

No. R. 252

31 March 2010

**CHILD JUSTICE ACT, 2008 (ACT NO. 75 OF 2008)  
DIRECTIVES IN TERMS OF SECTION 97(4)**

The National Director of Public Prosecutions has, under section 97(4) of the Child Justice Act, 2008 (Act No. 75 of 2008), and in consultation with the Cabinet member responsible for the administration of justice, issued the directives in the Schedule.

**SCHEDULE**

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## CHILDREN IN CONFLICT WITH THE LAW

### A. Objectives of the *Child Justice Act, 2008 (Act 75 of 2008)*.

The *Child Justice Act, 2008 (Act 75 of 2008)* (hereinafter referred to in this part as 'the Act'), effective as from 1 April 2010, provides for a criminal justice system that takes account of the vulnerability and special needs of children. The intention is for children in conflict with the law to be diverted from the criminal justice system when appropriate and for children not diverted to be dealt with in child justice courts. Children are to benefit from interventions, programs and sentencing options aimed at rehabilitation and reintegration in order to minimise the potential for re-offending whilst ensuring their responsibility and accountability for crimes committed.

### B. Directives of the National Director of Public Prosecutions.

1. Section 97(4)(a) of the Act requires of the National Director, in consultation with the Minister of Justice, to issue directives regarding all matters which are reasonably necessary or expedient to be provided for in order to achieve the objectives of this Act. In particular the directives must address diversion, how errors regarding age are to be dealt with after diversion and the exceptional circumstances that must exist before diversion of a matter in the case of a serious offence.
2. In terms of section 97(4)(b) such directives must be submitted to Parliament for approval, before publication in the Gazette. The first directives are required to be submitted to Parliament before commencement of the Act.

### C. Withdrawal of cases.

Care should be taken not to merely withdraw a case, where the best interests of the child call for some intervention.

### D. Criminal capacity

1. It is important to note that the Act amends the common law regarding the age of criminal capacity. A child committing an offence while under the age of 10 years cannot be prosecuted for such offence because of the lack of criminal capacity. In practice, prosecutors will not deal with any child who committed an offence while under the age of 10 years. Such children must not be arrested. The police must notify a probation officer who will deal with the matter.
2. A child who is 10 years or older, but under the age of 14 is presumed to lack criminal capacity unless the State proves beyond a reasonable doubt that the child was able to appreciate the difference between right and wrong and was able to act in accordance with that appreciation at the time of the commission of the offence.
3. See also paragraphs L(1) and L(2)(b).

**E. The decision to prosecute a child who is 10 years or older but under the age of 14 years**

1. The decision to prosecute a child who is 10 years or older but under the age of 14 years must be carefully considered. The factors set out in section 10(1) of the Act must be taken into consideration when taking such a decision.
2. Where it is unlikely that it will be proved that the child had the necessary criminal capacity prosecutors should have the child referred to a probation officer to be dealt with in the same manner as children under the age of 10 years.
3. Where it is likely to be proved that the child had the necessary criminal capacity the prosecutor may consider diversion where the alleged offence is minor (see paragraph G below) or may refer the matter to a preliminary inquiry in terms of the Act.
4. Where the prosecutor deems it necessary to have the criminal capacity of a child evaluated, he or she should request the court to have it done by the category or class of persons determined by the Minister of Justice, e.g. a psychiatrist or clinical psychologist.

**F. Basic principles relating to diversion**

1. The general requirements for diversion in terms of the Act are contained in section 52(1) of the Act
2. The diversion must be made an order of the court
3. Prosecutors are responsible for the ultimate decision whether to divert or not and should not abdicate this responsibility. They also have a duty to ensure that adequate conditions of diversion, commensurate with the crime committed, are imposed and should discuss appropriate and available options with the relevant probation officer (Sections 52 to 55 of the Act). With regard to *Schedule 3* offences directives are provided for in Paragraph J.
4. Prosecutors are not required by the Act to provide reasons for a decision not to divert. The furnishing of reasons might compromise the presiding officer in any further proceedings and prosecutors should therefore be careful if reasons are nevertheless provided. Prosecutors should, however, record reasons for non diversion in the investigation diary of the docket.
5. The Act requires diversion programmes and diversion service providers to apply for accreditation and be accredited. Where use is made of a diversion programme and diversion service provider which existed before commencement of the Act, these may continue to operate until informed of the outcome of their application for accreditation.
6. Compliance must always be monitored by a probation officer or a suitable person and this person must be identified in the diversion order (section 57).
7. If a *Family Group Conference* or *Victim Offender Mediation* is considered, the victim must also consent thereto (section 61 and 62):

