Do African customs support and promote children’s protection rights?

There are many positive customs that protect children and promote their well-being. However, some carry the risk of harm to children's welfare, safety, dignity, equality, development and health. In other words, they are possibly harmful to their protection rights.

What does the law say about this?

Customs that protect children must be promoted so that they are used more widely. Harmful ones must be changed so that children are protected.

Living customary law changes

Custom has changed over time and will continue to change. This happens when those who practise it change what it looks like and how it is practised. In this way harmful customary practices have been changed in the past and can continue to change in the future.

The purpose of these fact sheets

There are many stakeholders with the power to promote positive customary practices and change harmful ones. These fact sheets have been developed to provide information that can help them fulfill these roles.

The fact sheets give information about:

• The protection rights of children
• The cultural rights of children
• How children's protection rights and cultural rights can complement each other
• The legal obligations on role players to protect both sets of rights
• Who the different role players are that have the power to change customary practices
• How some of these role players can, in their day-to-day lives, promote positive practices or change harmful practices

Fact sheets in this series

1 The legal framework: Children's cultural rights & protection rights
2 Working together: Who has the power to develop custom and what are their roles?
   2.1 Children
   2.2 Parents, family and other community members
   2.3 Traditional leaders
   2.4 Traditional courts
   2.5 NGOs
   2.6 Government departments (Social Development, Health, COGTA, Justice and Constitutional Development)
   2.7 Parliament
   2.8 The state courts
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3 Positive African customary practices that protect children
4 Some practical guidelines on how to promote positive customary practices:
   4.1 Naming children
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   4.3 Peer and inter-generational communication and support
5 Harmful customary practices
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   8.1 Absent fathers
   8.2 Abuse of children and women
   8.3 Forced child marriages

We have seen many changes in how our customs look and have been practised.
Key international and regional legal instruments

- International Covenant on Economic, Social and Cultural Rights (1966) (ICESC)
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- The International Labour Organisation’s (ILO’s) Conventions - Minimum Age for Admission to Employment (1973) and on the Worst Forms of Child Labour (1999)

Key national laws pertaining to children

- The Children’s Act No. 38 of 2005 as amended by Act No. 41 of 2007 and Act No. 75 of 2008
- Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007 (commonly referred to as the Sexual Offences Act)
- The Child Justice Act No. 75 of 2008
- The Births and Deaths Registration Amendment Act No. 51 of 1992
- The South African Schools Act No. 84 of 1997
- Abolition of Corporal Punishment Act of 1997
- Basic Conditions of Employment Act No. 75 of 1997
- Recognition of Customary Marriages Act of 2000
- Marriage Act of 1961, as amended

South Africa has signed and ratified all of the above, except for the ICESC.

The law says that you children have the right to be protected and to develop to your full potential. Many of our customs can help realise these rights, but some may also cause harm – if they do, they must be changed.
Children's cultural rights

The law says that every child has the right to:

• Take part in the cultural life of their communities;
• participate freely and fully in cultural life;
• not be deprived of the right to enjoy their own culture.

Children's protection rights

The law says that every child has the right to protection. This right is made up of a collection of rights and matching responsibilities on parents and the government. Together they make up a package of rights that ensure the overall welfare, safety, dignity, equality, normal growth and development, and health of all children. This package includes the following rights:

• to be treated equally regardless of the child's or his or her parent's gender, race, ethnic group, colour or language;
• to access to information;
• to participate in all decisions and to express their views in all matters affecting them;
• to a name and nationality;
• to the best attainable physical, mental and spiritual health through the provision of health care, nutrition, information, and protection from harmful customary practices;
• not to be employed if they are younger than 15 years and to be protected from economic and domestic labour that is harmful to their education, development, health, safety or morals;
• to protection from violence, injury, abuse (including sexual abuse), neglect, maltreatment, and exploitation (including economic and sexual exploitation);
• not to be subjected to corporal punishment (physical punishment) in the home, school and through the justice system;
• to parental care and protection. This includes the right to know, live with, and be cared for by one's parents;
• protection from forced marriages or marrying under the age of 18 years;
• to be protected by positive African customary practices. Practices that respect and further children's protection rights must be promoted;
• to be protected against harmful customary practices that infringe their rights. Harmful practices must be changed.

