the functions of the Central Authorities are performed in accordance with paragraph 1.

(5) Notwithstanding any declaration made under paragraph 2, the reports provided for in Articles 15 and 16 shall, in every case, be prepared under the responsibility of the Central Authority or other authorities or bodies in accordance with paragraph 1.

45

CHAPTER V—RECOGNITION AND EFFECTS OF THE ADOPTION

Article 23

50

(1) An adoption certified by the competent authority of the State of the adoption as having been made in accordance with the Convention shall be recognized by operation of law in the other Contracting States. The certificate shall specify when and by whom the agreements under Article 17, sub-paragraph c, were given.

(2) Each Contracting State shall, at the time of signature, ratification, acceptance, approval or accession, notify the depositary of the Convention of the identity and the functions of the authority or the authorities which, in that State, are competent to make the certification. It shall also notify the depositary of any modification in the designation of these authorities. 5

Article 24

The recognition of an adoption may be refused in a Contracting State only if the adoption is manifestly contrary to its public policy, taking into account the best interests of the child.

Article 25 10

Any Contracting State may declare to the depositary of the Convention that it will not be bound under this Convention to recognize adoptions made in accordance with an agreement concluded by application of Article 39, paragraph 2.

Article 26

- (1) The recognition of an adoption includes recognition of 15
- (a) the legal parent-child relationship between the child and his or her adoptive parents;
 - (b) parental responsibility of the adoptive parents for the child;
 - (c) the termination of a pre-existing legal relationship between the child and his or her mother and father, if the adoption has this effect in the Contracting State 20 where it was made.

(2) In the case of an adoption having the effect of terminating a pre-existing legal parent-child relationship, the child shall enjoy in the receiving State, and in any other Contracting State where the adoption is recognized, rights equivalent to those resulting from adoptions having this effect in each such State. 25

(3) The preceding paragraphs shall not prejudice the application of any provision more favourable for the child, in force in the Contracting State which recognizes the adoption.

Article 27

(1) Where an adoption granted in the State of origin does not have the effect of terminating a pre-existing legal parent-child relationship, it may, in the receiving State which recognizes the adoption under the Convention, be converted into an adoption having such an effect— 30

- (a) if the law of the receiving State so permits; and
- (b) if the consents referred to in Article 4, sub-paragraphs c and d, have been or 35 are given for the purpose of such an adoption.

(2) Article 23 applies to the decision converting the adoption.

CHAPTER VI—GENERAL PROVISIONS

Article 28 40

The Convention does not affect any law of a State of origin which requires that the adoption of a child habitually resident within that State take place in that State or which prohibits the child's placement in, or transfer to, the receiving State prior to adoption.

Article 29

There shall be no contact between the prospective adoptive parents and the child's parents or any other person who has care of the child until the requirements of Article 4, sub-paragraphs a to c, and Article 5, sub-paragraph a, have been met, unless the adoption takes place within a family or unless the contact is in compliance with the conditions established by the competent authority of the State of origin. 45

Article 30

(1) The competent authorities of a Contracting State shall ensure that information held by them concerning the child's origin, in particular information concerning the identity of his or her parents, as well as the medical history, is preserved.

(2) They shall ensure that the child or his or her representative has access to such information, under appropriate guidance, in so far as is permitted by the law of that State. 5

Article 31

Without prejudice to Article 30, personal data gathered or transmitted under the Convention, especially data referred to in Articles 15 and 16, shall be used only for the purposes for which they were gathered or transmitted. 10

Article 32

(1) No one shall derive improper financial or other gain from an activity related to an inter-country adoption.

(2) Only costs and expenses, including reasonable professional fees of persons involved in the adoption, may be charged or paid. 15

(3) The directors, administrators and employees of bodies involved in an adoption shall not receive remuneration which is unreasonably high in relation to services rendered.

Article 33

20

A competent authority which finds that any provision of the Convention has not been respected or that there is a serious risk that it may not be respected, shall immediately inform the Central Authority of its State. This Central Authority shall be responsible for ensuring that appropriate measures are taken.

Article 34

25

If the competent authority of the State of destination of a document so requests, a translation certified as being in conformity with the original must be furnished. Unless otherwise provided, the costs of such translation are to be borne by the prospective adoptive parents.

Article 35

30

The competent authorities of the Contracting States shall act expeditiously in the process of adoption.

Article 36

In relation to a State which has two or more systems of law with regard to adoption applicable in different territorial units— 35

- (a) any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit of that State;
- (b) any reference to the law of that State shall be construed as referring to the law in force in the relevant territorial unit;
- (c) any reference to the competent authorities or to the public authorities of that State shall be construed as referring to those authorized to act in the relevant territorial unit; 40
- (d) any reference to the accredited bodies of that State shall be construed as referring to bodies accredited in the relevant territorial unit.

Article 37

45

In relation to a State which with regard to adoption has two or more systems of law applicable to different categories of persons, any reference to the law of that State shall be construed as referring to the legal system specified by the law of that State.

Article 38

A State within which different territorial units have their own rules of law in respect of adoption shall not be bound to apply the Convention where a State with a unified system of law would not be bound to do so.

Article 39

5

(1) The Convention does not affect any international instrument to which Contracting States are Parties and which contains provisions on matters governed by the Convention, unless a contrary declaration is made by the States Parties to such instrument.

