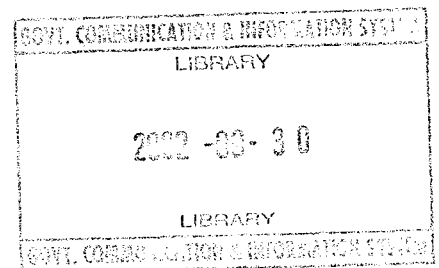


REPUBLIC OF SOUTH AFRICA

CHILD JUSTICE BILL

*(As introduced in the National Assembly as a section 75 Bill; explanatory summary of Bill
published in Government Gazette No 23728 of 8 August 2002)
(The English text is the official text of the Bill)*

(MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT)



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BILL

To establish a criminal justice process for those children accused of committing offences so as to protect the rights of children entrenched in the Constitution and provided for in international instruments; to provide for the minimum age of criminal capacity of such children; to incorporate diversion of cases away from formal court procedures as a central feature of the process; to establish assessment of children and a preliminary inquiry as compulsory procedures; to provide that children must be tried in child justice courts and to extend the sentencing options available in respect of children; to entrench the notion of restorative justice in respect of children; and to provide for matters incidental thereto.

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

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SCHEDULE 3

Definitions

1. In this Act, unless the context indicates otherwise— 5
- “**acknowledges responsibility**” means acknowledges responsibility for an offence without a formal admission of guilt;
- “**an appropriate adult**” means any member of a child’s family or a custodian or guardian of a child but excludes a parent or a primary care-giver as defined in section 1 of the Social Assistance Act, 1992 (Act No. 59 of 1992); 10
- “**assessment**” means assessment of a child by a probation officer as contemplated in Chapter 4;
- “**child**” means any person to whom this Act applies in terms of section 4;
- “**child justice court**” means a court contemplated in section 50 or a child justice court contemplated in section 51, as the case may be; 15
- “**children’s court**” means the court contemplated in section 5 of the Child Care Act, 1983 (Act No. 74 of 1983);
- “**community service**” means work for a community organisation or other work of value to the community performed by a child without payment;
- “**correctional supervision**” means any form of community correction contemplated in Chapter VI of the Correctional Services Act, 1998 (Act No. 111 of 1998); 20
- “**Criminal Procedure Act**” means the Criminal Procedure Act, 1977 (Act No. 51 of 1977);
- “**detention**” includes confinement in a police cell, lock-up, place of safety, secure care facility, prison or other residential facility; 25
- “**Director of Public Prosecutions**” means a Director of Public Prosecutions appointed in terms of section 13 of the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998);
- “**diversion**” means diversion of a child away from the formal court procedures to the informal procedures established by Chapter 5; 30
- “**diversion option**” means an option contemplated in section 47, and includes an option developed in terms of this Act;
- “**family group conference**” means a conference contemplated in section 48;
- “**independent observer**” means a representative from a community or organisation, or community police forum, who is not in the full-time employ of the State and who is accredited in terms of this Act; 35
- “**inquiry magistrate**” means the officer presiding at a preliminary inquiry;
- “**Legal Aid Board**” means the Legal Aid Board established under section 2 of the Legal Aid Act, 1969 (Act No. 22 of 1969);
- “**National Director of Public Prosecutions**” means the person appointed in terms of section 10 of the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998); 40
- “**offence**” where applicable, includes a common law crime;
- “**One-Stop Child Justice Centre**” means a centre established in terms of section 51;
- “**place of safety**” means a place of safety as defined in section 1 of the Child Care Act, 1983 (Act No. 74 of 1983); 45
- “**police official**” means a member of the South African Police Service or of a municipal police service established in terms of the South African Police Service Act, 1995 (Act No. 68 of 1995);
- “**preliminary inquiry**” means an inquiry contemplated in Chapter 5; 50
- “**prescribed**” means prescribed by regulation made under section 85;
- “**probation officer**” means any person who has been appointed as a probation officer under section 2 of the Probation Services Act, 1991 (Act No. 116 of 1991), and includes an assistant probation officer as defined in section 1 of that Act;
- “**residential facility**” means any residential facility established by the Cabinet member responsible for education or the Cabinet member responsible for social development and designated to receive sentenced children; 55
- “**residential requirement**” means compulsory residence in a residential facility or a place other than the child’s home;

“**restorative justice**” means the promotion of reconciliation, restitution and responsibility through the involvement of a child, the child’s parent, the child’s family members, victims and communities;

“**secure care facility**” means a secure care facility as defined in section 1 of the Child Care Act, 1983 (Act No. 74 of 1983);

“**symbolic restitution**” means the giving of an object owned, made or bought by a child to a person, a group of persons or an institution as symbolic compensation for the harm caused by that child;

“**this Act**” includes any regulation made under section 80 or 85.

CHAPTER 1

OBJECTS OF ACT AND GENERAL PRINCIPLES

Objects of Act

2. The objects of this Act are to—

- (a) protect the rights of children as contemplated in section 28(1)(g) and (h) of the Constitution; 15
- (b) promote *ubuntu* in the child justice system through—
 - (i) fostering children’s sense of dignity and worth;
 - (ii) reinforcing children’s respect for human rights and the fundamental freedoms of others by holding children accountable for their actions and safeguarding the interests of victims and the community; 20
 - (iii) supporting reconciliation by means of a restorative justice response; and
 - (iv) involving parents, families, victims and communities in child justice processes in order to encourage the reintegration of children; and
- (c) promote co-operation between all government departments and other organisations and agencies involved in implementing an effective child justice system. 25

General principles

3. (1) Any court or person performing any function in terms of this Act must be guided by the following principles:

- (a) Every child must as far as possible be given an opportunity to respond before any decision affecting him or her is taken. 30
- (b) Every child should be addressed in a manner appropriate to his or her age and intellectual development and should be spoken to and be allowed to speak in his or her language of choice, through an interpreter if necessary.
- (c) Every child must be treated in a manner which takes into account his or her cultural values and beliefs. 35
- (d) All procedures in terms of this Act must be conducted and completed speedily.
- (e) Every child has the right to maintain contact with his or her family, and to have access to social services.
- (f) Parents and families have the right to assist their child in proceedings under this Act and, wherever possible, to participate in decisions affecting them. 40
- (g) All consequences arising from the commission of an offence by a child must be proportionate to the circumstances of the child, the nature of the offence and the interests of society, and a child must not be treated more severely than an adult would have been in the same circumstances. 45
- (h) A child lacking in family support, or educational or employment opportunities must have equal access to available services and every effort must be made to ensure that children receive equal treatment when having committed similar offences.

(2) Any police official, Director of Public Prosecutions, prosecutor designated thereto by the Director, inquiry magistrate or officer presiding in a child justice court must consider the following principles when making any decision regarding the release of a child from detention: 50

- (a) Preference must be given to the release of a child into the care of his or her parent or an appropriate adult, with or without the imposition of any conditions; 55

- (b) if the release of the child into the care of his or her parent or an appropriate adult is not feasible, the release of the child on bail must be considered;
 - (c) if the child must be detained as a measure of last resort, the least restrictive form of detention appropriate to the child and the offence must be selected.
- (3) A child who is in detention in police custody— 5
- (a) must be detained separately from adults, and boys must be held separately from girls;
 - (b) must be detained in conditions which will reduce the risk of harm to that child, including the risk of harm caused by other children;
 - (c) has the right— 10
 - (i) to adequate food and water;
 - (ii) to medical treatment;
 - (iii) to reasonable visits by parents, guardians, legal representatives, registered social workers, probation officers, health workers and religious counsellors; 15
 - (iv) of access to reading material;
 - (v) to adequate exercise; and
 - (vi) to adequate clothing and sufficient blankets and bedding.

CHAPTER 2

APPLICATION AND CRIMINAL CAPACITY 20

Application of Act

4. (1) Subject to subsections (2) and (3), this Act applies to—
- (a) any person in the Republic of South Africa, irrespective of nationality, country of origin or immigration status, who is alleged to have committed an offence and who, at the time of the alleged commission of the offence, was under the age of 18 years; and 25
 - (b) a person contemplated in paragraph (a) who reaches the age of 18 years before proceedings instituted against him or her in terms of this Act have been concluded.
- (2) The Criminal Procedure Act applies to any person contemplated in subsection (1), 30
except in so far as this Act provides for different procedures in respect of such person.
- (3) A Director of Public Prosecutions or a prosecutor designated thereto by the Director may, under exceptional circumstances, direct that this Act applies to a person who is alleged to have committed an offence and who, at the time of the alleged 35
commission of the offence, was over the age of 18 years but under the age of 21 years.
- (4) The circumstances contemplated in subsection (3) include those where—
- (a) there are several co-accused and the majority of them are under the age of 18 years; or
 - (b) a person commits a further offence while serving a residential sentence 40
imposed in terms of this Act and after having reached the age of 18 years.