In summary - the best interests of the child

These laws protect and balance children's cultural rights and their protection rights as follows:

• custom and cultural rights are protected and promoted;
• however, any custom, tradition, or cultural practice that conflicts with any child's rights is not permitted; and
• in all actions related to the child, the best interests of the child must be the main consideration: in cases of conflict of culture and children's rights, children's rights must come first.

Who is a child?
A child is every person below the age of 18 years

We have rights to be protected and to practise our customs.
Who has the power to shape custom?

A number of role players have the power to promote or change African customs. For many of these role players, this power exists alongside their legal responsibilities to protect children. Those who have this power must take action to shape custom so that it works in the best interests of the child.

### WHO?

<table>
<thead>
<tr>
<th>Traditional leaders &amp; National, Provincial and Local Houses of Traditional Leaders</th>
<th>Traditional leaders must:</th>
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<tbody>
<tr>
<td></td>
<td>• Promote and develop custom.</td>
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<td></td>
<td>• Promote the rights in the Bill of Rights, including Children’s rights.</td>
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<td></td>
<td>• Must report any cases of child abuse or neglect in the community to officials.</td>
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<tr>
<td></td>
<td>• Should report any child in need of care and protection to officials.</td>
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**Traditional leaders should:**

- Advocate for community members to have their collective “eyes on the children” and to refer cases of child abuse to traditional leaders.
- Report community members who are abusing children through, for example, forced marriages to social workers or the police for prosecution.
- Advocate for the Children’s Act to recognise and regulate positive practices such as customary adoptions and foster care.
- Advocate for communities to revive past positive practices such as responsible present fathers who provide for and protect their children and women.
- Promote the use of traditional forms of positive discipline rather than corporal (physical) punishment.

**Traditional leaders preside over Traditional Courts which deal with many family and community matters and disputes.**

Traditional Courts must, when deciding these matters, respect and further the rights in the Bill of Rights in the Constitution, including children’s rights.

**Traditional Courts should:**

- Acquire a full understanding of the laws protecting children and apply the best interests of the child test to all relevant disputes.
- Refer abuse cases to the police for prosecution.
- Become part of community child protection networks and refer children in need of care and protection to social workers and other network partners, including NGOs.

<table>
<thead>
<tr>
<th>Parents</th>
<th>Parents have the main responsibility for the upbringing, development and protection of their children.</th>
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<td>Parents are also the most direct custodians of custom: they are the ones who decide whether or not they or their children will follow a custom.</td>
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**Parents should:**

- Stop practices if they are harmful to their child.
- Talk with their children and take their views into account in deciding whether or not to practise a custom.
- Obtain information about local practices, such as initiation schools, and make choices for their children based on what will best protect their children.
- Make community custodians of customs (such as initiation school leaders) accountable for the safety and protection of their children by prosecuting harmful practitioners.

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<tr>
<th>NGOs</th>
<th>NGOs play a key advocacy role in providing services at a family and community level that protect children from the risk of harm.</th>
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<td>These services, known as prevention and early intervention services, can promote different positive practices and discourage harmful practices.</td>
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**NGOs can develop prevention and early intervention programmes that include steps to promote positive practices and challenge harmful ones, including:**

- The provision of information about children’s protection rights and obligations to traditional leaders, traditional healers and traditional courts.
- Building networks of care that bring together the custodians of custom (such as traditional leaders, elders, community members, families) and NGOs and government service-providers to find solutions together.
- Parenting programmes that challenge gendered parenting roles.
- Workshops that encourage communication between children and their parents and which encourage children’s participation in matters that affect them.
- Therapeutic programmes for abused children that are based on traditional therapeutic practices such as role playing and play-acting.
## Role Players with the Power to Develop Custom