(2) Any Contracting State may enter into agreements with one or more other Contracting States, with a view to improving the application of the Convention in their mutual relations. These agreements may derogate only from the provisions of Articles 14 to 16 and 18 to 21. The States which have concluded such an agreement shall transmit a copy to the depositary of the Convention.

Article 40

No reservation to the Convention shall be permitted. 15

Article 41

The Convention shall apply in every case where an application pursuant to Article 14 has been received after the Convention has entered into force in the receiving State and the State of origin.

Article 42

20

The Secretary General of the Hague Conference on Private International Law shall at regular intervals convene a Special Commission in order to review the practical operation of the Convention.

CHAPTER VII—FINAL CLAUSES

25

Article 43

(1) The Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Seventeenth Session and by the other States which participated in that Session.

(2) It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the Convention. 30

Article 44

(1) Any other State may accede to the Convention after it has entered into force in accordance with Article 46, paragraph 1. 35

(2) The instrument of accession shall be deposited with the depositary.

(3) Such accession shall have effect only as regards the relations between the acceding State and those Contracting States which have not raised an objection to its accession in the six months after the receipt of the notification referred to in sub-paragraph b of Article 48. Such an objection may also be raised by States at the time when they ratify, accept or approve the Convention after an accession. Any such objection shall be notified to the depositary. 40

Article 45

(1) If a State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in the Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time. 45

(2) Any such declaration shall be notified to the depositary and shall state expressly the territorial units to which the Convention applies.

(3) If a State makes no declaration under this Article, the Convention is to extend to all territorial units of that State.

Article 46

5

(1) The Convention shall enter into force on the first day of the month following the expiration of three months after the deposit of the third instrument of ratification, acceptance or approval referred to in Article 43.

(2) Thereafter the Convention shall enter into force—

- (a) for each State ratifying, accepting or approving it subsequently, or acceding to it, on the first day of the month following the expiration of three months after the deposit of its instrument of ratification, acceptance, approval or accession; 10
- (b) for a territorial unit to which the Convention has been extended in conformity with Article 45, on the first day of the month following the expiration of three months after the notification referred to in that Article. 15

Article 47

(1) A State Party to the Convention may denounce it by a notification in writing addressed to the depositary.

(2) The denunciation takes effect on the first day of the month following the expiration of twelve months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary. 20

Article 48

The depositary shall notify the States Members of the Hague Conference on Private International Law, the other States which participated in the Seventeenth Session and the States which have acceded in accordance with Article 44, of the following— 25

- (a) the signatures, ratifications, acceptances and approvals referred to in Article 43;
- (b) the accessions and objections raised to accessions referred to in Article 44; 30
- (c) the date on which the Convention enters into force in accordance with Article 46;
- (d) the declarations and designations referred to in Articles 22, 23, 25 and 45;
- (e) the agreements referred to in Article 39;
- (f) the denunciations referred to in Article 47. 35

In witness whereof the undersigned, being duly authorized thereto, have signed this Convention.

Done at The Hague, on the ____ day of _____ 19____, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the States Members of the Hague Conference on Private International Law at the date of its Seventeenth Session and to each of the other States which participated in that Session. 40

SCHEDULE 2

HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION	5
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CHAPTER VI: FINAL CLAUSES	
<p>The States signatory to the present Convention, Firmly convinced that the interests of children are of paramount importance in matters relating to their custody, Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access, Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions—</p>	
	15
CHAPTER I—SCOPE OF THE CONVENTION	
Article 1	
The objects of the present Convention are—	
a. to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and	25
b. to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in other Contracting States.	
Article 2	
Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available.	
	30
Article 3	
The removal or the retention of a child is to be considered wrongful where—	
a. it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention;	35
and	
b. at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.	40
The rights of custody mentioned in sub-paragraph a above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.	
Article 4	
The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights.	
The Convention shall cease to apply when the child attains the age of 16 years.	
	45
Article 5	
For the purposes of this Convention—	
a. ‘rights of custody’ shall include rights relating to the care of the person of the child and, in particular, the right to determine the child’s place of residence;	50

- b. 'rights of access' shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

CHAPTER II—CENTRAL AUTHORITIES

Article 6

A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities. 5

Federal States, States with more than one system of law or States having autonomous territorial organisations shall be free to appoint more than one Central Authority and to specify the territorial extent of their powers. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which applications may be addressed for transmission to the appropriate Central Authority within that State. 10

Article 7

Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention. 15

In particular, either directly or through any intermediary, they shall take all appropriate measures—

- a. to discover the whereabouts of a child who has been wrongfully removed or retained;
- b. to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures; 20
- c. to secure the voluntary return of the child or to bring about an amicable resolution of the issues;
- d. to exchange, where desirable, information relating to the social background of the child; 25
- e. to provide information of a general character as to the law of their State in connection with the application of the Convention;
- f. to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organizing or securing the effective exercise of rights of access; 30
- g. where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers;
- h. to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child; 35
- i. to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application.

CHAPTER III—RETURN OF CHILDREN

Article 8

Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child. 40

The application shall contain— 45

- a. information concerning the identity of the applicant, of the child and of the person alleged to have removed or retained the child;
- b. where available, the date of birth of the child;
- c. the grounds on which the applicant's claim for return of the child is based;
- d. all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be. 50

The application may be accompanied or supplemented by—

- e. an authenticated copy of any relevant decision or agreement;

- f. a certificate or an affidavit emanating from a Central Authority, or other competent authority of the State of the child's habitual residence, or from a qualified person, concerning the relevant law of that State;
- g. any other relevant document.