- (a) For purposes of informed consent, prosecutors should ensure that the victim is provided with sufficient information regarding the nature of such interventions and the right to refuse to participate.
  - (b) Where the victim is a child, particular care must be taken and the consent of a parent, guardian or an appropriate adult should, in addition, be insisted upon as necessary.
  - (c) These will seldom be suitable interventions in the case of a contact crime.
  - (d) Unless pressing circumstances so require, for instance where the prosecutor is concerned about the victim or the latter so requests for good reason, it is not expected of prosecutors to attend the conference.
8. All efforts must be made to establish whether the child has previously been diverted. A diversion may still be considered despite a previous diversion or the existence of a previous conviction if the child will benefit from the proposed programs and if the child, all circumstances taken into account, should be afforded another such opportunity. Diversion is not suitable if it brings the administration of justice into disrepute. If unsure whether a certain decision will bring the administration of justice into disrepute or not, prosecutors should require the guidance of the DPP.
9. The views of victims and investigating officers must be considered in respect of *Schedule 2* and *3* offences. Whenever possible, such views should also be obtained and considered in respect of *Schedule 1* offences. Although prosecutors are not bound by these views, it should be kept in mind that the victim/person affected has no redress by way of a private prosecution once a diversion has been ordered (section 59(2)).
10. When a child has successfully complied with a diversion order a compliance report must be furnished to the prosecutor (section 57(5)). A copy of this report should be given to the clerk of the court and a copy filed in the docket.
11. In the event of non-compliance due to the child's fault, section 58(4) applies. The degree of non-compliance and the recommendation by the probation officer should inform the decision whether to proceed with prosecution or to impose more onerous diversion options. The latter must also be made an order of court.
12. Although a successful diversion does not constitute a previous conviction, no prosecution may be instituted following a successful diversion (section 59(1)).

**G. Diversion of matters in respect of minor offences before a preliminary inquiry**

1. A prosecutor may divert a matter involving a child alleged to have committed a minor offence listed in *Schedule 1* of the Act before a preliminary inquiry is held in terms of the Act, where the general requirements for diversion are present. This may be done after an assessment of the child by a probation officer, unless this requirement is dispensed with by the prosecutor where it is in the best interests of the child to do so (see paragraph K below).
2. Although the prosecutor may summarily indicate that the matter may be diverted where the offence is minor as listed in *Schedule 1* of the Act, where the investigating officer

and/or victim or any person with a direct interest in the affairs of the victim is readily available such persons should be consulted.

3. Prosecutors may select one or any combination of the level 1 diversion options set out in section 53(3) of the Act. If the matter is to be diverted, the child and, where possible, his or her parent, appropriate adult or guardian must appear before a magistrate in chambers in order to have the diversion option made an order of court. Where the prosecutor has decided to dispense with the requirements of an assessment, the reasons must be provided to the magistrate to enter on the record of proceedings.
4. Where the child has been arrested, and remains in detention, a preliminary inquiry must be held within 48 hours of arrest. Consequently, consideration of diversion must take place as soon as possible. Where it is not possible to consider diversion during this time period, the preliminary inquiry must be held and paragraph H below finds application.
5. Where the child has been released and a written notice been issued to appear at a preliminary inquiry, the consideration of diversion must take place prior to the appearance at the inquiry. Similarly, where a summons has been issued, the consideration of diversion must take place before appearance at the inquiry. Where a decision is made to divert such a matter, the return of service should be obtained from the clerk of the court and this, together with the diversion option, must be taken to a magistrate in chambers in order to make it an order of court.
6. Diversion of matters before a preliminary enquiry should not take place in, for example, the following circumstances:
  - (a) The offence is listed in *Schedule 1*, but the facts or circumstances of the offence are of a serious nature, e.g. the consequences are very serious.
  - (b) The child has a previous conviction, previous diversion or pending charge in respect of a similar or more serious offence.
  - (c) prosecutors are of the view that the child—
    - (i) has been abandoned or orphaned and is without any visible means of support;
    - (ii) displays behaviour which cannot be controlled by the parent or care-giver;
    - (iii) lives or works on the streets or begs for a living;
    - (iv) is addicted to a dependence-producing substance and is without any support to obtain treatment for such dependency;
    - (v) has been exploited or lives in circumstances that expose the child to exploitation;
    - (vi) lives in or is exposed to circumstances which may seriously harm that child's physical, mental or social well-being;
    - (vii) 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;
    - (viii) is in a state of physical or mental neglect;
    - (ix) 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;