<table>
<thead>
<tr>
<th>Role Players</th>
<th>What Are Their Powers and Obligations?</th>
<th>Some Suggestions As To How Role Players Can Exercise Their Powers in the Best Interest of the Child</th>
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</thead>
<tbody>
<tr>
<td>Parliament</td>
<td>Parliament must pass laws that protect the rights in the Bill of Rights, including children’s cultural and protection rights. Where there is a conflict between these rights, it must pass laws changing harmful customs.</td>
<td>Parliament has passed child protection laws that promote positive practices such as communal care of children and restorative justice practices, and which also outlaw harmful practices such as child marriages. It must continue this process of matching rights and custom in future laws and amendments. For example, the Children’s Act amendments should recognise customary adoption and foster care as well as outlaw corporal punishment in homes. It must also ensure that the laws are upheld.</td>
</tr>
<tr>
<td>The courts</td>
<td>The courts must: • Recognise customary law as part of the law of South Africa. • Change customary law to match it with the Constitution. In addition, Children’s Courts must: • Decide all matters on the basis of the best interest of the child. • Divert children away from the formal justice system to allow for family-based resolution of disputes.</td>
<td>The courts must: • Recognise positive practices as legally binding. For example, where a customary adoption has taken place, they must recognise this as creating parental obligations in relation to the child and require adoptive parents to fulfill their responsibilities. • Where a practice is harmful, either apply the criminal laws outlawing it and/or make an order requiring the legislature to abolish or regulate the practice. • Be child friendly places in which children are comfortable to talk. Children’s Courts should: • Where appropriate, refer child protection matters more often to the extended family for a family group conference to resolve the issue under consideration.</td>
</tr>
<tr>
<td>Government departments</td>
<td>Various departments have a mandate that allows for matching and balancing children’s cultural and protection rights. These include the Departments of Co-operative Governance and Traditional Affairs (COGTA), Home Affairs, Social Development, Health, and Justice and Constitutional Development.</td>
<td>• COGTA should facilitate the integration of child protection issues into traditional leadership and community programmes of action. • Home Affairs should amend the birth registration laws to accommodate naming practices that take longer than the 30 days allowed for birth registration. • Social Development should develop and support prevention and early intervention programmes that promote positive practices such as family conferences and the collective care and protection of children within the extended family by all family members. • Health should provide education on the health consequences of practices and protective alternatives. • Justice and Constitutional Development should train all Traditional Courts on children’s protection rights and build linkages between Traditional Courts and Children’s Courts.</td>
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<tr>
<td>Rights commissions</td>
<td>Commissions such as the South African Law Reform Commission (SALRC), Human Rights Commission (HRC) and Commission for the Promotion and Protection of the Rights of Cultural and Linguistic Communities (CLRC) are obliged to review, monitor and promote customary practices so as to further the rights in the Bill of Rights.</td>
<td>• The CLRC should revive positive protective practices that have fallen away by raising awareness of them and supporting campaigns to revive them. • The SALRC should review all customs and make formal recommendations for their change to ensure they respect the Constitution and the Bill of Rights. • The SAHRC should monitor respect for child protection laws and encourage dialogue between the cultural and children’s sectors about how to work together to match children’s protection and cultural rights.</td>
</tr>
<tr>
<td>Children</td>
<td>Children have a right to information and to participate in all decisions that affect them. Children also have the right not to be subject to harmful cultural practices.</td>
<td>Children should: • Obtain information about their cultural and protection rights. • Discuss with their peers whether their community practices protect them or harm them. • Discuss with their parents the concerns they have about harmful customs. If it is too difficult to talk to their parents, they should ask their schools to host a formal discussion amongst parents on the subject. • Report harmful practices to the police, their school counsellor or principal, ChildLine or any other welfare organisation in their area, clinic nurses, or their community or religious leaders.</td>
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*Image: Save the Children*
POSITIVE AFRICAN CUSTOMARY PRACTICES

POSITIVE AFRICAN CUSTOMARY PRACTICES THAT PROTECT CHILDREN

Obligations to promote positive African customary practices

International, regional and national laws protect the rights of all people, including children, to practise their customs. They oblige all stakeholders, including children, schools, traditional leaders, governments and the courts, to actively promote - preserve and strengthen - positive African customary practices and values.

The protection of children is central to African custom

Patriarchy and the extended family – two key features of African custom – require the head of the household (as supported by other household members) to protect and care for the family members, including the children.

Traditionally, children are viewed as a “gift” which must be cared for.

Consequently, there are many positive African customary practices that protect children. Certain of these practices have, however, fallen into disuse or changed over time in response to social, economic and legal pressures. This means that some practices no longer provide the same level of protection as they did in earlier times.

The nature of the legal obligation to promote positive practices

The legal obligation to promote positive practices requires the:

• safeguarding and increased use of positive customs that are still practised today which protect children against harm; and
• revival and promotion of positive practices that are no longer used today.