Article 9

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If the Central Authority which receives an application referred to in Article 8 has reason to believe that the child is in another Contracting State, it shall directly and without delay transmit the application to the Central Authority of that Contracting State and inform the requesting Central Authority, or the applicant, as the case may be.

Article 10

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The Central Authority of the State where the child is shall take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child.

Article 11

The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.

15

If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.

20

Article 12

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

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The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

30

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

Article 13

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Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that—

- a. the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal of retention; or
- b. there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

40

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

45

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

50

Article 14

In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formally recognized or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable. 5

Article 15

The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination. 10 15

Article 16

After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under the Convention is not lodged within a reasonable time following receipt of the notice. 20

Article 17

The sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested State shall not be a ground for refusing to return a child under this Convention, but the judicial or administrative authorities of the requested State may take account of the reasons for that decision in applying this Convention. 25

Article 18

The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time. 30

Article 19

A decision under this Convention concerning the return of the child shall not be taken to be determination on the merits of any custody issue.

Article 20

The return of the child under the provision of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms. 35

CHAPTER IV—RIGHTS OF ACCESS**Article 21**

An application to make arrangements for organizing or securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child. 40

The Central Authorities are bound by the obligations of co-operation which are set forth in Article 7 to promote the peaceful enjoyment of access rights and the fulfilment of any conditions to which the exercise of such rights may be subject. The Central Authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights. The Central Authorities, either directly or through intermediaries, may 45

initiate or assist in the institution of proceedings with a view to organizing or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject.

CHAPTER V—GENERAL PROVISIONS

Article 22 5

No security, bond or deposit, however described, shall be required to guarantee the payment of costs and expenses in the judicial or administrative proceedings falling within the scope of this Convention.

Article 23

No legalization or similar formality may be required in the context of this Convention. 10

Article 24

Any application, communication or other document sent to the Central Authority of the requested State shall be in the original language, and shall be accompanied by a translation into the official language or one of the official languages of the requested State or, where that is not feasible, a translation into French or English. 15

However, a Contracting State may, by making a reservation in accordance with Article 42, object to the use of either French or English, but not both, in any application, communication or other document sent to its Central Authority.

Article 25 20

Nationals of the Contracting States and persons who are habitually resident within those States shall be entitled in matters concerned with the application of this Convention to legal aid and advice in any other Contracting State on the same conditions as if they themselves were nationals of and habitually resident in that State.

Article 26 25

Each Central Authority shall bear its own costs in applying this Convention.

Central Authorities and other public services of Contracting States shall not impose any charges in relation to applications submitted under this Convention. In particular, they may not require any payment from the applicant towards the costs and expenses of the proceedings or, where applicable, those arising from the participation of legal counsel or advisers. However, they may require the payment of the expenses incurred or to be incurred in implementing the return of the child. 30

However, a Contracting State may, by making a reservation in accordance with Article 42, declare that it shall not be bound to assume any costs referred to in the preceding paragraph resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice. 35

Upon ordering the return of a child or issuing an order concerning rights of access under this Convention, the judicial or administrative authorities may, where appropriate, direct the person who removed or retained the child, or who prevented the exercise of rights of access, to pay necessary expenses incurred by or on behalf of the applicant, including travel expenses, any costs incurred or payments made for locating the child, the costs of legal representation of the applicant, and those of returning the child. 40

Article 27

When it is manifest that the requirements of this Convention are not fulfilled or that the application is otherwise not well founded, a Central Authority is not bound to accept the application. In that case, the Central Authority shall forthwith inform the applicant or the Central Authority through which the application was submitted, as the case may be, of its reasons. 45

Article 28

A Central Authority may require that the application be accompanied by a written authorization empowering it to act on behalf of the applicant, or to designate a representative so to act.

Article 29

5

This Convention shall not preclude any person, institution or body who claims that there has been a breach of custody or access rights within the meaning of Article 3 or 21 from applying directly to the judicial or administrative authorities of a Contracting State, whether or not under the provisions of this Convention.

Article 30

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Any application submitted to the Central Authorities or directly to the judicial or administrative authorities of a Contracting State in accordance with the terms of this Convention, together with documents and any other information appended thereto or provided by a Central Authority, shall be admissible in the courts or administrative authorities of the Contracting States.

15

Article 31

In relation to a State which in matters of custody of children has two or more systems of law applicable in different territorial units—

- a. any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit of that State;
- b. any reference to the law of the State of habitual residence shall be construed as referring to the law of the territorial unit in that State where the child habitually resides.

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Article 32

In relation to a State which in matters of custody of children has two or more systems of law applicable to different categories of persons, any reference to the law of that State shall be construed as referring to the legal system specified by the law of that State.

25

Article 33

A State within which different territorial units have their own rules of law in respect of custody of children shall not be bound to apply this Convention where a State with a unified system of law would not be bound to do so.

30

Article 34

This Convention shall take priority in matters within its scope over the Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors, as between Parties to both Conventions. Otherwise the present Convention shall not restrict the application of an international instrument in force between the State of origin and the State addressed or other law of the State addressed for the purposes of obtaining the return of a child who has been wrongfully removed or retained or of organizing access rights.

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Article 35

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This Convention shall apply as between Contracting States only to wrongful removals or retentions occurring after its entry into force in those States.