- (x) is a victim of child labour;
- (xi) is in a child-headed household; or
- (xii) is due to its conduct not suitable for diversion.

#### **H. Diversion of matters at a preliminary inquiry**

1. Where a matter has not been diverted in terms of paragraph E above, withdrawn or a decision made not to prosecute because of the probable lack of criminal capacity, a preliminary inquiry must be held in terms of the Act.
2. The preliminary inquiry is an informal pre-trial procedure before a magistrate which is inquisitorial in nature and the prosecutor is obliged to attend. This is the equivalent of the child's first appearance in court although this procedure may not necessarily take place in court.
3. Despite the inquisitorial nature of the preliminary inquiry, prosecutors should play an active role in the proceedings for purposes of ensuring a just outcome. Prosecutors should be able to provide all information relevant to the offence, the views of the victim or of the person affected by the crime and those of the investigating officer.
4. Prior to the preliminary inquiry the prosecutor must as a general rule have been provided with an assessment report on the child by a probation officer. This report should be studied by the prosecutor as it will provide information relevant to the decision of how the matter should be further dealt with and if any further information may be necessary, this should be obtained from the probation officer before the start of the preliminary inquiry if possible. The information obtained is confidential and for purposes of the inquiry. The information furnished at the preliminary inquiry is inadmissible during any bail application, plea, trial or sentence proceedings in which the child appears
5. A preliminary inquiry is not a trial and is not intended to become protracted proceedings for purposes of obtaining the presence of persons not listed as necessary. Whilst information obtained at the inquiry may not be used against the child in any other proceedings, there is no similar provision protecting victims or witnesses. Prosecutors should therefore object to victims or witnesses being called at such an inquiry.
6. At the preliminary inquiry the assessment report is considered. Inter alia, it is established whether the matter can be diverted and if so, the suitable diversion option.
7. However, an inquiry magistrate may stop the proceedings and order that the child be brought before a children's court where he or she is of the view that the child is in need of care and protection, does not live at home or in appropriate care, or is alleged to have committed minor offences aimed at meeting the child's basic need for food and warmth.
8. After the consideration of all relevant information presented at the preliminary inquiry, the possibility of diversion may be considered where the requirements set out in paragraph F1 above are met. Where a prosecutor indicates that the matter can be

- diverted, he or she must request the presiding officer to make an order for diversion of the matter.
9. Although the prosecutor may summarily indicate that the matter may be diverted where the offence is minor as listed in *Schedule 1* of the Act, where the investigating officer and/or victim or any person with a direct interest in the affairs of the victim is readily available, such persons should be consulted.
  10. Where the offence is a more serious offence listed in *Schedule 2* of the Act, the prosecutor may only indicate that the matter may be diverted after he or she has—
    - (a) consulted with the investigation officer;
    - (b) considered the views of the victim or any person with a direct interest in the affairs of the victim, whether or not the matter may be diverted, unless it is not reasonably possible to do so; and
    - (c) obtained the authorisation of the Senior Public Prosecutor.
  11. In the case of serious offences listed in *Schedule 3* of the Act, the written indication of the relevant DPP is required (see Paragraph J below).
  12. Prosecutors should inform the inquiry magistrate as soon as possible if a matter may not be diverted, provided that there is no likelihood of further information becoming available that might warrant a different decision. This should be done especially where the availability of a different magistrate to preside in any further proceedings might prove difficult. Given the nature of the inquiry the prosecutor should make all attempts possible to prevent the inquiry magistrate from receiving any information that may prevent the magistrate from hearing the trial.
  13. Where the prosecutor indicates that the matter may not be diverted he or she must confirm to the magistrate that there is sufficient evidence available or there is reason to believe that further investigation is likely to result in the necessary evidence becoming available. The magistrate will record this and refer the matter to a child justice court.
  14. A preliminary inquiry may be postponed for a period not exceeding 48 hours for specific purposes. These include where the prosecutor indicates that diversion is being considered, but an assessment has not been done and is required; where it is necessary to make arrangements in respect of a diversion option; or for the purposes of further investigation. A further postponement of the preliminary inquiry may only be granted where the postponement is likely to increase the prospect of diversion.
  15. A preliminary inquiry may be postponed for a period not exceeding 14 days if a probation officer has recommended a further and more detailed assessment of the child be undertaken or where it is necessary to obtain the written direction of the relevant DPP for the diversion of a matter in the case of a serious offence referred to in *Schedule 3* of the Act (see paragraph J below).
  16. Where the child is referred for trial to a child justice court and where the same magistrate who presided in the preliminary inquiry is due to preside, the prosecutor should alert the magistrate to the provisions of section 47(10).