African customary practices that promote children’s protection rights

Children's protection is guaranteed through a bundle of rights described in Fact Sheet Number 1 in this series. Many of these rights are promoted by a number of African customary practices, including the following:

Traditional naming practices

Traditional naming ceremonies take place shortly after a child is born. These mark a child's inclusion in the extended and protective family circle and the start of the family obligations to care for and protect the child. Naming practices therefore promote a child's rights to know and be cared for by their parents and families. They also promote the child's right to a name.
**The extended family**
The extended family is the main source of material and social support for all family members, including the children. The active role played in the life of children by all extended family members guarantees that a range of developmental rights and needs are met. These include their material (food, clothing and health care), educational, and psychosocial (counselling and communication) needs and rights.

**The African institution of fatherhood**
The extended family is headed by the African father. The African institution of fatherhood not only vests authority in men, it also creates a number of obligations on fathers to provide social and material support which provide stability and protection for children.

**Communal care of children**
Traditionally the care and protection of children is a communal and collective responsibility. All adults in the community are obliged to keep an eye on all children and ensure they are not neglected; that they are not hungry; that they have clothes to wear; that they are not harmed; and that they behave well and with respect to each other and other community members.

**Customary adoptions and foster care**
The ethic of communal care is the foundation for customary adoptions and foster care of children in need of alternative care. This has ensured that many children who have been orphaned in South Africa have found care and protection, within either their extended families, or the broader community.

**Early childhood development through games and role-playing**
Early childhood education and development is promoted in traditional communities through the playing of games, story telling and role-playing by children from a very young age, often under the guidance of their grandmothers.

**Positive alternative forms of discipline**
The communal care of children provides a positive alternative form of discipline for children. Where children are seen to be misbehaving, traditionally it is the role of all adults in the community to teach the child about what is good behaviour and acceptable in their community. This, together with the traditional practice of the payment of compensation to the victim of a child offender, offers positive alternative forms of discipline. In addition, these practices promote the principles of restorative justice and the rights of children to humane treatment and rehabilitative sentences when they are in conflict with the law.

**Psychosocial support through peer and inter-generational communication**
Children communicate regularly with their brothers and sisters, aunts and uncles, and older girls and boys in the community, as well as with their grandparents and teachers. This provides children with a continuous and accessible form of psychosocial support and possible protection from abuse.

**Freedom of expression through games and play-acting**
Traditional games, story telling and play-acting allow children to express themselves, voice their opinions and share their experiences with each other. These often take place in a safe and therapeutic space where children can talk about issues that may be traditionally taboo in day-to-day conversations with each other and their parents or other caregivers.

**Initiation ceremonies create a sense of identity, belonging and educate children**
Initiation ceremonies, which mark the transition of children to adulthood, contribute to children's sense of belonging to a broader community. They also have a strong educational component that offers space for age-appropriate education.

**Ante-natal and infant feeding practices promote health and well-being**
Traditional practices such as lengthy spacing between pregnancies and exclusive breast feeding for extended periods contribute to maternal and child health and development.
PROMOTING POSITIVE CUSTOMARY PRACTICES

How to promote positive practices?

The promotion of positive practices is a process through which more people are encouraged or obliged to make use of the relevant practices to protect children. This can be achieved through the recognition and integration of positive practices, either into the law or a child protection programme.

A key challenge to promoting positive practices: access to information about practices

One of the biggest challenges to making use of customary practices in daily child protection services is a lack of knowledge about what these practices are and what they look like.

How to overcome the challenge

Before any role player can set out to promote positive practices, there is a need to identify and document local customary practices which further children's rights. This applies to all role players.

NGOs, Parliament, government departments, rights commissions, judges, magistrates and children’s commissioners must spend more time, before making a decision, or developing a programme, or passing a law, talking to members of traditional communities – children, families and traditional leaders – about local practices.

This can be done at community meetings, through the schools, through workshops, through daily interactions with local community members in the process of providing them with services, and through the leading of evidence in a court of law.

Share this information

Where possible, information about positive practices should be documented and shared with other child protection stakeholders.

Sharing through office meetings, through newsletters, through seminars, workshops, and through awareness campaigns and the many networks in the sector will contribute to building a platform of shared information.

How can the different stakeholders promote positive customary practices in their day to day functions to further children’s rights?

The courts

In a number of instances the courts have recognised positive practices as creating binding legal obligations. For example, the High Court, in a case called Maneli v Maneli, recognised a customary adoption for the purpose of making an order for the payment of maintenance by an adoptive parent.

It is important for lawyers, social workers, probation officers and prosecutors to place evidence of positive customary practices before the court. Once this evidence is before the court, the court can be asked to take it into account in its decision and final order as to how the child or parent should act or be treated in the future.