Criminal capacity

5. (1) A child who commits an offence while under the age of 10 years cannot be prosecuted for that offence.
- (2) A child who commits an offence while under the age of 14 years is presumed not to have had the capacity to appreciate the difference between right and wrong and to act 45
in accordance with that appreciation, unless the criminal capacity of the child is proved in accordance with section 56.
- (3) If a Director of Public Prosecutions intends charging a child contemplated in subsection (2) with an offence, the Director or his or her delegate must issue a certificate confirming an intention to prosecute. 50
- (4) If the certificate contemplated in subsection (3) is not issued within 14 days after the preliminary inquiry, the Director of Public Prosecutions must be regarded as having declined to institute prosecution.
- (5) In issuing a certificate contemplated in subsection (3) the Director of Public Prosecutions may have regard to any relevant information, but must have regard to— 55
- (a) the appropriateness of diversion;

- (b) the educational level, cognitive ability, domestic and environmental circumstances, age and maturity of such child;
 - (c) the nature and gravity of the alleged offence;
 - (d) the impact of the alleged offence upon any victim of such offence; and
 - (e) a probation officer's assessment report. 5
- (6) The common law pertaining to the criminal capacity of children is hereby amended to the extent set out in this section.

CHAPTER 3

METHODS OF SECURING ATTENDANCE OF CHILD AT PRELIMINARY INQUIRY 10

Methods of securing attendance of child at preliminary inquiry

6. (1) The methods of securing the attendance of a child at a preliminary inquiry are—
- (a) arrest;
 - (b) summons; or
 - (c) a written warning. 15

(2) Before a police official uses any of the methods contemplated in subsection (1), he or she may open a docket for the purposes of consideration by a Director of Public Prosecutions or a prosecutor designated thereto by the Director as to whether or not the matter should be set down for the holding of a preliminary inquiry.

Arrest 20

7. (1) Unless there are compelling reasons justifying an arrest, a child may not be arrested for an offence contemplated in Schedule 1.

(2) (a) A warrant of arrest issued under section 43 of the Criminal Procedure Act in respect of a child must direct that the child be brought to appear at a preliminary inquiry.

(b) Where a warrant of arrest has been executed outside normal court hours, the police official concerned must take into account the principles set out in section 3(2). 25

(3) (a) The police official effecting the arrest of a child must—

- (i) inform the child of the nature of the allegation against him or her;
- (ii) inform the child of his or her rights in the prescribed manner; and
- (iii) explain to the child the immediate procedures to be followed in terms of this Act; and 30

(iv) notify the child's parent or an appropriate adult of the arrest.

(b) The National Commissioner of the South African Police Service must issue a national instruction with regard to the procedure to be followed when notifying a child's parent or an appropriate adult of the arrest. 35

(4) A police official, or where possible the police official who has arrested a child, must not later than 24 hours after the arrest, inform the probation officer in whose area of jurisdiction the child was arrested of such arrest in the prescribed manner.

(5) (a) Any child who has been arrested must, whether an assessment of the child has been effected or not, be taken by a police official to appear at a preliminary inquiry within 48 hours after arrest or, if the 48 hours expired outside court hours or on a day which is not a court day, not later than the end of the first court day after the expiry of the 48 hours. 40

(b) If a police official is unable to inform a probation officer of the arrest, the police official must submit a written report to the inquiry magistrate at the preliminary inquiry furnishing reasons for the non-compliance. 45

(6) Where a child accused of an offence referred to in Schedule 1 has not been released from detention in police custody before appearing at a preliminary inquiry, the investigating police official must provide the inquiry magistrate with a written report in the prescribed manner giving reasons why such child could not be released from detention. 50

(7) A police official may not arrest a child under the age of 10 years alleged to have committed an offence, but—

- (a) must inform the relevant probation officer of such particulars regarding the child as may be prescribed; and 55

- (b) may remove the child to a place of safety in terms of section 12 of the Child Care Act, 1983 (Act No. 74 of 1983), if the police official has reason to believe that the child is a child referred to in section 14(4) of that Act.

Summons

8. (1) A summons issued in respect of a child in terms of section 54 of the Criminal Procedure Act must specify the place, date and time of the preliminary inquiry. 5
 (2) A copy of the summons served on a child must be served on the child's parent or an appropriate adult.
 (3) A police official must—
 (a) not later than 24 hours after the service of the summons inform the probation officer concerned of the serving of such summons in the prescribed manner; 10
 (b) as soon as is reasonably possible, but before the commencement of the preliminary inquiry, explain the rights contemplated in section 7(3) to the child concerned.

Written warning to appear at preliminary inquiry 15

9. (1) A police official may warn a child to appear at a preliminary inquiry at a specified time on a specified date and to remain in attendance at the proceedings relating to the offence in question.
 (2) A police official who warns a child under subsection (1), must warn the child's parent or an appropriate adult to bring the child or cause the child to be brought to appear at the preliminary inquiry and to have the child remain in attendance at the proceedings relating to the offence in question. 20
 (3) A police official who warns a child under subsection (1) must complete and hand to the child and to the child's parent or appropriate adult, as the case may be, a written notice on which must be entered the offence in respect of which the child is being warned and the date on which and the time and place at which the child must appear. 25
 (4) The police official must—
 (a) when he or she hands the written notice to the child, the child's parent or the appropriate adult, as the case may be—
 (i) inform such child, parent or appropriate adult of the nature of the allegation against the child; 30
 (ii) inform such child, parent or appropriate adult of his or her rights in the prescribed manner; and
 (iii) explain to such child, parent or appropriate adult the immediate procedures to be followed in terms of this Act; and 35
 (b) not later than 24 hours after handing the warning to the child inform the probation officer concerned accordingly in the prescribed manner.
 (5) Section 55 of the Criminal Procedure Act applies with the changes required by the context to a written warning handed to a child, the child's parent or an appropriate adult under subsection (3). 40

Uncertainty as to child's age

10. If a police official is uncertain about the age of a person suspected of having committed an offence but has reason to believe that the age would render that person subject to this Act, the official must treat such person as a child for the purposes of this Chapter, subject to the estimation of that person's age at the preliminary inquiry. 45

Release of child into care of parent or appropriate adult before preliminary inquiry

11. (1) A police official must release a child who is in detention in police custody and who is accused of an offence referred to in Schedule 1 into the care of the child's parent or an appropriate adult before the child appears at the preliminary inquiry, unless— 50
 (a) exceptional circumstances as prescribed in this Act warrant detention;
 (b) the child's parent or an appropriate adult cannot be located or is not available and all reasonable efforts have been made to locate such parent or appropriate adult; or
 (c) there is a substantial risk that the child may be a danger to any other person or to himself or herself. 55

(2) (a) A police official may, in consultation with a Director of Public Prosecutions or a prosecutor designated thereto by the Director, release a child who—

(i) is in detention in police custody and who is accused of an offence referred to in Schedule 2; or

(ii) is accused of an offence referred to in Schedule 1 but has not been released in terms of subsection (1),

into the care of such child's parent or an appropriate adult on any one or more of the conditions referred to in paragraph (b).

(b) A child may be released in terms of paragraph (a) on condition that the child—

(i) appears at a specified place and time for assessment; 10

(ii) does not interfere with a witness, tamper with evidence or associate with a person or group of specified people; and

(iii) resides at a particular address.

Director of Public Prosecutions may authorise release of child

12. A Director of Public Prosecutions or a prosecutor designated thereto by the Director may, notwithstanding the decision of a police official to the contrary, authorise the release of a child contemplated in section 11(2) from detention in police custody into the care of the child's parent or an appropriate adult upon any of the conditions referred to in that section, and if such release is authorised, the written notice referred to in section 13(a) must be handed to the child and to the person into whose care the child is released. 15 20

Duty of police official and person into whose care child is released upon release of child

13. A police official who releases any child from detention in accordance with section 11(1) or (2) or who releases a child upon direction of a Director of Public Prosecutions or a prosecutor designated thereto by the Director in accordance with section 12 and places such child in the care of a parent or an appropriate adult, must— 25

(a) at the time of the release of the child, complete and hand to the child and to the person into whose care the child is released, a written notice in the prescribed form on which must be entered the offence in respect of which the child is being accused, any conditions relating to the release of the child and the place at, date on and time at which the child must appear for a preliminary inquiry; 30

(b) warn such parent or appropriate adult to bring the child or cause the child to be brought to appear at the preliminary inquiry at a specified place, date and time and to remain in attendance and, if any conditions have been imposed, to see to it that the child complies with such conditions; and 35

(c) warn the child to appear at the preliminary inquiry at a specified place, date and time and to remain in attendance and, if any conditions have been imposed, to comply with such conditions.

Release of child on bail before preliminary inquiry 40

14. (1) Notwithstanding section 59(1)(a) of the Criminal Procedure Act, a police official may, in consultation with the police official charged with the investigation, authorise the release of a child accused of an offence referred to in Schedule 1 on bail prior to the appearance of that child at a preliminary inquiry if the release of the child into the care of such child's parent or an appropriate adult is for any reason not appropriate. 45

(2) The National Commissioner of the South African Police Service may, after consultation with the National Director of Public Prosecutions, issue a national instruction regarding the amounts to be set for bail in terms of subsection (1).

(3) Notwithstanding section 59A(1) of the Criminal Procedure Act, the Director of Public Prosecutions or a prosecutor authorised thereto in writing by the Director of Public Prosecutions may, in consultation with the police official charged with the investigation, authorise the release of a child accused of an offence referred to in Schedule 2 on bail prior to the appearance of that child at a preliminary inquiry subject to reasonable conditions if the release of the child into the care of such child's parent or an appropriate adult is for any reason not appropriate. 50 55

(4) The National Director of Public Prosecutions may, after consultation with the Minister for Justice and Constitutional Development, issue directives regarding the amounts that may be set for bail in terms of subsection (3).