Where a declaration has been made under Article 39 or 40, the reference in the preceding paragraph to a Contracting State shall be taken to refer to the territorial unit or units in relation to which this Convention applies.

45

Article 36

Nothing in this Convention shall prevent two or more Contracting State, in order to limit the restrictions to which the return of the child may be subject, from agreeing among themselves to derogate from any provision of this Convention which may imply such a restriction.

5

CHAPTER VI—FINAL CLAUSES**Article 37**

The Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Fourteenth Session.

It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

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Article 38

Any other State may accede to the Convention. The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

15

The Convention shall enter into force for a State acceding to it on the first day of the third calendar month after the deposit of its instrument of accession.

The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession. Such declaration shall be deposited at the Ministry of Foreign Affairs of the Kingdom of the Netherlands; this Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States.

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The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the first day of the third calendar month after the deposit of the declaration of acceptance.

25

Article 39

Any State may, at the time of signature, ratification, acceptance, approval or accession, declare that the Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect at the time the Convention enters into force for that State.

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Such declaration, as well as any subsequent extension, shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 40

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If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.

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Any such declaration shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands and shall state expressly the territorial units to which the Convention applies.

Article 41

Where a Contracting State has a system of government under which executive, judicial and legislative powers are distributed between central and other authorities within that State, its signature or ratification, acceptance or approval of, or accession to this Convention, or its making of any declaration in terms of Article 40 shall carry no implication as to the internal distribution of powers within that State.

45

Article 42

Any State may, not later than the time of ratification, acceptance, approval or accession, or at the time of making a declaration in terms of Article 39 or 40, make one or both of the reservations provided for in Article 24 and Article 26, third paragraph. No other reservations shall be permitted. 5

Any State may at any time withdraw a reservation it has made. The withdrawal shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands. The reservation shall cease to have effect on the first day of the third calendar month after the notification referred to in the preceding paragraph.

Article 43

The Convention shall enter into force on the first day of the third calendar month after the deposit of the third instrument of ratification, acceptance, approval or accession referred to in Articles 37 and 38. 10

Thereafter the Convention shall enter into force—

1. for each State ratifying, accepting, approving or acceding to it subsequently, on the first day of the third calendar month after the deposit of its instrument of ratification, acceptance, approval or accession; 15
2. for any territory or territorial unit to which the Convention has been extended in conformity with Article 39 or 40, on the first day of the third calendar month after the notification referred to in that Article. 20

Article 44

The Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 43 even for States which subsequently have ratified, accepted, approved it or acceded to it.

If there has been no denunciation, it shall be renewed tacitly every five years. 25

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands at least six months before the expiry of the five year period. It may be limited to certain of the territories or territorial units to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States. 30

Article 45

The Ministry of Foreign Affairs of the Kingdom of the Netherlands shall notify the States Members of the Conference, and the States which have acceded in accordance with Article 38, of the following—

1. the signatures and ratifications, acceptances and approvals referred to in Article 37; 35
2. the accession referred to in Article 38;
3. the date on which the Convention enters into force in accordance with Article 43;
4. the extensions referred to in Article 39; 40
5. the declarations referred to in Articles 38 and 40;
6. the reservations referred to in Article 24 and Article 26, third paragraph, and the withdrawals referred to in Article 42;
7. the denunciation referred to in Article 44. In witness whereof the undersigned, being duly authorized thereto, have signed this Convention. 45

Done at The Hague, on the 25th day of October, 1980, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the States Members of the Hague Conference on Private International Law at the date of its Fourteenth Session. 50

SCHEDULE 3

TEXT OF THE UN PROTOCOL TO PREVENT TRAFFICKING IN PERSONS

Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, G.A. res. 55/25, annex II, 55 U.N. GAOR Supp. (No. 49) at 60, U.N. Doc. A/45/49 (Vol. I) (2001). 5

Preamble

The States Parties to this Protocol,

Declaring that effective action to prevent and combat trafficking in persons, especially women and children, requires a comprehensive international approach in the countries of origin, transit and destination that includes measures to prevent such trafficking, to punish the traffickers and to protect the victims of such trafficking, including by protecting their internationally recognized human rights, 10

Taking into account the fact that, despite the existence of a variety of international instruments containing rules and practical measures to combat the exploitation of persons, especially women and children, there is no universal instrument that addresses all aspects of trafficking in persons, 15

Concerned that, in the absence of such an instrument, persons who are vulnerable to trafficking will not be sufficiently protected,

Recalling General Assembly resolution 53/111 of 9 December 1998, in which the Assembly decided to establish an open-ended intergovernmental ad hoc committee for the purpose of elaborating a comprehensive international convention against transnational organized crime and of discussing the elaboration of, inter alia, an international instrument addressing trafficking in women and children, 20

Convinced that supplementing the United Nations Convention against Transnational Organized Crime with an international instrument for the prevention, suppression and punishment of trafficking in persons, especially women and children, will be useful in preventing and combating that crime, 25

Have agreed as follows:

I. General provisions 30*Article 1**Relation with the United Nations Convention against Transnational Organized Crime*

1. This Protocol supplements the United Nations Convention against Transnational Organized Crime. It shall be interpreted together with the Convention. 35
2. The provisions of the Convention shall apply, mutatis mutandis, to this Protocol unless otherwise provided herein.
3. The offences established in accordance with article 5 of this Protocol shall be regarded as offences established in accordance with the Convention.