Children’s courts

Children’s courts are authorised to refer cases involving children in need of care and protection and those in conflict with the law to community-level dispute resolution forums. For example,
Children’s Courts can order that a matter be considered by a family group conference. This must include the extended family members who will find solutions to the problem before the court. These courts may also refer a matter to any other Lay Forum, including a traditional authority.

Social workers and prosecutors should be encouraged to include recommendations for referrals to family conferences and traditional authorities in their reports to the court, especially in disputes involving children in traditional communities and those involving customary practices.

Parliament

Parliament has incorporated a number of positive customary practices into the Children’s Act No. 38 of 2005 and the Child Justice Act No. 75 of 2008. This has created an obligation on stakeholders to use these practices for the protection of vulnerable children.

For example, the definition of a family includes extended family members who share some of the protection responsibilities regulated by the Act.

It also incorporates and promotes communal care. It requires, for example, caring and responsible members of the community to provide care to child-headed households. It also recognises community-based drop-in centres and encourages the establishment of more in areas where there is not enough support for vulnerable children.

The administrative branch of government

The Department of Social Development must develop a prevention and early intervention programme of action in terms of the Children’s Act. It has undertaken studies to identify customary practices that contribute to the prevention of child abuse, neglect and exploitation as well as practices that contribute to reversing potential harm. It aims to incorporate these into its prevention and early intervention strategy.

Home and community-based care programmes developed by the Departments of Health and Social Development have revived and scaled up communal care principles.

NGOs

NGOs like the National Association of Child Care Workers, Child Welfare, the Umthatha Child Abuse Resource Centre, ACESS, RAPCAN and Childline have revived the communal care of children through community-based child protection programmes. They have identified caring and responsible community members and supported them with skills, knowledge and resources to enable them to provide care and support to children in their communities that are in need of care and protection.

Some practical ideas for promoting positive practices in the future

Increase birth registration rates in traditional customary communities.

Traditional communities view naming and naming practices as very important and significant. Yet, birth registration rates are lower in traditional communities. Birth registration campaigns should highlight the similarities between naming rituals and birth registration: showing that both the naming ritual and the birth registration process mark the commencement of responsibilities (on the government and parents) to care for the child. They must be promoted as equally important practices that should be followed by families for the benefit and protection of their children.

Advocate for the law to recognise customary foster care and adoptions

Earlier versions of the Children’s Act did recognise kinship care and rights and responsibilities between children and their kinship carers. However, the final version of the Act did not include this recognition. In moving forward, there is space to advocate for recognising and regulating kinship care as a way of providing regulated, but less formal, alternative care arrangements for children.

Build the protective capacity of the extended family and community members

Parenting and other child protection programmes must, of course, target children’s parents. They are the first line of defence for the protection of children. However, they should expand their reach to include members of the extended family and the community. Programmes to strengthen children’s networks of care, access to information, and counselling should target the education of parents, grandmothers, aunts and uncles, brothers and sisters as well as older boys and girls in the community to whom children turn for information, counselling and protection.
CUSTOMARY PRACTICES HARMFUL TO CHILDREN

Constitutional obligation to change harmful African customary practices

African custom is a recognised source of law in South Africa. As with any other law, it must comply with the Constitution – it must respect, protect and promote the rights in the Bill of Rights, including children's rights. The courts have confirmed that any custom that contravenes any of these rights must be changed.

African customary practices that are harmful to children's protection rights

Children's protection is guaranteed through the bundle of rights described in Fact Sheet 1 of this series. Some of these rights are put at risk by a number of harmful practices, including the following:

Harmful gender roles

It is customary for mothers and fathers to have different parenting roles. This results in children not benefitting from their rights to know and be cared for by both parents. Mothers are responsible for the daily upbringing, the nurturing and disciplining of children. Fathers, on the other hand, have a more distant relationship with their children. They are seen as responsible for providing children's material needs, and do not get involved in the daily upbringing of children, except for teaching specific skills to their boys. Consequently, children tend to have a poor relationship with their fathers.

Children are taught how to fulfil these gendered roles from an early stage in life through their early childhood games and education. Boys are taught to take on a traditional male role of looking after the livestock and family fields, being providers and protectors of their households, while girls are prepared to take care of the children and household.

