

# FREQUENTLY ASKED QUESTIONS



## THE CHILDREN'S ACT, 2005 (ACT 38 OF 2005)



**the doj & cd**

Department:  
Justice and Constitutional Development  
REPUBLIC OF SOUTH AFRICA





### How will this booklet help me?

The Department of Justice and Constitutional Development receives questions on the Children's Act, 2005 (Act 38 of 2005), daily. The aim of this Frequently Asked Questions (FAQs) booklet is to answer these questions in a user-friendly manner and to create a better understanding of the Act and how it can work for you.

You can visit the Department of Justice and Constitutional Development's website ([www.justice.gov.za](http://www.justice.gov.za)) for an electronic copy of this booklet . You can also visit the Department of Social Development's website ([www.dsd.gov.za](http://www.dsd.gov.za)) for more information regarding child protection services, adoptions, foster care, child support grants, etc. or the South African Police Services website ([www.saps.gov.za](http://www.saps.gov.za)) for information regarding child abuse, emergency numbers, safety tips, etc

### How do I use this booklet to answer my questions on the Children's Act?

This booklet includes a range of questions and answers as received from the public and stakeholders and are listed under different categories.

### Are the answers supplied in the booklet, an opinion of an individual?

The answers we give are gathered directly from the Act. We also consult with other stakeholders to make sure you are given the right information.



## THE CHILDREN'S ACT, 2005

### 1.1 What is the Children's Act, 2005 and how can it help me?

The Children's Act is a piece of law which consists of 22 chapters and gives effect to certain rights of children as contained in the Constitution. It sets out principles relating to the care and protection of children. It also defines parental responsibilities and rights.

### 1.2 Does it really differ from all the previous legislation governing the rights of children?

Yes, it does! The Children's Act, 2005 makes further provision regarding children's courts. It provides for the issuing of contribution orders; makes new provision for the adoption of children; provides for inter-country adoption; gives effect to the Hague Convention on Inter-country Adoption; prohibits child abduction and gives effect to the Hague Convention on International Child Abduction; provides for surrogate motherhood; creates certain new offences relating to children; and provides for all the connected matters.

Many pieces of legislation that covered children's issues are now all covered in the Children's Act, 2005.

### 1.3 Will this booklet discuss the chapters individually?

Yes. We will attempt to answer as many questions within their individual categories as possible. If a question is urgent and

not answered here directly, you are welcome to contact the Department of Justice and Constitutional Development for further assistance

### **1.4 Is the Children's Act only for children?**

No. Basically everyone can get guidance from this Act including parents, guardians, grandparents, aunts, uncles, teachers and social workers. Although this Act is mainly about children, it speaks to the whole public.

### **1.5 I have heard about the Child Justice Act, 2008. Is this the same as the Children's Act, 2005?**

Not at all! The Child Justice Act, 2008 focuses on children who are in conflict with the law and are accused of committing offences, while the Children's Act, 2005 deals with matters relating to the care and protection of children, in general. (Refer to paragraphs 1.1 and 1.2 above).

### **1.6 Where can I get a copy of the Children's Act?**

An electronic copy of the Children's Act, 2005 (Act 38 of 2005) can be obtained from the Department of Justice and Constitutional Development's website ([www.justice.gov.za](http://www.justice.gov.za)).





## CHAPTER 1



### 2.1 Who is a child?

A child is a person under the age of 18 years.

### 2.2 What is sexual abuse in relation to a child?

Sexual abuse is:

- sexually molesting or assaulting a child or allowing a child to be sexually molested or assaulted
- encouraging, inducing or forcing a child to be used for the sexual gratification of another person
- using a child in, or deliberately exposing a child to sexual activities or pornography
- 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.

### 2.3 How do I know if a child is a “street child”?

A “street child” is a child who, because of abuse, neglect, poverty, community disorder or any other reason, has left his/her home, family or community and lives, begs or works on the streets. It can also be a child who, because of inadequate care, begs or works on the streets, but returns home at night.