## **I. Diversion of matters at a trial**

1. Where the matter has not been diverted at a preliminary inquiry, the prosecutor may indicate that the matter can be diverted until the point in the proceedings where the case for the prosecution is concluded. Once the prosecution has closed its case the prosecutor may no longer request the presiding officer to make a diversion order in respect of the child.
2. After the consideration of all relevant information, including whether a child has a record of previous diversions, a prosecutor may give consideration to diversion where the requirements set out in paragraph F1 above are met. Where a prosecutor indicates that the matter can be diverted, he or she must request the presiding officer to make an order for diversion of the child.
3. Although the prosecutor may summarily indicate that the matter may be diverted where the offence is minor as listed in *Schedule 1* of the Act, where the investigating officer and/or victim or any person with a direct interest in the affairs of the victim is readily available, such persons should be consulted.
4. Where the offence is a more serious offence listed in *Schedule 2* of the Act, the prosecutor may only indicate that the matter may be diverted after he or she has—
  - (a) consulted with the investigation officer; and
  - (b) considered the views of the victim or any person with a direct interest in the affairs of the victim, whether or not the matter may be diverted, unless it is not reasonably possible to do so.
5. Diversion in respect of offences listed in *Schedule 2* of the Act may only be agreed to with the authorisation of a Senior Public Prosecutor.
6. In the case of serious offences listed in *Schedule 3* of the Act, the written direction of the relevant DPP is required (see paragraph J below). The proceedings may be postponed in order to obtain the written indication of the DPP.

## **J. Diversion of matters in respect of serious offences**

1. Where an offence is listed in *Schedule 3* of the Act, a matter may only be considered for diversion if exceptional circumstances exist, and the DPP having jurisdiction has indicated in writing that the matter may be diverted.
2. The exceptional circumstances that may exist include—
  - (a) particular youthfulness;
  - (b) particularly low developmental level of a child;
  - (c) presence of particular hardship, vulnerability or handicap (e.g. where the child heads a household);
  - (d) victim prefers diversion to trial as he/she does not want to testify in court;
  - (e) compelling mitigating circumstances such as diminished responsibility;



- (f) undue influence exerted upon the child in the commission of the offence (e.g. Child used by adult to commit crime (CUBAC));
  - (g) witnesses for the prosecution are fragile and/or unwilling to testify; or
  - (h) to proceed would be potentially damaging to a child witness/victim.
3. Furthermore, the DPP may only indicate that such a matter be diverted where the DPP has consulted with the investigation officer and considered the views of the victim or any person with a direct interest in the affairs of the victim.
4. Where it is reasonable to do so, the DPP should have given the victim or the person with a direct interest in the affairs of the victim an opportunity to express a view on—
- (a) whether or not the matter should be diverted; and if so,
  - (b) the nature and content of the diversion option being considered; and
  - (c) the possibility of including in the diversion option a condition relating to compensation or the rendering of a special benefit or service.