Customary adoptions and foster care

On the one hand, customary adoptions and foster care fill an important protection role in communities. On the other hand, these care arrangements are not regulated and monitored as they are with government placements. This creates a risk of abuse and exploitation of vulnerable children. There are examples of children being “adopted” by extended family members simply to get to the child support grant and these children are not cared for properly. There is a need for these customary practices to be regulated.

Culture of strict obedience and loyalty to the male headed extended family

“Culture puts children in a particular setting in terms of rules – they have to obey, there is no room for negotiation. Rules take centre-stage over the feelings, emotions and rights of children.” (Traditional leader, KwaZulu-Natal)

There is a risk that the protection rights of children may be seen as less important than their loyalty and responsibilities to protect the family interests. This means that there is little, if any, room for children to participate in decision-making in the households. The unquestioning obedience to male adults by children, together with the tradition of strict discipline and loyalty to the male elders, can create a greater risk of abuse. Children may be afraid to disobey an adult...
CUSTOMARY PRACTICES HARMFUL TO CHILDREN

male family member. Moreover, they may be unwilling to speak out, or other family members may hide the act of abuse out of fear of the family being disgraced or for fear of losing the family breadwinner.

In some communities this contributes to low levels of prosecution of child abuse cases. This is sometimes made worse by the traditional (but declining) view of sexual abuse as a matter between two families that can be resolved by the payment of a fine to the affected family.

Children and their parents do not communicate easily with each other
Traditionally, communication between children and their parents is poor. Parents do not talk to their children, especially about certain taboo matters that children must receive proper adult guidance on. For example, children cannot talk to their parents about their changing bodies, about their sexuality, and about abuse they may have been subjected to. The evidence shows that this exposes children, especially girls, to a higher risk of abuse.

Corporal punishment
Traditional authoritarian relationships between parents and their children often mean that parents use physical forms of punishment. Corporal punishment is also used on children by some Traditional Courts.

I may not go for virginity testing until I am 16 years old. And the law says I can choose whether or not to go after I get to this age.

Child labour
It is common for children in traditional families to be working – either for payment or in the house or homestead. The two main reasons for this are, first, the obligations children are traditionally seen to have towards the family, and, second, the high levels of poverty in rural areas. Child labour is not by its nature harmful – but it does become harmful when it affects the child's education, health and well-being, or results in the exploitation of the child.

Initiation ceremonies, virginity testing and circumcisions
Traditionally boys and girls go through initiation ceremonies when they grow from one stage of life to another. For older children, when their bodies start changing - when they reach puberty - these ceremonies involve a period of separation from their families. In the case of some tribes, boys undergo circumcision.

These ceremonies are not by their nature harmful. They do have positive elements: they promote inclusion in the community, and they also provide an important educational space.

However, the way in which they are practised creates a risk of harm. The information that is taught at some schools promotes harmful gender roles. The lack of adult supervision and the exclusion of parents from knowing what happens at the ceremonies create a risk of physical harm and neglect. Children can suffer great physical and emotional harm if the practices are not carefully planned to match their protection rights.

Despite the fact that the Children's Act prohibits the circumcision of boys and virginity testing of girls younger than 16 years, it is quite common for children younger than this to participate in both customs.

These harmful practices must be challenged and changed by all stakeholders. Many of these are already not as frequently practised as they were in the past. This declining use must be speeded up for the benefit of children in traditional communities. Fact Sheet 6 considers some of the ways in which stakeholders can change harmful African customary practices.
CHANGING HARMFUL CUSTOMARY PRACTICES

What does it mean when we say a custom must be changed?

A number of customary practices are harmful to children. The nature and the amount of harm caused differ from one practice to the next. This difference means that different levels of change will be required.

Some customs are intrinsically harmful. That is to say, they are by their very nature harmful in all circumstances. Some however are not intrinsically harmful. They are only made harmful because of the specific (harmful) way they are practised.

A custom may simply need to be regulated in order to prevent it from being practised in a harmful way. Alternatively, a custom that is by its nature harmful will have to be prohibited, abolished and/or made a crime.

How can harmful practices be changed?

The Courts have abolished practices

The Courts have made orders outlawing customs because they are not compliant with the Constitution. For example, the Courts have said the customary law of primogeniture – which gave preference to the inheritance rights of males – is unconstitutional. Not only did the Court outlaw the custom, it also ordered that Parliament pass a law prohibiting the practice and guaranteeing the equal inheritance rights of males and females.