### 2.4 What do people mean when they say that a child is being “trafficked”?

Trafficking in relation to a child means the recruitment, sale,

supply, transportation, transfer, harbouring or receipt of children, within or across the borders of South Africa. This can be done by any means, including: the use of threats, force or other forms of coercion; abduction; fraud; deception; abuse of power; or the giving or receiving of payments or benefits to achieve the consent of a person having control of a child. It can also be done because of a position of vulnerability on the side of the child. All of this must be done for the purposes of exploiting the child, and it can also include the adoption of a child facilitated or secured through illegal means.

### **2.5 How do I know if a child has been abandoned?**

A child has been abandoned if the parent, guardian or caregiver has deserted him/her; or if he/she has, for no apparent reason, had no contact with the parent, guardian, or caregiver for at least three months.

### **2.6 What is meant by “parental neglect”?**

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

## **CHAPTER 2**

### **3.1 How does the court know what is in the “best interests of the child”?**

The court looks at all relevant factors to determine what is in the



best interest of the child. Section 7 of the Act lists certain factors that the court must take into consideration when determining what is in the best interests of the child.

**3.2 I am a child. Will the court allow me to speak and tell my side of the story, or will the grown-ups make all the decisions?**

If you are of such an age, maturity and stage of development that you are able to participate in the proceedings, you have the right to participate in an appropriate way and express your views.

**3.3 I am 17 years old and I have been told that I need to be circumcised. Can people force me into circumcision?**

You cannot be forced. You must give your consent and be properly counselled before you make the decision to undergo circumcision.

**3.4 Are people allowed to take my 14-year-old sister for virginity tests?**

Virginity testing of children under the age of 16 is prohibited by the Law.



### **3.5 Is it possible for a child to bring a matter to Court on their own? Or does he/she need the permission of his parents or guardian?**

Every child has the right to bring and to be assisted in bringing, a matter to Court, provided that the matter falls within the jurisdiction of that Court.

## **CHAPTER 3**

### **4.1 What are parental rights and responsibilities?**

Parental rights and responsibilities that a person may have in respect of a child, include the responsibility and the right to:

- care for the child
- maintain contact with the child
- act as guardian of the child
- contribute to the maintenance of the child.

### **4.2 Does a father/mother have any rights when he is not paying any maintenance?**

Yes, a father/mother is not precluded from exercising contact if he/she has failed to pay maintenance.

### **4.3 How do grandparents obtain rights to a grandchild?**

Grandparents may apply to the Children's Court at the Magistrate's Office or the High Court for an order granting contact with, or care of the grandchild.



You can also ask to form part of the Parenting Plan or Parental Rights and Responsibilities Agreement, drawn up by parents and/or other family members, usually with the assistance of a social worker and/or family advocate.

## CHAPTER 4

### 5.1 Where can I find a Children's Court?

Every Magistrate's Court in South Africa is a Children's Court. This means that there are almost 737 children's courts in the country.

Contact details for all the magistrates' (lower) courts can be obtained from the Department of Justice and Constitutional Development's website ([www.justice.gov.za](http://www.justice.gov.za)).

### 5.2 I am afraid to go to the Children's Court. Will they let me sit with criminals?

Not at all! The Children's Court aims to be child-friendly. This means that a matter in the Children's Court is, as far as is practicable, not heard in the same room that is used for the prosecution of criminals.

### 5.3 What matters can I take to the Children's Court?

You can go to the Children's Court with matters relating to the following:

- the protection and well-being of a child
- the care of, or contact with a child

- paternity of a child
- support of a child
- the provision of early childhood development services
- prevention or early intervention services
- maltreatment, abuse, neglect, degradation or exploitation of a child, except criminal prosecutions in this regard
- the temporary safe care of a child
- alternative care of a child
- the adoption of a child, including an inter-country adoption
- 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
- any other matter relating to the care, protection or well-being of a child provided for in this Act.