#### **K. The assessment**

1. The assessment is vital for purposes of coming to an informed decision and has to be done prior to the child appearing at a preliminary inquiry. If the child is in custody this should be done within 48 hours of arrest.
2. Prosecutors may dispense with such assessment in terms of section 41(3) only in respect of a *Schedule 1* offence if it is in the best interest of the child. The reasons for having dispensed with the assessment must be furnished and recorded in terms of section 42.
3. Dispensing with the assessment should be the exception. It may only be done where the prosecutor has sufficient information to make a decision on whether to divert or not, e.g. age determination, criminal capacity, suitable diversion option; where an assessment will not be possible within a reasonable period of time; or where the crime committed is petty.
4. The information obtained during assessment is confidential and may only be used for a legally authorised purpose (section 36(1)), e.g. to determine criminal capacity in accordance with section 11(2).
5. It may not be used during a bail application, plea, trial or sentencing proceedings in which the child appears.

#### **L. Categories of child offenders**

1. Children under 10 years:  
Such a child does not have criminal capacity (section 7(1)) and cannot be prosecuted but must be referred to the probation officer to be dealt with in terms of section 9(3).
2. Children 10 years or older but under 14 years:

- (a) Such a child may only be detained in a police cell or lockup if a child and youth care centre is not available or, if available, does not have a vacancy (section 27).
  - (b) There is a rebuttable presumption that such a child does not have criminal capacity. If criminal capacity is unlikely to be proved beyond reasonable doubt, the prosecutor must refer the child back to the probation officer to be dealt with in terms of section 9(3) unless the latter has already indicated in the assessment report that, in accordance with section 9(3)(a)(vi), no action is contemplated. Where no action is contemplated the prosecutor should withdraw the charge. In the event of doubt, especially so where the child is closer to 14 or where a more serious offence (*Schedule 2* or 3 offence) is involved, the issue should become the subject of investigation during the preliminary inquiry.
  - (c) Unless specific reasons are recorded for exceeding the usual duration, diversion orders may not exceed 12 months in duration in respect of level 1 diversions or 24 months in respect of level 2 diversions. (section 53(5) and (6)). As prosecutors may be the sole deciders on the duration of diversion orders following a *Schedule 1* offence, they should, for example, take into account the nature of the offence, the nature of the diversion option, the circumstances of the child, and more particularly its prospects of rehabilitation.
3. Children 14 years and older but under 16 years (section 30(2)):
- (a) If such a child is to be detained in prison, a certificate informing the court that sufficient evidence exists and that the child will be charged with a *Schedule 3* offence is required.
  - (b) The DPP is required to authorise prosecutors to furnish such certificates.
  - (c) In all instances where it is imperative that the child be kept in prison pending the trial, the certificate should be obtained and submitted to the court during application for detention.
4. Children 14 years and older but under 18 years (section 27 (a)/(b)):
- (a) Such children may only be detained in a police cell or lockup if a child and youth care centre is not available or, if available, does not have a vacancy. However, in respect of a *Schedule 3* offence, if the child is to be detained following arrest, this **must** be in a police cell or lock-up (section 27), pending a decision by the inquiry magistrate.
  - (b) Unless specific reasons are recorded for exceeding the usual duration, diversion orders may not exceed 24 months in duration in respect of level 1 diversions or 48 months in respect of level 2 diversions (section 53(5) and (6)).
5. Children 14 years or older (section 30(5)(a)):
- (a) Such a child may also be detained in prison in respect of a *Schedule 1* and 2 offence if substantial and compelling circumstances exist.
  - (b) Substantial and compelling circumstances might be present if the child has a history of violence or aggression or if the available child and youth care centres are not sufficiently secure.

**M. Directives in respect of persons who were children at the time of commission of a crime but are 18 years and older, but under 21 years**

1. Where a person is 18 years or older, but under the age of 21 years, when handed a written notice, served with a summons or arrested for allegedly having committed an

offence when he or she was under the age of 18 years, a DPP may direct that the matter be conducted in accordance with the provisions of the Act as if the person were still a child.