Parliament has passed laws changing harmful customs

To avoid harm to children, Parliament has passed laws that either forbid harmful practices or regulate how they should be practised.

For example, the Children's Act completely prohibits child marriages, forced marriages and female genital mutilation. It also forbids any other customary practice that is harmful to children. In addition, it regulates other practices such as virginity testing and circumcisions. It says that no children may participate in these customs if they are younger than 16 years, and that children older than that must be counselled before undergoing these ceremonies and they may choose to participate or not.

Government departments have provided information

Working through community clinics, government departments like the Department of Health have provided information about the harmful consequences of certain practices. For example, information has been provided to pregnant mothers about some of the dangers of using herbs while they are pregnant. The use of these herbs may cause heavy bleeding when the mother gives birth.
Change from within communities is the strongest
There are many laws that protect children. They forbid or regulate most of the practices that harm children. The problem is that these laws are not always known within communities. Sometimes they are known but they are not respected and obeyed.

It is here that the most work must be done. Parents, children, traditional leaders and community members should take ownership of these laws – and NGOs and government must empower them to take ownership.

Parents, children, traditional leaders and community members must get to know these laws and make sure they are respected by all. Traditional leaders and community elders are viewed with respect and have the power to speak with authority. It is important that they take the lead and promote respect for these laws in their communities.

Communities can look to a number of partners to help raise awareness of the laws. The partners include schools, the CRLC and the HRC.

Where there is no law in place to regulate a harmful practice, it is important that communities lead the advocacy for the development of the law. Children, parents and other community members should ask their traditional leaders to lead the call for the necessary law. There is a dedicated legal space in the Houses of Traditional Leaders – which are mandated to advise government on legislation affecting custom – for traditional leaders to raise these matters.

If there is resistance from the traditional leaders, other routes can be followed to advocate for change. These include the following:

- children, their parents, and NGOs can ask the courts for help;
- they can ask the police, municipalities and government officials for help;
- they can ask the Human Rights Commission to conduct an investigation and make recommendations for change; and
- they can ask their parliamentarians to start a law reform process.

NGOs, government departments and rights commissions must support community ownership

NGOs, government departments and the SAHRC and CLRC must support traditional leaders, parents, community elders and children in taking ownership of and responsibility for child protection laws.

They can do this by:

- providing information about rights, laws and advocacy processes;
- creating spaces in communities for discussions about customs and practices at community meetings or at religious meetings;
- supporting parents, traditional leaders and community members to know their child protection responsibilities and help them fulfill these. For example, they can raise awareness amongst traditional leaders of their duty to report children in need of care and protection. They can also provide reporting mechanisms through community-level child protection networks.

It is our responsibility as community leaders to make sure that child protection laws are obeyed.
IDEAS FOR FUTURE CHANGE

USEFUL IDEAS FOR CHANGING HARMFUL PRACTICES IN THE FUTURE

Corporal punishment

Three changes must take place to prevent the common use of corporal punishment in families and schools.

- Discipline is important - parents and caregivers must revive and use non-violent positive forms of discipline.
- the Children’s Act must be strengthened. It must outlaw the use of corporal punishment in the home.
- This legal change must be accompanied by a change in community attitudes to corporal punishment.

This change in attitude must be driven through family- and community-level advocacy. These advocacy campaigns must:

- show that corporal punishment is abuse and that it causes children physical and emotional harm;
- show parents and communities different positive forms of discipline that are acceptable in traditional communities.

Initiation ceremonies

The Children’s Act states that children must participate in processes and decisions that affect them. It also requires that parents safeguard children against harm and neglect, and that they be given a chance to express their views on matters involving their children. This means, for example, that children and their parents should be part of the community-level discussions about what takes place during the initiation ceremonies, how it takes place, and what is taught to the children.

Grandparents, parents and children should be encouraged and empowered to speak out and advocate for ownership of the knowledge that is shared and practiced in initiation schools.

Parents and children should be informed of these rights and responsibilities. They should be encouraged to make a formal request to the traditional leadership to create a community forum for developing shared community initiation practices. This should ensure:

- appropriate teaching;
- proper supervision and care while children are away; and,
- ongoing supervision and mentoring of the boys when they return from the mountains.

Advocacy campaigns should encourage families and communities to identify and document different local customary alternative positive forms of discipline. These local forms, such as an older brother or uncle speaking to a child, must be promoted in awareness-raising material and distributed by NGOs, government departments, the HRC and the CRLC.