Article 2 40*Statement of purpose*

The purposes of this Protocol are:

- (a) To prevent and combat trafficking in persons, paying particular attention to women and children;
- (b) To protect and assist the victims of such trafficking, with full respect for their human rights; and 45
- (c) To promote cooperation among States Parties in order to meet those objectives.

*Article 3**Use of terms*

For the purposes of this Protocol:

- (a) “Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs; 5
- (b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used; 10
- (c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered “trafficking in persons” even if this does not involve any of the means set forth in subparagraph (a) of this article; 15
- (d) “Child” shall mean any person under eighteen years of age. 20

*Article 4**Scope of application*

This Protocol shall apply, except as otherwise stated herein, to the prevention, investigation and prosecution of the offences established in accordance with article 5 of this Protocol, where those offences are transnational in nature and involve an organized criminal group, as well as to the protection of victims of such offences. 25

*Article 5**Criminalization*

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of this Protocol, when committed intentionally. 30
2. Each State Party shall also adopt such legislative and other measures as may be necessary to establish as criminal offences:
 - (a) Subject to the basic concepts of its legal system, attempting to commit an offence established in accordance with paragraph 1 of this article; 35
 - (b) Participating as an accomplice in an offence established in accordance with paragraph 1 of this article; and
 - (c) Organizing or directing other persons to commit an offence established in accordance with paragraph 1 of this article.

II. Protection of victims of trafficking in persons 40*Article 6**Assistance to and protection of victims of trafficking in persons*

1. In appropriate cases and to the extent possible under its domestic law, each State Party shall protect the privacy and identity of victims of trafficking in persons, including, inter alia, by making legal proceedings relating to such trafficking confidential. 45
2. Each State Party shall ensure that its domestic legal or administrative system contains measures that provide to victims of trafficking in persons, in appropriate cases:
 - (a) Information on relevant court and administrative proceedings; 50

- (b) Assistance to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings against offenders, in a manner not prejudicial to the rights of the defence.
3. Each State Party shall consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons, including, in appropriate cases, in cooperation with non-governmental organizations, other relevant organizations and other elements of civil society, and, in particular, the provision of:
- (a) Appropriate housing;
 - (b) Counselling and information, in particular as regards their legal rights, in a language that the victims of trafficking in persons can understand;
 - (c) Medical, psychological and material assistance; and
 - (d) Employment, educational and training opportunities.
4. Each State Party shall take into account, in applying the provisions of this article, the age, gender and special needs of victims of trafficking in persons, in particular the special needs of children, including appropriate housing, education and care.
5. Each State Party shall endeavour to provide for the physical safety of victims of trafficking in persons while they are within its territory.
6. Each State Party shall ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered.

Article 7

Status of victims of trafficking in persons in receiving States

1. In addition to taking measures pursuant to article 6 of this Protocol, each State Party shall consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases.
2. In implementing the provision contained in paragraph 1 of this article, each State Party shall give appropriate consideration to humanitarian and compassionate factors.

Article 8

Repatriation of victims of trafficking in persons

1. The State Party of which a victim of trafficking in persons is a national or in which the person had the right of permanent residence at the time of entry into the territory of the receiving State Party shall facilitate and accept, with due regard for the safety of that person, the return of that person without undue or unreasonable delay.
2. When a State Party returns a victim of trafficking in persons to a State Party of which that person is a national or in which he or she had, at the time of entry into the territory of the receiving State Party, the right of permanent residence, such return shall be with due regard for the safety of that person and for the status of any legal proceedings related to the fact that the person is a victim of trafficking and shall preferably be voluntary.
3. At the request of a receiving State Party, a requested State Party shall, without undue or unreasonable delay, verify whether a person who is a victim of trafficking in persons is its national or had the right of permanent residence in its territory at the time of entry into the territory of the receiving State Party.
4. In order to facilitate the return of a victim of trafficking in persons who is without proper documentation, the State Party of which that person is a national or in which he or she had the right of permanent residence at the time of entry into the territory of the receiving State Party shall agree to issue, at the request of the receiving State Party, such travel documents or other authorization as may be necessary to enable the person to travel to and re-enter its territory.
5. This article shall be without prejudice to any right afforded to victims of trafficking in persons by any domestic law of the receiving State Party.

6. This article shall be without prejudice to any applicable bilateral or multilateral agreement or arrangement that governs, in whole or in part, the return of victims of trafficking in persons.

III. Prevention, cooperation and other measures

Article 9

5

Prevention of trafficking in persons

1. States Parties shall establish comprehensive policies, programmes and other measures:
 - (a) To prevent and combat trafficking in persons; and
 - (b) To protect victims of trafficking in persons, especially women and children, from revictimization. 10
2. States Parties shall endeavour to undertake measures such as research, information and mass media campaigns and social and economic initiatives to prevent and combat trafficking in persons.
3. Policies, programmes and other measures established in accordance with this article shall, as appropriate, include cooperation with non-governmental organizations, other relevant organizations and other elements of civil society. 15
4. States Parties shall take or strengthen measures, including through bilateral or multilateral cooperation, to alleviate the factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity. 20
5. States Parties shall adopt or strengthen legislative or other measures, such as educational, social or cultural measures, including through bilateral and multilateral cooperation, to discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking. 25