### **5.4 I am not the parent or guardian of the child. May I still approach the Court if I know that the child is being abused?**

Yes, you may approach the Court. The Act says that anyone acting in the interests of the child may approach the Court.

## **CHAPTER 5**

### **6.1 What is partial care?**



Partial care is provided when a person, whether for a fee or without a fee, 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, by agreement between the



parents or care-givers and the provider of the service.

**6.2 My child goes to a partial-care facility. I have noticed that medication and other things that can be harmful to my child are not stored away. Does the Act say anything about this?**

Yes. The National Norms and Standards for Partial Care Facilities clearly state the following:

- Medicine, cleaning substances and any dangerous substances must be kept out of reach of children.
- Medicine and dangerous substances must be kept in separate locked or childproof cupboards.
- Dangerous objects, materials, sharp instruments and utensils must be kept out of reach of children.
- Dangerous substances may not be used in the vicinity of children.
- Electrical plugs must be covered.
- Paraffin, gas and other electric appliances must be kept out of reach of children.
- Cleaning agents must be kept in clearly marked containers and out of reach of children.

**6.3 My babysitter looks after all three of my children. Does this fall under partial care?**

No. The Act says that a person must take care of more than six children on behalf of their parents to qualify as a partial caregiver.

**CHAPTER 6****7.1 What is early childhood development (ECD)?**

ECD, for the purposes of this Act, means the process of emotional, cognitive, sensory, spiritual, moral, physical, social and communication development of children from birth to school-going age.

**7.2 My child attends an ECD Programme. Can anyone deliver ECD programmes?**

No. The national Norms and Standards for ECD programmes states clearly that such programmes must be delivered by members of staff who have the knowledge and training to deliver ECD programmes.

**CHAPTER 7****8.1 What is the National Child Protection Register?**

The purpose of Part A of the register is to have a record of all children who were victims of abuse and neglect, and to monitor child protection service delivery to these children. The purpose of Part B of the register is to have a record of persons who are unsuitable to work with children to protect children against abuse from these persons.



## **8.2 I have been notified that my name has been included on Part B of the register. What does this mean?**

When your name is included in Part B of the register, you are not allowed to:

- manage, operate, participate or assist in managing or operating an institution providing welfare services to children, including a child- and youth-care centre, a partial-care facility, a shelter or drop-in centre, a cluster foster-care scheme, a school, club or association providing services to children
- work with or have access to children at an institution providing welfare services to children, including a child- and youth-care centre, a partial-care facility, a shelter or drop-in centre, a school, club or association providing services to children, or in implementing a cluster foster-care scheme, either as an employee, volunteer or in any other capacity
- be permitted to become the foster parent or adoptive parent of a child
- work in any unit of the South African Police Service tasked with child protection
- be employed in terms of the Public Service Act in a position where you work with or have access to children
- be employed in terms of the Municipal Systems Act, 2000 (Act 32 of 2000), in a position where you work with or have access to children
- work in any other form of employment or activity where you have access to children.

### **8.3 Is it possible to appeal against the finding that I am unsuitable to work with children?**

Yes. You have the right to appeal to a higher court against the finding if a court made the finding, or you may have the finding reviewed by a court, if a forum other than a court made the finding.

### **8.4 Where can I find more information on submission of details to this register?**

The Department of Social Development has an information page on the details regarding submission. Please visit their website ([www.dsd.gov.za](http://www.dsd.gov.za)) for more information.

## **CHAPTER 8**

### **9.1 Who can the court order to participate in an Early Intervention Programme?**

The Court can order the child, parent and caregiver to participate in an early intervention programme. An early intervention programme can help parents to develop their parenting skills.