Child accused of certain offences not to be released from detention

15. Subject to section 16, a police official may not release a child accused of an offence referred to in Schedule 3 from detention in police custody. 5

Detention in place of safety in lieu of detention in police custody

16. If a child cannot for any reason be released into the care of a parent or an appropriate adult or cannot be released on bail, the child must, in lieu of detention in police custody, be placed in a place of safety if such place is available within a reasonable distance from the place where the child has to appear for a preliminary inquiry and there is a vacancy. 10

Duties of police official in respect of child

17. (1) (a) Where a child in detention in police custody complains of an injury sustained during arrest or whilst in detention, the police official to whom such complaint is made must report the complaint to the station commissioner, who must delegate a police official to take the child to a medical practitioner for examination as soon as is reasonably possible. 15

(b) The report by the medical practitioner must be included in the appropriate police docket. 20

(2) The police official responsible for a case must ensure that the child concerned is assessed before the commencement of the preliminary inquiry and may use police transport for that purpose.

Register of children in detention in police cells

18. (1) The station commissioner of each police station must keep a register in which prescribed details regarding the detention in police cells of all children must be distinctively recorded. 25

(2) The register may be examined by such persons as may be prescribed.

CHAPTER 4

ASSESSMENT OF CHILD 30

Duty of probation officer to assess child

19. A probation officer who receives a notification from a police official that a child has been arrested, served with a summons or issued with a written notice must assess the child before the child appears at the preliminary inquiry.

Place where assessment is to be conducted 35

20. (1) The assessment of a child may take place in any suitable place identified by the probation officer, which place may include a room at the magistrate's court or at the offices of the Department of Social Development.

(2) The place identified in terms of subsection (1) must be conducive to privacy.

Persons to attend assessment 40

21. (1) The child must be present at his or her assessment in terms of this Act.

(2) Subject to section 22(3), a child's parent or an appropriate adult must attend the assessment of the child.

(3) The following persons may attend the assessment of a child:

(a) The prosecutor in whose magisterial district the assessment is being conducted;

(b) the legal representative of the child;

- (c) any police official;
- (d) any person whose presence is necessary or desirable for the assessment; and
- (e) any other person permitted by the probation officer to attend, including a researcher.

(4) The probation officer may exclude any person referred to in subsection (2) or (3), except the child's legal representative, from attending an assessment if the presence of such person is obstructing the completion of the assessment. 5

(5) A probation officer may in the prescribed manner request a police official to be present at an assessment.

Powers and duties of probation officer before assessment 10

22. (1) A probation officer may at any time before the assessment of a child issue a notice in the prescribed manner to a parent of the child or an appropriate adult to appear at the assessment or, where the interests of justice so require, the probation officer may orally request the parent or appropriate adult to appear at the assessment.

(2) A notice contemplated in subsection (1) must be delivered by a police official upon the request of the probation officer in the prescribed manner. 15

(3) A person who has been notified in terms of subsection (1) may apply to the probation officer not to attend the assessment, and if the probation officer exempts the person from attending the exemption must be in writing.

(4) A person notified in terms of subsection (1) and not exempted in terms of subsection (3) who fails to attend the assessment is guilty of an offence and liable upon conviction to a fine or to imprisonment for a period not exceeding three months. 20

(5) A probation officer may request a police official in the prescribed manner to—

- (a) obtain any documentation required for the completion of assessment of a child; 25

- (b) locate a child's parent or an appropriate adult; and

- (c) provide transport in order to secure the attendance at the assessment of a child, and his or her parent or an appropriate adult.

(6) (a) The probation officer must make every effort to locate a parent or an appropriate adult for the purposes of concluding the assessment of a child. 30

(b) If all reasonable efforts to locate the parent or an appropriate adult have failed, the probation officer may conclude the assessment in the absence of such person.

Powers and duties of probation officer at assessment

23. (1) The probation officer must—

- (a) explain the purpose of assessment to the child; 35

- (b) inform the child of his or her rights in the prescribed manner;

- (c) explain to the child the immediate procedures to be followed in terms of this Act; and

- (d) inquire from the child whether or not he or she intends acknowledging responsibility for the offence in question. 40

(2) The probation officer may at any stage during the assessment of a child consult with—

- (a) the prosecutor;

- (b) the police official who arrested the child, served the summons, issued the written warning or is responsible for the investigation of the matter; or 45

- (c) any person who may provide information necessary for the assessment.

(3) The probation officer may at any stage during the assessment consult individually with any person at the assessment.

(4) The probation officer may contact or consult any person who is not at the assessment and who has any information relating to the assessment, but if such additional information is obtained, the child must be informed of such information. 50

(5) Where a child is accused with another child, the probation officer may conduct the assessment of such children simultaneously.

(6) The probation officer must encourage the participation of the child during the assessment process. 55

(7) The probation officer must complete an assessment report in the prescribed manner with recommendations as to—

- (a) the prospects of diversion;

- (b) the possible release of the child into the care of a parent or an appropriate adult, if the child is in detention;
 - (c) the placement, where applicable, of a child in a particular place of safety, secure care facility or prison; or
 - (d) the transfer of the matter to a children's court, stating reasons for such recommendation. 5
- (8) If it appears to the probation officer that the child does not intend to acknowledge responsibility for the alleged offence, it must be indicated in the assessment report.
- (9) The report referred to in subsection (7) must be submitted to the prosecutor before the commencement of the preliminary inquiry. 10

Estimation of child's age by probation officer

24. (1) If the age of a child who must be assessed is uncertain, the probation officer must make an estimation of the child's age and must complete the prescribed form.
- (2) In making the estimation, the probation officer must consider any available information in the following order of cogency, subject to subsection (3): 15
- (a) A previous determination of age by a magistrate under this Act or under the Criminal Procedure Act or an estimation of age in terms of the Child Care Act, 1983 (Act No. 74 of 1983);
 - (b) statements made by a parent, the legal guardian or any other person likely to have direct knowledge of the age of the child or a statement made by the child himself or herself; 20
 - (c) a baptismal certificate, school registration form or school report, or other information of a similar nature; or
 - (d) an estimation of age made by a medical practitioner.
- (3) If the probation officer is unable to make an estimation by virtue of information contemplated in subsection (2)(a), (b) or (c), the probation officer must refer the child in the prescribed manner to a medical practitioner for an estimation of the child's age. 25
- (4) The probation officer must submit the estimation on the prescribed form together with any relevant documentation to the inquiry magistrate before the child's appearance at a preliminary inquiry. 30

CHAPTER 5

PRELIMINARY INQUIRY

Nature and objectives of preliminary inquiry

25. (1) A preliminary inquiry must be held in respect of every child prior to plea.
- (2) A child's appearance at a preliminary inquiry must be regarded as his or her first appearance in a court as contemplated in section 50 of the Criminal Procedure Act. 35
- (3) The objectives of a preliminary inquiry are to—
- (a) establish whether the matter can be diverted before plea;
 - (b) identify a suitable diversion option, where applicable;
 - (c) establish whether the matter should be transferred to a children's court in terms of the Child Care Act, 1983 (Act No. 74 of 1983); 40
 - (d) provide an opportunity for the prosecutor to assess whether there are sufficient grounds for the matter to proceed to trial;
 - (e) ensure that all available information relevant to the child, his or her circumstances and the offence is considered in order to make a decision on diversion and placement of the child; 45
 - (f) ensure that the views of all persons present are considered before a decision is taken;
 - (g) encourage the participation of the child and his or her parent or an appropriate adult in decisions concerning the child; and 50
 - (h) determine the release or placement of the child pending—
 - (i) conclusion of the preliminary inquiry;
 - (ii) appearance of the child in a court; or
 - (iii) transfer of the matter to the children's court.
- (4) A preliminary inquiry may be held in a court or any other suitable place. 55
- (5) The inquiry magistrate must conduct the proceedings in an informal manner by asking questions, interviewing persons at the inquiry and eliciting information.

Head of administrative region to designate inquiry magistrate

26. The head of each administrative region as defined in section 1 of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), must designate a magistrate as inquiry magistrate for each district in that administrative region unless a One-Stop Child Justice Centre has been established for a particular district. 5

Persons to attend preliminary inquiry

27. (1) The following persons must attend the preliminary inquiry:

- (a) The child;
- (b) the child's parent or an appropriate adult;
- (c) the probation officer; and 10
- (d) any person contemplated in section 29(1)(a).

(2) The inquiry magistrate may exclude the child's parent or an appropriate adult from attending the preliminary inquiry if the parent or adult's presence at the preliminary inquiry is not in the best interest of the child.

(3) A preliminary inquiry may only proceed in the absence of the child's parent, an appropriate adult or the probation officer in exceptional circumstances. 15

(4) If a preliminary inquiry proceeds in the absence of a probation officer, the probation officer's assessment report must be available at the preliminary inquiry unless assessment has been dispensed with in terms of section 29(2).