If we have a right to be part of decisions that affect us, this must mean we should be part of the discussion about our initiation practices and curriculum.
Children’s participation

Children must be made more comfortable with expressing their views and participating in decision-making in their schools, families and communities.

This can be achieved by opening up traditional spaces normally used for children’s expression. This includes letting children express their views about customs in plays, poems and games which are presented to their friends, families, community members and traditional leaders.

NGOs and children must ask all decision-makers – families, churches, schools, and traditional leadership structures, local government structures, all the way up to the local, provincial and national Houses of Traditional Leaders – to create spaces for children to share their views on issues.

The Department of Cooperative Governance and Traditional Affairs (COGTA) should be approached to support advocacy for the creation of these spaces as it is mandated to create enabling mechanisms for communities to participate in traditional and local governance.

Children have a right to information and to be a part of decisions that affect them.

Please can we have a place to talk to you and your council about our customs?
There are some harmful practices in traditional communities that are un-African. Those who follow them often try and justify them by calling them an “African” custom. However, a practice is only a custom if it is widely accepted by the whole community and if the whole community feels obliged to respect the custom.

Amasiko are true cultural practices which have the approval of traditional leaders, community elders and the broader community.

Imikhuba are mere habits with no legal force – they may be practised by a large number of community members, but are not generally accepted as true African customs.

How to change harmful imikhuba

Because they are not true customs, they do not (or should not) have the approval of the traditional leaders, community elders and other respected community leaders. They should lead the fight against these practices. It is their duty to ensure that customs are properly practised and respected.

Advocacy to change harmful imikhuba should start with traditional leaders

Many traditional leaders have spoken out publicly against harmful practices because they are not customs. Building a relationship with traditional leaders is the key to advocacy success. Once the traditional leader takes ownership of a campaign, it will be easier to bring other important partners on board. The local police, local magistrates, social workers, families and community elders are likely to follow.
The aim is to make use of the power of the traditional leader to bring about a growing community change of attitude and a refusal to accept harmful practices.

Some traditional leaders may need convincing that they should lead a campaign against the practice

The way to convince them that they should is through education about:

- the harm that the practice does; and
- the obligations they have as community leaders to protect children and outlaw harmful un-African practices.

Harmful imikhuba include:

**Absent neglectful fathers**

More than 7 million (39%) of children in South Africa live without their fathers – they live only with their mothers. African children are the worst affected: 42% of African children do not live with their fathers.¹

A fatherless child is un-African. African fatherhood is all about responsibilities to children and women. Lesejane says that an African father is:

- available – he must spend time with his children in order to exercise his moral authority, maintain family customs and laws, and be a leader;
- responsible for providing for, guiding, organising and generally overseeing the management of his children's lives;
- involved in decisions about when a child goes to initiation school;
- engaged – he interacts with his family;
- a listener. It is a sign of a good father to listen to members of the family, consult with other members of the kgoro and revert to established systems and values. Rarely would a major decision be made on behalf of children and the wife without such consultations taking place.²

**Advocacy, parenting programmes and customary traditional institutions must restore the positive customary vision of fatherhood as a positive patriarchy and an institution in harmony with the core values of equality, respect, human dignity and freedom enshrined in South Africa's Constitution.**

**Abuse of women and children**

A number of successful advocacy campaigns have been led by traditional leaders and community elders in the fight against gender-based violence. They have publicly led campaigns against violence on the grounds that it is un-African for a man to beat his wife or partner.

The same is true for children. It is un-African to abuse children who are “a gift from God” and must be nurtured and protected. This central message should inform:

- child protection advocacy at a community level;
- awareness-raising campaigns about children's protection rights;
- campaigns to outlaw corporal punishment; and
- campaigns for active ownership of the responsibilities bestowed by the Children’s Act on traditional leaders, community members, extended family members and parents to protect children.

“In our African culture a woman is not supposed to be abused and beaten. That is un-African. Our culture respects our women.” These are the words of traditional leaders in the fight against abuse.

**Child abductions and forced marriages**

The abduction of children and forcing them to marry is not an African custom. Traditional leaders have proven to be strong allies in the fight against this form of child abuse.

“This is not ukuthwala, this is child abuse. At 12, the child is not ready to be a wife.” These are the words of a prominent African customary leader, Dr Nokuzola Mbende of the South African Camagwini Institute.

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