## CHAPTER 9

### 10.1 How will I know if a child is in need of care and protection?

The Act states clearly that a child is in need of care and protection if, the child:

- has been abandoned or orphaned and is without any visible means of support
- displays behaviour which cannot be controlled by the parent or care-giver
- lives or works on the streets or begs for a living
- is addicted to a dependence-producing substance and is without any support to obtain treatment for such dependency
- has been exploited or lives in circumstances that expose the child to exploitation
- lives in or is exposed to circumstances which may seriously harm that child's physical, mental or social well-being
- may be at risk if returned to the custody of the parent, guardian or care-giver of the child if there is reason to believe that he/she will live in or be exposed to circumstances which may seriously harm the physical, mental or social well-being of the child
- is in a state of physical or mental neglect
- 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
- is a victim of child labour
- is in a child-headed household.

### **10.2 What if the child is clearly in danger at the place he/she lives? Must the police/social worker always wait to get a court order before they can remove the child to a safer place?**

A social worker or a police official may remove a child from their home and place the child in temporary safe care without a court order. However, there must be reasonable grounds for believing that the child is in need of care and protection and needs immediate emergency protection. This may only be done when the delay in getting a court order for the removal of the child may jeopardise the child's safety and well-being.

The official concerned must also make sure that the removal of the child from his/her home environment is the best way to secure the child's safety and well-being.



### **10.3 Is it always the child that will be taken away from the home? Can't the alleged offender be removed?**

The police may remove the alleged offender from the home, but only if the official is certain that it will be in the best interest of the child to do so.

### **10.4 How does the Court decide what is in the best interest of my child before it issues an order?**

The Court considers a report from a designated social worker on the circumstances surrounding your child. The social worker also makes recommendations on how your family can be assisted.



## **10.5 I am afraid that the Court will place my child in a child- and youth-care centre. When will the Court use this option?**

A Children's Court may issue an order placing a child in the care of a child- and youth-care centre, but only if there are no other appropriate options available, such as placement in foster care or placement with you as the parent and a social worker supervising the well-being of your child.

## **10.6 What is a Foster Care Order?**

A Foster Care Order is an order that the Children's Court can make when it has found that a child is in need of care and protection. The Court can also issue such order when it is of the opinion that the order would be necessary in the protection and well-being of the child. The Foster Care Order would entail that the child is placed in the care of a foster parent who is not the parent or guardian of the child. A foster parent can also be an active member of an organisation operating a cluster foster-care scheme and who has been assigned responsibility for the foster care of a child. For further information on foster child grants, please visit SASSA's website ([www.sassa.gov.za](http://www.sassa.gov.za)).

## **CHAPTER 10**

### **11.1 What is a Contribution Order?**

A Children's Court can instruct a person such as a parent or guardian to pay money towards expenses incurred by the State

in respect of the child during a period when compulsory care and protection measures had to be taken. The Children's Court can also issue an order instructing a person such as a parent or guardian to pay a sum of money as a contribution towards the maintenance or treatment of a child placed in alternative care, such as foster care.

### CHAPTER 11

#### **12.1 When someone says a child has been placed in "alternative care", what does this mean?**

This means the child has been placed either in foster care, a child- and youth-care centre, or in temporary safe care.

#### **12.2 I am a foster parent. We would like to go on holiday outside South Africa and take the children to whom we are foster parents, along. Is this possible?**

A child in alternative care may not leave South Africa without the written approval of the Provincial Head of Social Development. This approval must be obtained in writing prior to departure from the country.





## CHAPTER 12

### **13.1 How many children may be placed with me in foster care?**

The Act says that not more than six children may be placed in foster care with a single person or two persons sharing a common household, except where the children are siblings or blood relations or if the Court considers this to be in the best interests of all the children concerned.

### **13.2 What is the duration of a foster care placement?**

This is with the discretion of the Court. Normally, placements are made for up to two years. But it can be up to 18 years if all the requirements are met.