(5) The following persons may attend the preliminary inquiry: 20

- (a) The child's legal representative;
- (b) any police official;
- (c) any researcher, with the approval of the inquiry magistrate; and
- (d) any person contemplated in section 29(1)(b).

Procedure relating to holding of preliminary inquiry 25

28. (1) At the start of the preliminary inquiry—

- (a) the inquiry magistrate must determine the age of a child in accordance with section 31, if necessary;
- (b) the inquiry magistrate must in the prescribed manner— 30
 - (i) explain the purposes of the preliminary inquiry to the child;
 - (ii) inform the child of the nature of the allegation against him or her;
 - (iii) inform the child of his or her rights; and
 - (iv) explain to the child the immediate procedures to be followed in terms of this Act; and
- (c) the prosecutor must ensure that the inquiry magistrate has a copy of the probation officer's assessment report, if available, and any form and documentation contemplated in section 24(4). 35

(2) Information regarding a previous diversion or previous conviction of the child concerned may be submitted at a preliminary inquiry by any person attending the inquiry. 40

(3) A child, the child's legal representative, the child's parent, an appropriate adult and the prosecutor must be given an opportunity to question the probation officer or any other person giving evidence at the preliminary inquiry.

(4) If the child in respect of whom the holding of a preliminary inquiry is contemplated, is a co-accused with one or more other children, a joint preliminary inquiry may be held. 45

(5) Where a joint preliminary inquiry is held, different decisions may be made in respect of each child.

(6) If a child does not acknowledge responsibility for the offence with which he or she is being charged, no further questions regarding such offence may be put to the child and the prosecutor may set the matter down for plea and trial in a court. 50

(7) No information furnished at a preliminary inquiry may, in any subsequent court proceedings, be used against the person who furnished it.

(8) The inquiry magistrate must keep a record of the proceedings of the preliminary inquiry. 55

Powers and duties of inquiry magistrate

29. (1) The inquiry magistrate may—
- (a) subpoena or cause to be subpoenaed any person whose presence is necessary for the conclusion of the preliminary inquiry;
 - (b) permit the attendance of any other person who may be able to contribute to the proceedings; 5
 - (c) request any further documentation or information which may be relevant or necessary to the proceedings;
 - (d) after consideration of the information contained in the assessment report, elicit any information from any person attending the inquiry to supplement or clarify the information in the assessment report; 10
 - (e) take such steps as may be necessary to establish the truth of any statement or the correctness of any submission; and
 - (f) where the conducting of the proceedings of the preliminary inquiry or any aspect concerning the proceedings is in dispute, rule on the conducting of the proceedings in a manner consistent with the provisions of this Act. 15
- (2) If the child has not yet been assessed, the inquiry magistrate may dispense with assessment if it is in the best interests of the child to do so.
- (3) The inquiry magistrate must ensure that the child, the child's legal representative, the child's parent and an appropriate adult— 20
- (a) know of the recommendations in the probation officer's assessment report; and
 - (b) are informed of any diversion option available in the district or area of his or her jurisdiction and the aims and content of such option.
- (4) If the probation officer is present at the preliminary inquiry, the inquiry magistrate 25 may request the probation officer to explain, elaborate upon or justify any recommendation or statement made in the assessment report, or to provide additional information.
- (5) The inquiry magistrate must consider the reports regarding the arrest of the child and detention in police custody provided by the arresting police official.

Fingerprints 30

30. A child's fingerprints may not be taken in terms of section 37 of the Criminal Procedure Act before the conclusion of the preliminary inquiry in respect of the child, unless to do so is—
- (a) essential for the investigation of any case;
 - (b) required for the purposes of establishing the age of the person concerned; or 35
 - (c) necessary to establish the previous convictions of a child for the purposes of making a decision on diversion, release from detention in police custody or placement in a particular place of safety, secure care facility or prison.

Age to be determined by inquiry magistrate

31. (1) If the age of the child is uncertain, the inquiry magistrate must determine the 40 age of the child after considering the form and any documentation submitted by the probation officer in terms of section 24(4).
- (2) (a) For the purposes of a determination—
- (i) an inquiry magistrate may require any relevant documentation, information or statement from any person; 45
 - (ii) an inquiry magistrate may subpoena any person to produce the documentation, information or statements contemplated in subparagraph (i); and
 - (iii) section 24(2) applies with the changes required by the context.
- (b) Chapter 23 of the Criminal Procedure Act applies with the changes required by the context to the issue of a subpoena contemplated in paragraph (a)(ii). 50
- (3) The inquiry magistrate must enter the age determined in terms of subsection (1) into the record as the age of the child, which age must be regarded as the correct age of the child until the contrary is proved on a balance of probabilities.
- (4) If the inquiry magistrate determines that the person was over the age of 18 years 55 at the time of the alleged commission of the offence, he or she must close the preliminary inquiry and postpone the proceedings as contemplated in section 50(6) of the Criminal Procedure Act.

(5) If the inquiry magistrate makes a determination of age that is not supported by a valid birth certificate, identity document or passport, a copy of the record of the determination must be forwarded to the Department of Home Affairs for the issue of an identification document to the person concerned.

Failure to appear at preliminary inquiry

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32. (1) A child or his or her parent, or an appropriate adult, who has been warned to appear at a preliminary inquiry by a police official in terms of section 13 and who fails to appear at such inquiry, is guilty of an offence and liable on conviction to the punishment prescribed in subsection (2) or (3).

(2) The inquiry magistrate may—

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(a) if satisfied that the person into whose care the child was released, was warned in terms of section 13 and that the person has failed to comply with the warning or condition imposed, issue a warrant for the arrest of that person;

(b) when the person is brought before the inquiry magistrate, in a summary manner, enquire into his or her failure to appear at the preliminary inquiry or failure to comply with the condition; and

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(c) unless the person satisfies the magistrate that there is a reasonable possibility that the failure contemplated in paragraph (b) was not due to fault on his or her part, sentence him or her to a fine or to imprisonment for a period not exceeding three months.

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(3) Subsection (2) applies with the changes required by the context and subject to sections 69 and 71 to a child who has been released into the care of his or her parent or an appropriate adult and who fails to comply with the directions contained in the written notice referred to in section 13(a) or with any condition imposed in terms of section 11(2).

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Release of child into care of parent or appropriate adult at preliminary inquiry

33. (1) The inquiry magistrate must release a child who is in detention into the care of a parent or an appropriate adult if—

(a) the case is not disposed of at the first appearance at the preliminary inquiry; and

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(b) it is in the interests of justice to so release the child.

(2) In considering whether or not it would be in the interests of justice to release a child into the care of a parent or an appropriate adult, the inquiry magistrate must have regard to the recommendation of the probation officer and all other relevant factors, including—

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(a) the best interests of the child;

(b) whether the child has any previous convictions;

(c) the availability of the child's parent or an appropriate adult;

(d) the likelihood of the child returning to the preliminary inquiry for a further appearance;

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(e) the period for which the child has already been in detention since arrest;

(f) the probable period of detention of the child until conclusion of the preliminary inquiry;

(g) the risk that the child may be a danger to himself or herself or to any other person;

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(h) the state of health of the child;

(i) the reason for any delay in the disposal or conclusion of the preliminary inquiry and whether such delay was due to any fault on the part of the State or on the part of the child or his or her legal representative;

(j) whether detention would prejudice the child in the preparation of the defence case;

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(k) the likelihood that, if the child is convicted of the offence, a sentence of substantial imprisonment will be imposed;

(l) the fact that the child is between 10 and 14 years of age and presumed to lack criminal capacity; and

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(m) the receipt of a written confirmation by the Director of Public Prosecutions to the effect that he or she intends to charge the child with an offence referred to in Schedule 3.

(3) The inquiry magistrate may, in releasing a child into the care of the child's parent or an appropriate adult, impose one or more of the following conditions, namely that the child— 5

- (a) must appear at a specified place and time;
- (b) must report periodically to a specified person or place;
- (c) must attend a particular school;
- (d) must reside at a particular address; 10
- (e) must be placed under the supervision of a specified person; or
- (f) may not to interfere with any witness, tamper with any evidence or associate with any person or group of specified people.

(4) If the inquiry magistrate releases the child into the care of a parent or an appropriate adult, the inquiry magistrate must warn the parent or adult, as the case may be, to bring the child to appear or to ensure that the child appears at a specified place and time and if a condition has been imposed in terms of this section, to see to it that the child complies with such condition. 15

(5) Any person in whose care a child is placed and who fails to comply with subsection (4) is guilty of an offence and liable upon conviction to a fine or to imprisonment for a period not exceeding three months. 20

(6) Subject to sections 69 and 71, a child who has been released into the care of a parent or an appropriate adult and who fails to comply with any condition imposed in terms of subsection (3) is guilty of an offence and liable upon conviction to a fine or to imprisonment for a period not exceeding three months. 25

Release of child on own recognisance

34. (1) An inquiry magistrate may release a child on his or her own recognisance after consideration of the factors contemplated in section 33(2), with or without conditions as set out in section 33(3), and must order the child to appear at a preliminary inquiry at a specified place and time. 30

(2) Subject to sections 69 and 71, a child who has been released on his or her own recognisance and who fails to appear at the preliminary inquiry at the place and time contemplated in subsection (1) or to comply with any condition imposed in terms of that subsection is guilty of an offence and liable upon conviction to a fine or to imprisonment for a period not exceeding three months. 35

Release of child on bail by inquiry magistrate

35. (1) An inquiry magistrate may, if the release of a child on his or her own recognisance or into the care of a parent or an appropriate adult is for any reason not possible, after consideration of the factors contemplated in section 33(2), release the child on bail subject to any one or more of the conditions contemplated in section 33(3). 40

(2) If bail has been granted previously for a child appearing at a preliminary inquiry by a police official in terms of section 14(1) or by a Director of Public Prosecutions or a prosecutor authorised thereto by the Director in terms of section 14(3), the inquiry magistrate may extend the bail on the same conditions, amended conditions or additional conditions and may increase or reduce the amount of bail. 45

Further detention of child after first appearance

36. (1) (a) An inquiry magistrate may order the further detention of a child in a place of safety or a secure care facility if such place or facility is available within a reasonable distance from the place where the preliminary inquiry is held, if—

- (i) the proceedings of a preliminary inquiry are postponed in terms of section 37 or 38; and 50
- (ii) the release of a child on his or her own recognisance, into the care of a parent or an appropriate adult or on bail is for any reason not possible.