Article 10

Information exchange and training

1. Law enforcement, immigration or other relevant authorities of States Parties shall, as appropriate, cooperate with one another by exchanging information, in accordance with their domestic law, to enable them to determine: 30
 - (a) Whether individuals crossing or attempting to cross an international border with travel documents belonging to other persons or without travel documents are perpetrators or victims of trafficking in persons;
 - (b) The types of travel document that individuals have used or attempted to use to cross an international border for the purpose of trafficking in persons; and 35
 - (c) The means and methods used by organized criminal groups for the purpose of trafficking in persons, including the recruitment and transportation of victims, routes and links between and among individuals and groups engaged in such trafficking, and possible measures for detecting them. 40
2. States Parties shall provide or strengthen training for law enforcement, immigration and other relevant officials in the prevention of trafficking in persons. The training should focus on methods used in preventing such trafficking, prosecuting the traffickers and protecting the rights of the victims, including protecting the victims from the traffickers. The training should also take into account the need to consider human rights and child- and gender-sensitive issues and it should encourage cooperation with non-governmental organizations, other relevant organizations and other elements of civil society. 45
3. A State Party that receives information shall comply with any request by the State Party that transmitted the information that places restrictions on its use. 50

*Article 11**Border measures*

1. Without prejudice to international commitments in relation to the free movement of people, States Parties shall strengthen, to the extent possible, such border controls as may be necessary to prevent and detect trafficking in persons. 5
2. Each State Party shall adopt legislative or other appropriate measures to prevent, to the extent possible, means of transport operated by commercial carriers from being used in the commission of offences established in accordance with article 5 of this Protocol. 10
3. Where appropriate, and without prejudice to applicable international conventions, such measures shall include establishing the obligation of commercial carriers, including any transportation company or the owner or operator of any means of transport, to ascertain that all passengers are in possession of the travel documents required for entry into the receiving State. 15
4. Each State Party shall take the necessary measures, in accordance with its domestic law, to provide for sanctions in cases of violation of the obligation set forth in paragraph 3 of this article.
5. Each State Party shall consider taking measures that permit, in accordance with its domestic law, the denial of entry or revocation of visas of persons implicated in the commission of offences established in accordance with this Protocol. 20
6. Without prejudice to article 27 of the Convention, States Parties shall consider strengthening cooperation among border control agencies by, inter alia, establishing and maintaining direct channels of communication. 25

*Article 12**Security and control of documents*

Each State Party shall take such measures as may be necessary, within available means:

- (a) To ensure that travel or identity documents issued by it are of such quality that they cannot easily be misused and cannot readily be falsified or unlawfully altered, replicated or issued; and 30
- (b) To ensure the integrity and security of travel or identity documents issued by or on behalf of the State Party and to prevent their unlawful creation, issuance and use. 35

*Article 13**Legitimacy and validity of documents*

At the request of another State Party, a State Party shall, in accordance with its domestic law, verify within a reasonable time the legitimacy and validity of travel or identity documents issued or purported to have been issued in its name and suspected of being used for trafficking in persons. 40

IV. Final provisions*Article 14**Saving clause*

1. Nothing in this Protocol shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein. 45
2. The measures set forth in this Protocol shall be interpreted and applied in a way that is not discriminatory to persons on the ground that they are victims 50

of trafficking in persons. The interpretation and application of those measures shall be consistent with internationally recognized principles of non-discrimination.

Article 15

Settlement of disputes 5

1. State Parties shall endeavour to settle disputes concerning the interpretation or application of this Protocol through negotiation.
2. Any dispute between two or more States Parties concerning the interpretation or application of this Protocol that cannot be settled through negotiation within a reasonable time shall, at the request of one of those States Parties, be submitted to arbitration. If, six months after the date of the request for arbitration, those States Parties are unable to agree on the organization of the arbitration, any one of those States Parties may refer the dispute to the International Court of Justice by request in accordance with the Statute of the Court. 10
15
3. Each State Party may, at the time of signature, ratification, acceptance or approval of or accession to this Protocol, declare that it does not consider itself bound by paragraph 2 of this article. The other States Parties shall not be bound by paragraph 2 of this article with respect to any State Party that has made such a reservation. 20
4. Any State Party that has made a reservation in accordance with paragraph 3 of this article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

Article 16

Signature, ratification, acceptance, approval and accession 25

1. This Protocol shall be open to all States for signature from 12 to 15 December 2000 in Palermo, Italy, and thereafter at United Nations Headquarters in New York until 12 December 2002.
2. This Protocol shall also be open for signature by regional economic integration organizations provided that at least one member State of such organization has signed this Protocol in accordance with paragraph 1 of this article. 30
3. This Protocol is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations. A regional economic integration organization may deposit its instrument of ratification, acceptance or approval if at least one of its member States has done likewise. In that instrument of ratification, acceptance or approval, such organization shall declare the extent of its competence with respect to the matters governed by this Protocol. Such organization shall also inform the depositary of any relevant modification in the extent of its competence. 35
40
4. This Protocol is open for accession by any State or any regional economic integration organization of which at least one member State is a Party to this Protocol. Instruments of accession shall be deposited with the Secretary-General of the United Nations. At the time of its accession, a regional economic integration organization shall declare the extent of its competence with respect to matters governed by this Protocol. Such organization shall also inform the depositary of any relevant modification in the extent of its competence. 45

Article 17 50

Entry into force

1. This Protocol shall enter into force on the ninetieth day after the date of deposit of the fortieth instrument of ratification, acceptance, approval or accession, except that it shall not enter into force before the entry into force of

the Convention. For the purpose of this paragraph, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by member States of such organization.