2. Thus, the person will need to be assessed by a probation officer, a preliminary inquiry held in respect of the offence and consideration be given to diversion –
  - (a) by the prosecution prior to the preliminary inquiry in the case of minor offences (listed in *Schedule 1*); or
  - (b) at the preliminary inquiry.
3. Where the matter is not diverted, withdrawn or referred to a children's court, the matter will be referred to child justice court for plea and trial.
4. A DPP may issue such a direction—
  - (a) in the event of a *Schedule 1* offence;
  - (b) if the co-accused is a child;
  - (c) if the person was used by an adult to commit the crime;
  - (d) where there is doubt regards the age of the person;
  - (e) where the person appears to be intellectually or developmentally challenged; or
  - (f) where other pertinent and relevant circumstances so demand, such as those listed in paragraph J.2 above.
5. A direction should generally not be given where the co-accused are adults, unless the person was used by them to commit the crime.
6. The relevant DPP should be requested for a directive at the earliest possible opportunity. This may be done telephonically and as soon as it appears that the person will probably be prosecuted and where any of the above criteria are met. The DPP should confirm his/her telephonic directive in writing.
7. Prosecutors may, in respect of a *Schedule 1* offence, where there is no indication that a direction in terms of section 4(2) of the Act is appropriate and if circumstances so dictate and the requirements are met divert the person without requesting a direction from the DPP. In such instances adult diversion finds application and the diversion is then not in terms of this Act.
8. Allowing for the benefit of proper assessment and appropriate handling does not imply that the person must also be diverted: Diversion will depend on the usual weighing up of relevant interests and the prescribed requirements will also need to be met.
9. If the prosecutor holds the view that the person will probably be diverted, the prosecutor may *mero motu* cause the person to be assessed pending the directive from the DPP.

**N. Error regarding the age of a child or adult discovered after the matter is diverted**

1. Determining the correct age of the accused person is crucial. If after diversion the age of the accused person differs from that which was previously accepted as correct, it

must be brought to the attention of the presiding officer who ordered the diversion to deal with in terms of section 16.

2. It is then for the presiding officer to decide what steps should be taken to address the situation.
3. The prosecutor must inform the presiding officer whether diversion, and if so, the same conditions of diversion would have been ordered if the correct age was known when the matter was initially considered for diversion.

## **O. Categories of offences**

### **1. Schedule 1 (least serious) offences:**

- (a) Prosecutors may release the child on bail.
- (b) Section 59A of the Criminal Procedure Act as it relates to children must be read as follows:  
*"Prosecutors may in respect of the offences referred to in Schedule 1 of the Child Justice Act and in consultation with the police official charged with the investigation authorise the release of the child on bail."*
- (c) A prosecutor may agree at the preliminary inquiry or at the trial proceedings to a diversion or may divert the child at an earlier stage without assessment (paragraph C *supra*) and/or without referral to a preliminary inquiry (section 41). In the latter instance the child must still be present when the diversion is made an order of court (section 42) and an assessment by the probation officer should ordinarily still be required.
- (d) If asked for guidance by a police officer in terms of section 17 with regards to the need for a preliminary inquiry, prosecutors should ordinarily indicate that the child will have to attend a preliminary inquiry for purposes of ensuring that the child is brought to court. The exception will be where a police docket is submitted to the prosecutor for decision and the prosecutor may probably decline to prosecute.
- (e) Prosecutors may decide not to refer a matter to a preliminary inquiry but to divert the matter in the following circumstances (provided that all requirements for diversion are met):
  - (i) Where the crime is a minor *Schedule 1* offence;
  - (ii) Where the child is not in need of care and protection; and
  - (iii) Where the child does not have a record of previous criminality.
- (f) In these circumstances only Level 1 diversion options may be utilized (section 53(2)(a)).

### **2. Schedule 2 (more serious) offences:**

- (a) A prosecutor may release the child on bail (section 21(2) (b)).
- (b) Section 59A of the Criminal Procedure Act as it relates to children must be read as follows:  
*"Prosecutors may in respect of the offences referred to in Schedule 2 of the Child Justice Act and in consultation with the police official charged with the investigation authorise the release of the child on bail."*
- (c) The prosecutor may, subject to paragraph O(2)(d), agree to a diversion at the preliminary inquiry or trial only after having considered the views of the victim

- or person with a direct interest and after having consulted the investigating officer.
- (d) Diversion may only be agreed to with the authorisation of the Senior Public Prosecutor. If in doubt, the office of the DPP should be contacted for guidance.
  - (e) Level 1 and 2 diversion options apply (section 53(2)(b)).
3. *Schedule 3* (most serious) offences:
- (a) A certificate authorizing the detention of a child 14 years and older but under 16 must be issued (paragraph L(3) above).
  - (b) Diversion may only occur in exceptional circumstances (see paragraph J) with the written consent of the relevant DPP after having considered the views of the victim or of a person with a direct interest as well as the investigating officer (section 52(3)).
  - (c) Prosecutors should bring deserving cases to the attention of their respective DPP as soon as it seems that a diversion needs to be considered.