(b) If a place of safety or secure care facility is not available or if there is no vacancy, the child may be detained in a police cell as long as the detention facilities at the police station— 55

- (i) are suitable for the detention of children; and

(ii) provide for children to be detained separately from adults.

(2) An inquiry magistrate may order the further detention of a child in a place of safety or a secure care facility or, subject to subsection (4), a prison, if—

(i) the child is to appear for plea and trial as contemplated in section 42(1); and

(ii) the release of a child on his or her own recognisance, into the care of a parent or an appropriate adult or on bail is for any reason not possible. 5

(3) The inquiry magistrate must have regard to the recommendations of the probation officer when deciding on the placement of the child as contemplated in subsection (1) or (2).

(4) (a) A child of 14 years or older charged with an offence referred to in Schedule 3 may be detained in prison if— 10

(i) there is no place of safety or secure care facility within a reasonable distance of the preliminary inquiry at which the child is appearing;

(ii) there is no vacancy in the place of safety or secure care facility; or

(iii) there is a substantial risk that the child will cause harm to other children in the place of safety or secure care facility. 15

(b) An inquiry magistrate who makes an order that a child be detained in prison must record the reasons for making such an order.

(5) (a) If an inquiry magistrate orders the further detention of a child in terms of subsection (2), the child must appear before the magistrate at least every 60 days if detained in a place of safety or secure care facility and at least every 30 days if detained in a prison. 20

(b) When the child appears before the inquiry magistrate, the magistrate must—

(i) determine whether or not the detention remains necessary;

(ii) if ordering further detention of the child, record the reasons for the detention; 25

(iii) consider a reduction of the amount of bail, if applicable;

(iv) inquire whether or not the child is being properly treated and kept under suitable conditions; and

(v) if not satisfied that the child is being properly treated and kept under suitable conditions, inspect and investigate the treatment and conditions and may make an appropriate remedial order. 30

Postponement of preliminary inquiry

37. (1) The inquiry magistrate may postpone the proceedings of a preliminary inquiry for a period not exceeding 48 hours for the purposes of—

(a) securing the attendance of a person necessary for the conclusion of the inquiry; 35

(b) obtaining information necessary for the conclusion of the inquiry;

(c) establishing the attitude of the victim regarding diversion;

(d) planning a diversion option;

(e) finding alternatives to pre-trial residential detention; or 40

(f) assessing the child, where no assessment has previously been undertaken and it is found that assessment may not be dispensed with.

(2) If the proceedings of a preliminary inquiry are postponed for the purpose of noting a confession, an admission or a pointing-out, or the holding of an identity parade, the inquiry magistrate must inform the child of the right to have a parent, an appropriate adult or legal representative present during such proceedings. 45

(3) The proceedings of a preliminary inquiry may be postponed for a further period not exceeding 48 hours if the postponement is likely to increase the prospects of diversion, after which the preliminary inquiry, if it has not been concluded and subject to section 38, must be closed and the prosecutor must set the matter down for plea and trial in a court. 50

Postponement of preliminary inquiry for detailed assessment

38. (1) Any person may request the inquiry magistrate to postpone the proceedings of a preliminary inquiry for the purposes of obtaining a detailed assessment of a child.

(2) The inquiry magistrate may postpone the proceedings of the preliminary inquiry for a period not exceeding 14 days if there are exceptional circumstances warranting a further assessment of the child and if such circumstances relate to— 55

(a) the possibility that the child may be a danger to others or to himself or herself;

- (b) the fact that the child has a history of repeatedly committing offences or abscondment;
- (c) the social welfare history of the child;
- (d) the possible admission of the child to a sexual offenders' programme, substance abuse programme or other intensive treatment programme; or 5
- (e) the possibility that the child may be a victim of sexual or other abuse.

(3) Any detailed assessment must be conducted in the home of the child, unless assessment in the home is not in the best interests of the child or impossible, in which case assessment may be conducted at any residential facility.

Decision regarding diversion 10

39. (1) The inquiry magistrate must ascertain from the prosecutor whether the matter can be diverted after consideration of—

- (a) the assessment report, unless assessment has been dispensed with in terms of section 29(2);
- (b) the views of all the persons present at the preliminary inquiry and any information provided by any such person; 15
- (c) any information requested in terms of section 29(1)(c); and
- (d) the willingness of the child to acknowledge responsibility for the offence.

(2) If the prosecutor indicates that the matter may be diverted, the inquiry magistrate must make an order for diversion in respect of the child concerned. 20

(3) In addition to the diversion options set out in section 47, the inquiry magistrate may, after consultation with the persons present at the preliminary inquiry, develop an individual diversion option which meets the purposes of and standards applicable to diversion set out in sections 43 and 45.

Failure to comply with diversion order 25

40. (1) If a child fails to comply with any order relating to diversion, the inquiry magistrate may, upon being notified of such failure in the prescribed manner, issue a warrant for the arrest of the child or a written notice to the child to appear before the magistrate.

(2) When a child appears before an inquiry magistrate pursuant to a warrant of arrest or written notice, the inquiry magistrate must inquire into the reasons for the child's failure to comply with the diversion order. 30

(3) (a) Unless the prosecutor decides to proceed with the prosecution of the child concerned, the inquiry magistrate may, after consideration of the views of any person present at the inquiry, decide to— 35

- (i) apply the same option with altered conditions;
- (ii) apply any other diversion option; or
- (iii) make an appropriate order which will assist the child and his or her family to comply with the diversion option initially applied.

(b) If the prosecutor decides to proceed with prosecution the matter must be set down for plea and trial in a court, in which case section 42 applies with the changes required by the context. 40

Referral of child to children's court

41. (1) If it appears during proceedings at a preliminary inquiry that a child is a child as referred to in section 14(4) of the Child Care Act, 1983 (Act No. 74 of 1983), and that it is desirable to deal with the child in terms of that Act, the inquiry magistrate may stop the proceedings and order that the matter be referred to a children's court. 45

(2) Referral of a matter to the children's court must be considered by an inquiry magistrate if a child—

- (a) has previously been assessed on more than one occasion with regard to minor offences committed to meet the child's basic need for food and warmth and in the preliminary inquiry in question it is again alleged that the child has committed such an offence; 50
- (b) is the subject of a current order of the children's court;
- (c) is allegedly abusing dependence-producing substances; 55

- (d) does not live at his or her family home or in appropriate substitute care, and is alleged to have committed a minor offence the purpose of which was to meet the child's basic need for food and warmth; or
- (e) is a child as described in section 14 of the Child Care Act, 1983 (Act No. 74 of 1983).

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Procedure upon referral of matter for plea and trial

42. (1) If no diversion has taken place and the child has not been transferred to a children's court upon the conclusion of the preliminary inquiry, the prosecutor must inform the inquiry magistrate of the place where and the date and time when the child must appear for plea and trial in a court having jurisdiction or a court at a One-Stop Child Justice Centre. 10

(2) The inquiry magistrate must, if the child—

(a) is not legally represented, explain to the child and the parent or an appropriate adult, as the case may be, the provisions of Chapter 9 regarding legal representation; and 15

(b) indicates an intention to apply for legal representation at State expense in terms of section 75, assist the child, as far as is reasonably possible, to make such application to a Legal Aid Officer.

(3) If the child is—

(a) in detention, the inquiry magistrate must inform the child of the place, date and time of the next appearance in court and must warn the child's parent or an appropriate adult to attend such proceedings at the specified place and time; or 20

(b) not in detention, the inquiry magistrate—

(i) may alter or extend any condition imposed in terms of section 11(2) or section 33(3); and 25

(ii) must warn the child and his or her parent or an appropriate adult, as the case may be, to appear in court at a specified place, date and time.

(4) Where an inquiry magistrate has presided over a preliminary inquiry and has heard any information prejudicial to the impartial determination of the matter, such magistrate may not preside over any subsequent trial emanating from that inquiry. 30

CHAPTER 6

DIVERSION

Purposes of diversion

43. The purposes of diversion are to—

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(a) encourage the child to be accountable for the harm caused;

(b) meet the particular needs of the individual child;

(c) promote the reintegration of the child into the family and community;

(d) provide an opportunity to those affected by the harm to express their views on its impact on them; 40

(e) encourage the rendering to the victim of some symbolic benefit or the delivery of some object as compensation for the harm;

(f) promote reconciliation between the child and the person or community affected by the harm caused by the child;

(g) prevent stigmatising the child and prevent adverse consequences flowing from being subject to the criminal justice system; and 45

(h) prevent the child from having a criminal record.