2. For each State or regional economic integration organization ratifying, accepting, approving or acceding to this Protocol after the deposit of the fortieth instrument of such action, this Protocol shall enter into force on the thirtieth day after the date of deposit by such State or organization of the relevant instrument or on the date this Protocol enters into force pursuant to paragraph 1 of this article, whichever is the later.

Article 18 10

Amendment

1. After the expiry of five years from the entry into force of this Protocol, a State Party to the Protocol may propose an amendment and file it with the Secretary-General of the United Nations, who shall thereupon communicate the proposed amendment to the States Parties and to the Conference of the Parties to the Convention for the purpose of considering and deciding on the proposal. The States Parties to this Protocol meeting at the Conference of the Parties shall make every effort to achieve consensus on each amendment. If all efforts at consensus have been exhausted and no agreement has been reached, the amendment shall, as a last resort, require for its adoption a two-thirds majority vote of the States Parties to this Protocol present and voting at the meeting of the Conference of the Parties.
2. Regional economic integration organizations, in matters within their competence, shall exercise their right to vote under this article with a number of votes equal to the number of their member States that are Parties to this Protocol. Such organizations shall not exercise their right to vote if their member States exercise theirs and vice versa.
3. An amendment adopted in accordance with paragraph 1 of this article is subject to ratification, acceptance or approval by States Parties.
4. An amendment adopted in accordance with paragraph 1 of this article shall enter into force in respect of a State Party ninety days after the date of the deposit with the Secretary-General of the United Nations of an instrument of ratification, acceptance or approval of such amendment.
5. When an amendment enters into force, it shall be binding on those States Parties which have expressed their consent to be bound by it. Other States Parties shall still be bound by the provisions of this Protocol and any earlier amendments that they have ratified, accepted or approved.

Article 19

Denunciation

1. A State Party may denounce this Protocol by written notification to the Secretary-General of the United Nations. Such denunciation shall become effective one year after the date of receipt of the notification by the Secretary-General.
2. A regional economic integration organization shall cease to be a Party to this Protocol when all of its member States have denounced it.

Article 20

Depositary and languages

1. The Secretary-General of the United Nations is designated depositary of this Protocol.
2. The original of this Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF, the undersigned plenipotentiaries, being duly authorized thereto by their respective Governments, have signed this Protocol.

SCHEDULE 4**LEGISLATION REPEALED**

No. and year	Short Title	Extent of repeal	
33 of 1960	Children's Act	The whole	5
93 of 1962	General Law Further Amendment Act	Section 1	
57 of 1972	Age of Majority Act	The whole	
74 of 1983	Child Care Act	The whole	
82 of 1987	Children's Status Act	The whole	10
133 of 1993	Prevention of Family Violence Act	Section 4	
192 of 1993	Guardianship Act	The whole	
72 of 1996	Hague Convention on the Civil Aspects of International Child Abduction Act	The whole	15
86 of 1997	Natural Fathers of Children Born out of Wedlock Act	The whole	

MEMORANDUM ON THE OBJECTS OF THE CHILDREN'S BILL, 2003

1. LEGAL-TECHNICAL BACKGROUND OF BILL

This Bill (the "current Bill") contains part of the envisaged Children's Act. The Bill which was initially submitted to Parliament ("the consolidated Bill") dealt with the full spectrum of protection of children in both national and provincial spheres and was to be dealt with in terms of section 76 of the Constitution (functional area of concurrent national and provincial legislative competence). It was later found to be a "mixed" Bill, including elements to be handled in terms of both section 75 (functional area of national legislative competence) and section 76 of the Constitution. Due to its mixed character, the Deputy Speaker of the National Assembly requested the Executive to split the consolidated Bill, which has now been done. The provisions of the consolidated Bill which will apply to the provincial government have been removed and, consequently, the current Bill only contains matters which have to be dealt with in terms of section 75 of the Constitution. The numbering of the consolidated Bill has, however, been retained, hence the gaps in the current Bill, indicated by "*****". As soon as the current Bill is enacted, an amendment Bill containing the matters which apply to the provincial government only ("the amendment Bill") will be introduced. The amendment Bill will have to be dealt with in terms of section 76 of the Constitution. The amendment Bill will complete the current Bill by inserting the provisions which deal with welfare services.

2. GENERAL BACKGROUND AND OVERVIEW

The lives of children are affected by various pieces of legislation and international conventions. Apart from section 28 of the Constitution, which deals with the rights of children specifically, some of the statutes pertaining to children currently on the statute book are the following:

- Age of Majority Act, 1972 (Act No. 57 of 1972)
- Child Care Act 1960 (Act No. 74 of 1983)
- Children's Status Act, 1987 (Act No. 82 of 1987)
- Guardianship Act, 1993 (Act No. 192 of 1993)
- Hague Convention on the Civil Aspects of International Child Abduction Act, 1996 (Act No. 72 of 1996)

Over the past few years, it has become clear that existing legislation is not in keeping with the realities of current social problems and no longer protects children adequately. In addition thereto, the Republic of South Africa has acceded to various international conventions, such as the UN Protocol on the Rights of the Child and the African Charter on Children's Rights, the principles of which have to be incorporated into local legislation.

During 1997 the Minister for Social Development requested the South African Law Reform Commission to investigate the Child Care Act, 1983, and to make recommendations to the Minister for the reform of this particular branch of the law. After an extensive process of research and consultation, the Law Reform Commission finalised its report and proposed a draft Children's Bill in January 2003.