The following information must be submitted—

- (i) the case docket;
- (ii) the assessment report;
- (iii) a report by the prosecutor providing—
  - a summary of the evidence;
  - the preliminary views of the victim or person affected and the investigating officer, in writing and signed by them with their contact numbers;
  - confirmation that the requirements for diversion have been met; and
  - motivated recommendations.

## **P. The trial in a child justice court (section 63)**

1. A referral to a child justice court following the preliminary inquiry means a referral to any court having jurisdiction and therefore may also be a Regional or High Court. In instances where a child is charged with an adult, the court sits simultaneously as an ordinary court and a child justice court. There is no reason to request a separation of trials, even though the child was dealt with separately during the preliminary inquiry.
2. Prevailing prescripts with regards to forum still apply (High or Lower Courts). However the High Court will only be a suitable forum in cases of children 10 years and older but under 14 years of age if compelling reasons exist.
3. The trials have to be prioritised and section 66 places limitations on the length of postponements. Prosecutors should make all efforts to ensure that the trials are finalised speedily.
4. The child has to be informed by the court of his/her rights and the procedure that will be followed. The presence of a legal representative will not alleviate the court of this duty and prosecutors should remind courts of such duty if necessary.
5. Prosecutors should refrain from hostile and inappropriate cross-examination of the

child and should, as officers of the court, object, where necessary, to such cross-examination by any other party.

6. The court may divert the case at the request of the prosecutor at any stage prior to the close of the state case (section 67(1) read with section 52(5)). Prosecutors should consider making a request where a diversion would have been favourably considered at an earlier stage had the child accepted responsibility; or where the child is now prepared to consent to the diversion options; or where the court in the exercise of its independent discretion is now prepared to make such order contrary to the decision of the inquiry magistrate. Where the prosecution has previously not agreed to diversion, there should be compelling reasons for deviating at this stage from the initial decision.
7. The court must warn the child prior to making a diversion order that any acknowledgement of responsibility may, upon non-compliance with a diversion order, be recorded as an admission in terms of section 220 of the Criminal Procedure Act. Where the court fails to warn the child, the prosecutor should request the court to do so timeously. The purpose of the warning is to encourage compliance and to ensure that the admission has evidential value (section 67(1)(b)).
8. The proceedings are postponed pending completion of the diversion and in the event of compliance, they are stopped. Where the child fails to comply with a diversion order and this is found to be due to the child's fault, the trial may proceed or a more onerous diversion option may be decided on.
9. At the trial the magistrate must stop the proceedings and order that the child be brought before a children's court where the he or she is of the view that the child is in need of care and protection, does not live at home or in appropriate care, or is alleged to have committed minor offences aimed at meeting the child's basic need for food and warmth.

#### **Q. Sentencing.**

1. Prosecutors should take cognisance of the provisions of sections 69 to 78 for purposes of addressing the court on sentence.
2. The minimum sentence provisions in the *Criminal Law Amendment Act, 1997 (Act No. 105 of 1997)*, do not apply (*vide Centre for Child Law v Minister of Justice and Constitutional Development and others CCT98/08, 2009 ZACC 18*).
3. Prosecutors are encouraged to obtain a victim impact statement. Undisputed victim impact statements are admissible upon mere production.
4. Pre-sentence reports are compulsory and should be requested by the court and not by the prosecutor (section 71(1)(a)).

#### **R. Children used by adults to commit offences**

Prosecutors should ensure that case dockets are opened in respect of all adults who are

alleged to have used children to commit crime (section 92).

**S. Monitoring**

Each office should keep a Diversion Register of all persons diverted in terms of this Act.

**T. Failure to comply with any duty imposed by the Act or Directives.**

Failure by a prosecutor to comply with these Directives and/or any duty imposed on him/her in terms of this Act may lead or result in disciplinary steps being taken against such prosecutor.

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