Child to be considered for diversion under certain circumstances

44. A child must be considered for diversion if—

(a) the child voluntarily acknowledges responsibility for the offence; 50

(b) the child understands his or her right to remain silent and has not been unduly influenced to acknowledge responsibility;

(c) there is sufficient evidence to prosecute; and

(d) the child and his or her parent, or an appropriate adult, consent to diversion and the diversion option. 55

Minimum standards applicable to diversion and diversion options

45. (1) No child may be excluded from a diversion programme due to an inability to pay any fee required for such programme.
- (2) A child may be required to perform community service as an element of diversion, with due consideration for the child's age and development. 5
- (3) Diversion options—
- (a) must promote the dignity and well-being of a child, and the development of his or her sense of self-worth and ability to contribute to society;
 - (b) may not be exploitative, harmful or hazardous to a child's physical or mental health; 10
 - (c) must be appropriate to the age and maturity of a child; and
 - (d) may not interfere with a child's schooling.
- (4) Diversion options must, where reasonably possible—
- (a) impart useful skills;
 - (b) include a restorative justice element which aims at healing relationships, including the relationship with the victim; 15
 - (c) include an element which seeks to ensure that the child understands the impact of his or her behaviour on others, including the victims of the offence, and may include compensation or restitution; and
 - (d) be presented in a location reasonably accessible to the child, and a child who cannot afford transport in order to attend a selected diversion programme should, as far as is reasonably possible, be provided with the means to do so. 20
- (5) Any diversion option presented by a government department or a non-governmental organisation, which has a predetermined content and duration and which involves a service to groups of children or offers a service to individual children on a regular basis, must be registered as prescribed. 25

Availability of diversion options and keeping of records

46. (1) The Cabinet member responsible for social development must—
- (a) develop suitable diversion options as contemplated in this Chapter; and
 - (b) keep a register of children who have been subject to diversion in terms of this Act. 30
- (2) Subsection (1) does not preclude any government department or non-governmental organisation from developing suitable diversion options for children who are alleged to have committed offences.

Diversion options 35

47. (1) For the purposes of this section—
- (a) diversion options are set out in three levels with level one comprising the least onerous and level three the most onerous options;
 - (b) "a compulsory school attendance order" means an order requiring a child to attend school every day for a specified period of time, which attendance is to be monitored by a specified person; 40
 - (c) "a family time order" means an order requiring a child to spend a specified number of hours with his or her family;
 - (d) "a good behaviour order" means an order requiring a child to abide by an agreement made between the child and his or her family to comply with certain standards of behaviour; 45
 - (e) "a positive peer association order" means an order requiring a child to associate with persons who can contribute to the child's positive behaviour;
 - (f) "a reporting order" means an order requiring a child to report to a specified person at a time or at times specified in such order so as to enable such person to monitor the child's behaviour; and 50
 - (g) "a supervision and guidance order" means an order placing a child under the supervision and guidance of a mentor or peer in order to monitor and guide the child's behaviour.
- (2) In selecting a specific diversion option for a particular child at a preliminary inquiry, consideration must be given to— 55
- (a) the selection of a diversion option from an appropriate level in terms of this section;

- (b) the child's cultural, religious and linguistic background;
 - (c) the child's educational level, cognitive ability and domestic and environmental circumstances;
 - (d) the proportionality of the option recommended or selected to the circumstances of the child, the nature of the offence and the interests of society; and 5
 - (e) the child's age and developmental needs.
- (3) Level one diversion options include—
- (a) an oral or a written apology to a specified person or persons or institution;
 - (b) a formal caution in the prescribed manner with or without conditions;
 - (c) placement under a supervision and guidance order in the prescribed manner for a period not exceeding three months; 10
 - (d) placement under a reporting order in the prescribed manner;
 - (e) the issue of a compulsory school attendance order in the prescribed manner for a period not exceeding three months;
 - (f) the issue of a family time order in the prescribed manner for a period not exceeding three months; 15
 - (g) the issue of a positive peer association order in the prescribed manner in respect of a specified person or persons or a specified place for a period not exceeding three months;
 - (h) the issue of a good behaviour order in the prescribed manner; 20
 - (i) the issue in the prescribed manner of an order prohibiting the child from visiting, frequenting or appearing at a specified place;
 - (j) referral to counselling or therapy for a period not exceeding three months;
 - (k) compulsory attendance at a specified centre or place for a specified vocational or educational purpose and for a period not exceeding five hours each week, for a maximum of three months; 25
 - (l) symbolic restitution to a specified person, persons, group or institution; and
 - (m) restitution of a specified object to a specified victim or victims of the alleged offence where the object in question can be returned or restored. 30
- (4) Level two diversion options include— 30
- (a) the options referred to in subsection (3) but the maximum periods contemplated in that subsection must for the purposes of this subsection be construed as six months;
 - (b) compulsory attendance at a specified centre or place for a specified vocational or educational purpose for a period not exceeding eight hours each week, for a maximum of six months; 35
 - (c) performance without remuneration of some service for the benefit of the community under the supervision or control of an organisation or institution, or a specified person or group identified by the probation officer effecting the assessment for a maximum period of 50 hours, and to be completed within a maximum period of six months; 40
 - (d) provision of some service or benefit to a specified victim or victims in an amount which the child or the family can afford;
 - (e) payment of compensation to a maximum of R500 to a specified person, persons, group or institution where the child or his or her family is able to afford this; 45
 - (f) where there is no identifiable person or persons to whom restitution or compensation can be made, provision of some service or benefit or payment of compensation to a community organisation, charity or welfare organisation;
 - (g) referral to appear at a family group conference or a victim-offender mediation at a specified place and time; and 50
 - (h) any two of the options listed used in combination.
- (5) Level three diversion options apply to children over the age of 14 years in cases where a court upon conviction of the child for the offence in question is likely to impose a sentence of imprisonment for a period not exceeding six months, and include— 55
- (a) referral to a programme which does not exceed six months and which has a residential element that does not exceed 35 days in total and 21 consecutive days during the operation of the programme;
 - (b) performance without remuneration of some service for the benefit of the community under the supervision and control of an organisation or institution, or a specified person or group, identified by the probation officer and for a period not exceeding 250 hours which must be completed within 12 months of the commencement of the service; 60

- (c) where a child is over the age of compulsory school attendance as contemplated in the South African Schools Act, 1996 (Act No. 84 of 1996), and is not attending formal schooling, compulsory attendance at a specified centre or place for a specified vocational or educational purpose for a period not exceeding six months and no more than 35 hours per week; and 5
- (d) referral to counselling or therapeutic intervention in conjunction with any of the options listed in this subsection.

(6) (a) Upon the selection of a diversion option, the inquiry magistrate must identify a probation officer or other suitable person to monitor the child's compliance with the selected diversion option. 10

(b) In the event of a child failing to comply with any condition of the selected diversion option, the officer or person identified in terms of paragraph (a) must notify the inquiry magistrate in writing of such failure.

Family group conference

48. (1) If a child has been referred to appear at a family group conference, the probation officer appointed by the inquiry magistrate must within 21 days after such referral convene the conference by— 15

- (a) setting the time and place of the conference; and
- (b) taking steps to ensure that all persons who may attend the conference are timeously notified of the time and place of the conference. 20

(2) The following persons may attend a family group conference:

- (a) The child and his or her parent or an appropriate adult;
- (b) any person requested by the child;
- (c) the probation officer;
- (d) the prosecutor; 25
- (e) any police official;
- (f) the victim of the alleged offence and, if such victim is under the age of 18 years, his or her parent or an appropriate adult;
- (g) the legal representative of the child;
- (h) a member of the community in which the child normally resides; and 30
- (i) any person authorised by the probation officer to attend the conference.

(3) If a family group conference fails to take place at the time and place set for the conference, the probation officer must convene another conference as contemplated in this section.

(4) Participants in a family group conference must follow the procedure agreed upon by them and may agree to such plan in respect of the child as they deem fit. 35

(5) A plan contemplated in subsection (3)—

- (a) may include—
 - (i) the application of any option contained in section 47(3) or (4); or
 - (ii) any other plan appropriate to the child, his or her family and local circumstances, which is consistent with the principles contained in this Act; and 40
- (b) must—
 - (i) specify the objectives for the child and the period within which they are to be achieved; 45
 - (ii) contain details of the services and assistance to be provided to the child and a parent or an appropriate adult;
 - (iii) specify the persons or organisations to provide such services and assistance;
 - (iv) state the responsibilities of the child and of the child's parent or appropriate adult; 50
 - (v) state personal objectives for the child and for the child's parent or appropriate adult; and
 - (vi) include such other matters relating to the education, employment, recreation and welfare of the child as are relevant. 55

(6) (a) The probation officer must record the details of and reasons for any plan agreed to at the family group conference and must furnish a copy of the record to the child and to the officer or person contemplated in section 47(6)(a).