The Department of Social Development then took the process further through close liaison with the national Departments of Justice and Constitutional Development, Education, Health, Labour, the South African Police Service, the provinces, national non-governmental organisations and service providers as well as the Office on the Rights of the Child in the Presidency. Consultative workshops were also held with the Portfolio Committee on Social Development.

3. OBJECTS

The main objects of the proposed Children's Bill are:

- (a) To make provision for the structure, the services and the means for promoting and monitoring the sound physical, intellectual, emotional and social development of children;
- (b) to strengthen and develop community structures which can assist in providing care and protection for children;
- (c) to protect children from maltreatment, abuse, neglect, degradation, discrimination, exploitation and any other physical or moral harm or hazards;

- (d) to provide care and protection for children who are in need thereof;
- (e) to give effect to the Republic's obligations concerning the well-being of children in terms of the international instruments binding on the Republic; and
- (f) in general, to promote the protection, development and well-being of children.

Significant new proposals to address lacunas in the present situation include specific provision for the participation of children in matters affecting them, an extension of the rights of unmarried fathers, provision for a High Court procedure to allow persons other than parents to gain rights with regard to children, the need to formally recognise and provide for child-headed households and the protection of children. The Bill proposes to lower the age of majority and provides for parental responsibilities and rights agreements. Provision is made for parenting plans in certain instances. A chapter to formally regulate surrogate motherhood is also introduced to give effect to an earlier parliamentary investigation into this issue.

The Bill has 19 chapters, which can be summarised as follows:

- Chapter 1 deals with the interpretation, objects, application and implementation of the Bill, while the general principles underlying the Bill and the best interest of the child standard is set out in Chapter 2.
- Chapter 3 provides for children's rights and deals with issues such as the paramountcy of the best interest of the child, child participation, harmful social and cultural practices, access to children's courts and the age of majority.
- Chapter 4 deals with all matters pertaining to parental responsibilities and rights, parental responsibilities and rights agreements and the assignment of parental responsibilities and rights by order of court. This chapter also provides for the rights of fathers, presumption of paternity, parenting plans and the rights of children conceived by artificial fertilisation.
- The functioning, powers and jurisdiction of children's courts, the conduct of proceedings before the children's court and presiding officers and other court officials form the subject matter of Chapter 5 of the Bill.
- Chapters 6, 7, 10, 12, 14 and 15, respectively, deal with partial care, the definition of early childhood development and early childhood development services, the identification of children in need of care and protection, children in alternative care, child and youth care centres and shelters and drop-in centres.
- Chapters 16 and 17, respectively provide for adoption and inter-country adoption and Chapter 17 also gives effect to the Hague Convention on Inter-country Adoption.
- Chapter 18 gives effect to the Hague Convention on the Civil Aspects of International Child Abduction, while Chapter 19 similarly gives effect to the UN Protocol to Prevent Trafficking in Persons.
- Chapter 20 introduces new legislation into the South African legal system by formally providing for surrogate motherhood.
- Chapter 21 provides for the enforcement of the Bill through powers of inspection and the creation of offences.
- Chapters 22 and 23 of the Bill deal with general administrative issues and other miscellaneous matters such as regulations, delegations and assignments, outsourcing of services and transitional measures.

4. AMENDMENT BILL

The amendment Bill referred to in paragraph 1 will add to welfare service delivery and further protection of families and children. The amendment Bill will insert the following chapters in the envisaged Act:

- Chapter 8 is a crucial part of the Bill as it provides for measures for the protection of children. The chapter introduces a provision on the compulsory reporting by certain persons of children in need of care and protection, addresses the child protection system, the provision of child protection services, the National Child Protection Register and measures relating to the health of children.
- Chapter 9 makes provision for prevention and early intervention as a first layer of services provided to children and families in need of assistance.

- Chapter 11 deals with contribution orders.
- Chapter 13 deals with foster care and care by family members.

5. EFFECT ON THE PROVINCES AND LOCAL GOVERNMENT

The envisaged Act will rationalise legislation pertaining to children in South Africa. As such, it negates the need for each province to promulgate its own legislation on children's issues. It should therefore streamline provincial governance.

The current Bill will have no direct implications on local government.

6. CONSULTATION

Apart from the broad consultation process followed by the South African Law Reform Commission during its review of the Child Care Act, 1983, the Department of Social Development also distributed the draft Children's Bill to the provinces, national departments, non-governmental organisations and other service providers for comment. The explanatory summary of the Bill was also published for general comment in the *Gazette* on 13 August 2003.

7. FINANCIAL IMPLICATIONS FOR STATE

The Department of Social Development is in the process of considering the financial implications of the envisaged Children's Act. The Department has done an initial scoping exercise of the envisaged Act and identified the costing elements which may have inter-governmental fiscal and budgetary implications, which may include, amongst others:

- Fiscal risks: provisions that create implicit or explicit obligations on government;
- administrative costs: additional processes, personnel, management practices and procedures, information and reporting etc;
- institutional arrangements: new committees, units, associations etc;
- transfer of functions currently performed by provinces to the national government; and
- delegation or assignment of functions to provinces and municipalities.

8. PARLIAMENTARY PROCEDURE

The Department of Social Development and the State Law Advisers are of the view that this Bill must be dealt with by Parliament in accordance with the procedure established by section 75 of the Constitution.

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