## CHAPTER 13

### **14.1 Can a boarding school also be a child- and youth-care centre?**

No a boarding school cannot also be a child- and youth-care centre. The Act states that a child-and youth-care centre is a facility for the provision of residential care to more than six children outside the child's family environment in accordance with a Residential Care Programme suited for the children in the facility, but excludes:

- a partial care facility

- a drop-in centre
- a boarding school
- a school hostel or other residential facility attached to a school
- a prison
- any other establishment which is maintained mainly for the tuition or training of children other than an establishment which is maintained for children ordered by a court to receive tuition or training.

### CHAPTER 14

#### 15.1 What is a drop-in centre?

A drop-in centre is a facility that must offer any of the following basic services:

- provision of food
- school-attendance support
- assistance with personal hygiene
- laundry services.



### CHAPTER 15

#### 16.1 Who may adopt a child?

A child may be adopted jointly by a husband and wife; partners in a permanent domestic life-partnership; or other persons sharing a common household and forming a permanent family unit. The following persons may also adopt a child:



- a widower, widow, divorced or unmarried person
- a married person whose spouse is the parent of the child or by a person whose permanent domestic life-partner is the parent of the child
- the biological father of a child born out of wedlock
- the foster parent of the child.

### **16.2 I am not a rich person, but I would like to adopt a child. Will this be possible?**

Yes, it is possible. A person may not be disqualified from adopting a child by virtue of his/her financial status.

### **16.3 Must a child give permission for his/her own adoption?**

A child over the age of 10 years must give consent to his/her own adoption. If the child is however under the age of 10 years, but is of an age, maturity and stage of development to understand the implications of consent, his/her consent must also be sought.

### **16.4 Does the Court take into account the religion of the adoptable child, before making an adoption order?**

Yes. The Court takes into account all relevant factors, including the religious and cultural background of:

- the child
- the child's parent
- the prospective adoptive parent or parents.



**CHAPTER 16****17.1 Is it possible for a person from another country to adopt a child from South Africa?**

Yes. The Act makes provision for people from all other countries to adopt a child from South Africa, as long as the requirements under the Act are met. Requirements will differ depending on whether the person is adopting from a Convention or Non-Convention country.

**17.2 What is a Convention/Non-Convention country?**

A Convention or Non-Convention country refers to a country that has or has not yet signed and ratified the Hague Convention on Inter-Country Adoptions.

**CHAPTER 17****18.1 I have care and contact of my child; my wife has taken my child with her overseas, and said she will not be returning. What recourse do I have?**

The Hague Convention on the Civil Aspects of International Child Abduction, which was ratified by South Africa, governs these types of abductions. You are advised to contact the office of the Chief Family Advocate ([www.justice.gov.za](http://www.justice.gov.za)) to assist you with this matter.



## CHAPTER 18

### **19.1 Is it possible for a child to be trafficked within the borders of South Africa?**

Yes, it is possible. Trafficking of children can also occur within the borders of the country.

### **19.2 What if the child consented to being trafficked?**



The Act clearly states that the consent of the child cannot be used as a defence.

### **19.3 I am a doctor. What must I do when I come into contact with a child who has been a victim of trafficking?**

The Act calls on immigration officials, police officials, social workers, social service professionals, medical practitioners and registered nurses, who come into contact with a child who is a victim of trafficking, to refer that child to a designated social worker for investigation.

**CHAPTER 19****20.1 What is meant with “surrogate motherhood”?**

Surrogate motherhood is an agreement between a woman (surrogate mother) and another person (commissioning parent) that the surrogate mother will be artificially fertilised for the purpose of bearing a child for the commissioning parent. The surrogate mother then undertakes to hand over the child to the commissioning parent upon its birth, or within reasonable time thereafter, with the intention that the child concerned becomes the legitimate child of the commissioning parent.

**Should you have any further questions about the Act, please keep a close eye on our website [www.justice.gov.za](http://www.justice.gov.za), as we will be updating our FAQ webpage on a regular basis!**

Also, should you want to ask any other questions about your rights as a child or have questions about the Children’s Act, e-mail us at [children@justice.gov.za](mailto:children@justice.gov.za).







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