(b) In the event of the child failing to comply with any condition of the plan agreed to at the family group conference, the officer or person must notify the inquiry magistrate in writing of such failure, in which case section 40 applies. 60

(7) If the participants in a family group conference cannot agree on a plan, the conference must be closed and the probation officer must refer the matter back to the inquiry magistrate for consideration of another diversion option.

(8) The proceedings at a family group conference are confidential and no statement made by any participant in the conference may be used as evidence in any subsequent court proceedings. 5

Victim-offender mediation

49. (1) If a child has been referred to appear at a victim-offender mediation, subsections (1), (5), (6), (7) and (8) of section 48 apply with the changes that the context requires. 10

(2) A probation officer appointed by the inquiry magistrate must convene the victim-offender mediation and may regulate the procedure to be followed at the mediation.

CHAPTER 7

CHILD JUSTICE COURTS 15

Certain courts regarded as child justice courts

50. (1) (a) Any court to which proceedings against a child are referred for plea and trial in terms of section 42 must be regarded as a child justice court.

(b) Preference must be given to a court contemplated in section 89(1) of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), when deciding to which court proceedings must be referred in terms of section 42. 20

(2) The head of each administrative region as defined in section 1 of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), must as far as is reasonably practicable provide a court room for a child justice court that is conducive to—

- (a) privacy and the dignity and well-being of children; and 25
- (b) informality and participation by all persons involved in the proceedings.

Establishment and jurisdiction of One-Stop Child Justice Centres

51. (1) The Cabinet member responsible for the administration of justice, in consultation with the Cabinet members responsible for social development, safety and security and correctional services, may establish centralised services for child justice to be known as One-Stop Child Justice Centres which may be situated at a place other than the local magistrate's court or police station. 30

(2) Every One-Stop Child Justice Centre must have—

- (a) offices for use by members of the South African Police Service;
- (b) offices for use by probation officers; 35
- (c) facilities to accommodate children temporarily pending the conclusion of a preliminary inquiry; and
- (d) a child justice court which has the same jurisdiction in respect of offences as a court contemplated in section 89(1) of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944). 40

(3) A One-Stop Child Justice Centre may have—

- (a) offices for use by a child's legal representative;
- (b) offices for use by persons who are able to provide diversion and prevention services;
- (c) offices for use by persons authorised to trace the families of a child; 45
- (d) offices for use by persons who are able to provide correctional supervision;
- (e) a children's court; and
- (f) a child justice court which has the same jurisdiction in respect of offences as a court of a regional division contemplated in section 89(2) of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944). 50

(4) Each Cabinet member referred to in subsection (1) is severally responsible for the provision of such resources and services as may be required to enable a One-Stop Child Justice Centre to function effectively.

(5) (a) The Cabinet member responsible for the administration of justice may determine the boundaries of jurisdiction of One-Stop Child Justice Centres by notice in the *Gazette*.

(b) The boundaries of a One-Stop Child Justice Centre do not have to correspond with the boundaries of any magisterial districts. 5

(6) If a One-Stop Child Justice Centre has concurrent jurisdiction with a magistrate's court due to the fact that the geographical area of jurisdiction of the magistrate's court or part thereof falls within the boundaries of geographical jurisdiction of the One-Stop Child Justice Centre, the jurisdiction of the One-Stop Child Justice Centre in relation to the hearing of cases in terms of this Act takes precedence. 10

Parental assistance

52. (1) Subject to subsections (2) and (5), a child must be assisted by a parent or an appropriate adult at proceedings in a child justice court.

(2) If a parent or an appropriate adult cannot be traced after reasonable efforts and any further delay would be prejudicial to the best interests of the child, the child justice court may dispense with the obligation that the child must be assisted by a parent or an appropriate adult. 15

(3) The parent of a child or an appropriate adult who has been warned by an inquiry magistrate to attend proceedings in terms of section 42(3), must attend such proceedings unless exempted in terms of subsection (5). 20

(4) If a parent or an appropriate adult has not been warned to attend as contemplated in subsection (3), the child justice court may at any stage of the proceedings subpoena or cause to be subpoenaed any parent or appropriate adult to appear at such proceedings.

(5) A parent or an appropriate adult warned to appear as contemplated in subsection (3) or subpoenaed in terms of subsection (4) may apply to the child justice court for exemption from the obligation to attend the proceedings in question, and if the presiding officer of the child justice court exempts a parent or an appropriate adult he or she must do so in writing. 25

(6) Where a child is not assisted by a parent or an appropriate adult, and such child requests assistance, an independent observer may, if such observer is available, assist a child in circumstances referred to in subsection (1) of this section. 30

Conduct of proceedings in child justice court

53. (1) At the start of proceedings in a child justice court, the presiding officer must in the prescribed manner—

(a) inform the child of the nature of the allegations against him or her; 35

(b) inform the child of his or her rights; and

(c) explain to the child the further procedures to be followed in terms of this Act and the Criminal Procedure Act.

(2) Notwithstanding section 93*ter* of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), the presiding officer in a child justice court may not summon assessors to assist him or her. 40

(3) The child justice court may participate in eliciting evidence from any person involved in the proceedings if it would be in the best interests of the child.

(4) The proceedings of the child justice court must, with due regard to the child's procedural rights, be conducted in an informal manner to encourage maximum participation by the child and his or her parent or an appropriate adult. 45

(5) The child justice court must protect a child from hostile cross-examination where the cross-examination is prejudicial to the well-being of the child or the fairness of the proceedings.

Admissibility of certain evidence 50

54. (1) Evidence obtained as a result of a confession, an admission or a pointing out rendered admissible in terms of section 218 of the Criminal Procedure Act is only admissible as evidence in a child justice court if the child's parent, appropriate adult or legal representative was present when the confession or admission was made or the pointing out took place. 55

(2) No evidence relating to an identity parade is admissible in a court without the aforementioned representation on behalf of the child.

(3) (a) If a child refuses to have a parent or an appropriate adult present at the procedures contemplated in subsections (1) and (2), or where a parent or an appropriate adult is not present or cannot be traced and a legal representative is not available, an independent observer must be present at such procedure. 5

(b) An independent observer may assist a child at such procedure.

(4) The police official responsible for the case must request an independent observer to assist the child if required in terms of subsection (2).

Children in detention at child justice court

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55. (1) No child may be subjected to the wearing of leg-irons when appearing in any child justice court, and handcuffs may only be used in a child justice court if there are exceptional circumstances warranting their use.

(2) (a) A child held in a cell in or at the child justice court must be kept separate from adults and be treated in a manner and kept in conditions which take account of his or her age. 15

(b) A girl must be kept separate from boys and must be under the care of an adult woman.

(c) Where a child is transported to or from a child justice court the child must, if reasonably possible, be transported separate from adults. 20

(3) The National Commissioner of the South African Police Service must issue a national instruction on the treatment and conditions of children while in detention at a child justice court.

Establishment of criminal capacity

56. (1) The criminal capacity of a child over the age of 10 years but under the age of 14 years must be proved by the State beyond reasonable doubt. 25

(2) The prosecutor or the child's legal representative may request the child justice court to order an evaluation of the child by a suitably qualified person to be conducted at State expense.

(3) If an order has been made by the child justice court in terms of subsection (2), the person identified to conduct an evaluation of the child must furnish the child justice court with a written report of the evaluation within 30 days of the date of the order. 30

(4) The evaluation must include an assessment of the cognitive, emotional, psychological and social development of the child.

(5) The person who conducts the evaluation may be called to attend the child justice court proceedings and give evidence and, if called, must be remunerated by the State in accordance with section 191 of the Criminal Procedure Act. 35

Separation and joinder of trials involving children and adults

57. (1) Where a child and a person other than a child are alleged to have committed the same offence, they are to be tried separately unless it is in the interest of justice to join the trials. 40

(2) An application for such joinder must be directed to the child justice court in which the child is to appear after notice to the child, such person and their legal representatives.

(3) If the child justice court grants an application for joinder of trials, the matter must be transferred to the court in which such person is to appear. 45

(4) The court to which the matter has been transferred must afford the child concerned all such benefits conferred upon such child by this Act.

Time limits relating to conclusion of trials

58. (1) A child justice court must conclude all trials of accused children as speedily as possible and must ensure that postponements are limited in number and in duration. 50

(2) Sections 33, 34, 35 and 36 apply with the changes required by the context to a child justice court where a child appearing in the child justice court for the first time is in detention.

(3) Where a child remains in detention in a place of safety, secure care facility or prison and the trial of the child is not concluded within a period of six months from the date upon which the child has pleaded to the charge, the child must be released from detention, unless charged with an offence listed under item 1, 2 or 3 of Schedule 3.

Child justice court may divert matter 5

59. (1) (a) If at any time before the conclusion of the case for the prosecution it comes to the attention of a child justice court that a child acknowledges or intends to acknowledge responsibility for an alleged offence, the child justice court may make an order for diversion in respect of the child if the prosecutor indicates that the matter may be diverted. 10

(b) Chapter 6 applies with the changes required by the context if the child justice court makes an order contemplated in subsection (1).

(c) A child justice court that makes a diversion order must postpone proceedings pending the child's compliance with the diversion condition in question.

(2) (a) The child justice court must, upon receipt of a report from the probation officer that the child has successfully complied with the diversion conditions, acquit the child on all charges in question. 15

(b) An acquittal may be made in the absence of the child.

(3) If a child fails to comply with an order relating to diversion, section 40 applies with the changes required by the context. 20

Privacy and confidentiality

60. (1) At any sitting of a child justice court no person may be present unless his or her presence is necessary in connection with the proceedings of the child justice court or unless the presiding officer has granted him or her permission to be present.

(2) No person may publish any information which reveals or may reveal the identity of a child or of any witness under the age of 18 years appearing at any proceedings before a child justice court. 25

(3) Subject to subsection (4), no prohibition under this section precludes—

(a) access to information pertaining to a child if such access would be in the interests, safety or welfare of any such child or of children in general; 30

(b) the publication, in the form of a law report, of—

(i) information for the purpose of reporting any question of law relating to the proceedings in question; or

(ii) any decision or ruling given by any child justice court on such question; or 35

(c) the publication, in the form of any report of a professional or technical nature, of research results and statistical data pertaining to a child if such publication would be in the interests, safety or welfare of the child or of children in general.

(4) The reports referred to in subsection 3(b) or (c) may not mention the name of the person charged or of the person against whom or in connection with whom the offence in question was alleged to have been committed or of any witness at such proceedings, and may not mention the place where the offence in question was alleged to have been committed. 40

CHAPTER 8 45

SENTENCING

Child to be sentenced in terms of this Chapter

61. A child justice court must, after convicting a child, impose a sentence in accordance with this Chapter.

Pre-sentence reports 50

62. (1) A child justice court imposing a sentence must request a pre-sentence report prepared by a probation officer or any other suitable person prior to the imposition of sentence.

(2) The probation officer or other person must complete the report as soon as possible but no later than one calendar month following the date upon which such report was requested.

(3) A child justice court that imposes a sentence other than that recommended in the pre-sentence report must record the reasons for the imposition of a different sentence. 5

(4) (a) A child justice court may dispense with a pre-sentence report where a child is convicted of an offence referred to in Schedule 1 or where requiring such report would cause undue delay in the conclusion of the case to the prejudice of the child, but no child justice court sentencing a child may impose a sentence with a residential requirement unless a pre-sentence report has first been obtained. 10

(b) For the purposes of paragraph (a), "a sentence with a residential requirement" includes a sentence where the residential requirement of the sentence is suspended.

(5) The officer presiding in a child justice court who imposes any sentence involving detention in a residential facility must certify on the warrant of detention that a pre-sentence report has been placed before the child justice court prior to imposition of sentence. 15

(6) If the certification contemplated in subsection (5) does not appear on the warrant of detention the person admitting the child to the residential facility in question must refer the matter back to the relevant child justice court.

Purposes of sentencing 20

63. The purposes of sentencing in terms of this Act are to—

- (a) encourage the child to understand the implications of and be accountable for the harm caused;
- (b) promote an individualised response which is appropriate to the child's circumstances and proportionate to the circumstances surrounding the offence; 25
- (c) promote the reintegration of the child into the family and community; and
- (d) ensure that any necessary supervision, guidance, treatment or services which form part of the sentence assist the child in the process of reintegration.

Community-based sentences 30

64. (1) Sentences which allow a child to remain in the community and which may be imposed in terms of this Act are—

- (a) any of the options referred to in section 47(4)(a), (b), (d), (e), (f) or (h);
- (b) placement under a supervision and guidance order in the prescribed manner for a period not exceeding three years; 35
- (c) in cases which warrant such specialised intervention, referral to counselling or therapy in conjunction with any of the options listed in this section for such period of time as the child justice court deems fit;
- (d) where a child is over the age of compulsory school attendance as contemplated in the South African Schools Act, 1996 (Act No. 84 of 1996), and is not attending formal schooling, compulsory attendance at a specified centre or place for a specified vocational or educational purpose for a period not exceeding 12 months and for no more than 35 hours per week; 40
- (e) performance without remuneration of some service for the benefit of the community under the supervision or control of an organisation or an institution, or a specified person or group identified by the child justice court, or by the probation officer of the district in which the child justice court is situated, for a maximum period of 250 hours and to be completed within twelve months; 45
- (f) any other sentence, subject to section 71, which is appropriate to the circumstances of the child and in keeping with the principles of this Act and which, if it includes a period of time, may not exceed 12 months in duration. 50

(2) Before a child under the age of 14 years is sentenced to a sentence contemplated in subsection (1)(e), due consideration must be given to the child's age and development. 55

Restorative justice sentences

65. (1) A child justice court that convicts a child of an offence may refer the matter to a family group conference or for victim-offender mediation.
- (2) Section 48 applies where a child justice court has referred a matter to a family group conference, and section 49 applies where a child justice court has referred a matter for victim-offender mediation. 5
- (3) Upon receipt of the written recommendations from a family group conference or victim-offender mediation, the child justice court may—
- (a) confirm the recommendations by making them an order of the child justice court; or 10
- (b) substitute or amend the recommendations and make an appropriate order.
- (4) If the child justice court does not agree with the terms of the plan made at a family group conference or victim-offender mediation and imposes a sentence which differs in a material respect from that agreed to or decided upon at the conference or mediation, the child justice court must note the reasons for deviating from the plan on the record of the proceedings. 15
- (5) (a) If a child has been sentenced in accordance with an order arising from a family group conference or victim-offender mediation and fails to comply with that order, the probation officer must notify the child justice court of such failure as soon as possible.
- (b) The child justice court may issue a warrant of arrest for the child and when the child appears before the child justice court pursuant to such a warrant may impose an appropriate sentence on the child. 20

Sentences involving correctional supervision

66. (1) A child justice court may impose a sentence of correctional supervision for a period not exceeding three years on a child over the age of 14 years. 25
- (2) The whole or any part of a sentence contemplated in subsection (1) may be postponed or suspended, with or without the conditions contemplated in section 70(3).

Sentence with residential requirement

67. (1) No sentence involving a residential requirement may be imposed upon a child unless the presiding officer is satisfied that such a sentence is justified by— 30
- (a) the seriousness of the offence, the protection of the community and the severity of the impact of the offence upon the victim; or
- (b) the previous failure of the child to respond to non-residential alternatives.
- (2) A presiding officer imposing any sentence involving a residential requirement on a child must note the reasons for the sentence on the record and explain them to the child in language that he or she can understand. 35
- (3) A sentence involving a residential requirement includes referral to a—
- (a) programme with a periodic residence requirement where the duration of the programme does not exceed 12 months, and no portion of the residence requirement exceeds 21 consecutive nights, with a maximum of 60 nights for the duration of the programme; 40
- (b) residential facility, subject to section 68; and
- (c) prison, subject to section 69.

Referral to residential facility

68. (1) Subject to subsection (2), a sentence involving a residential requirement may not exceed a period of two years. 45
- (2) (a) A sentence involving a residential requirement may be imposed for a period exceeding two years if the child is under the age of 14 years and the child would have been sentenced to imprisonment due to the seriousness of the offence were it not for section 69(1)(a). 50
- (b) A child contemplated in paragraph (a) may not be required to reside in a residential facility beyond the age of 18 years.
- (3) Upon completion of a sentence contemplated in subsection (1) or upon attainment of the age of 18 years in the case of a child referred to in subsection (2), the child concerned may request permission in the prescribed manner from the head of the 55

residential facility to continue to reside at such residential facility for the purposes of completing his or her education.

Referral to prison

69. (1) A sentence of imprisonment may not be imposed unless—
- (a) the child was over the age of 14 years of age at the time of commission of the offence; and 5
 - (b) substantial and compelling reasons exist for imposing a sentence of imprisonment, which may include conviction of a serious offence or a previous failure to respond to alternative sentences, including sentences with a residential element. 10
- (2) No sentence of imprisonment may be imposed on a child—
- (a) in respect of an offence referred to in Schedule 1; or
 - (b) as an alternative to any other sentence contemplated in this Act.
- (3) If any child fails to comply with a condition of a sentence imposed on him or her, the child may, in the prescribed manner, be brought before the child justice court which imposed the original sentence for reconsideration of an appropriate sentence which may, subject to subsections (1) and (2), include a sentence of imprisonment. 15
- (4) A child justice court imposing a sentence of imprisonment must announce the period of imprisonment in an open child justice court and the coming into effect of the term of imprisonment must be antedated by the number of days that the child has spent in prison prior to the sentence being announced in child justice court. 20

Postponement or suspension of passing of sentence

70. (1) The passing of any sentence may be postponed, with or without one or more of the conditions referred to in subsection (3), for a period not exceeding three years.
- (2) The whole or any part of any sentence may be suspended, with or without one or more of the conditions referred to in subsection (3), for a period not exceeding five years. 25
- (3) The conditions contemplated in subsections (1) and (2) may be those appropriate to the circumstances of the child which are in keeping with the objects of this Act and which promote the child's reintegration into society and may include— 30
- (a) restitution, compensation or symbolic restitution;
 - (b) an apology;
 - (c) the obligation not to commit a further offence of a similar nature;
 - (d) good behaviour;
 - (e) regular school attendance for a specified period; 35
 - (f) attendance at a specified time and place of a family group conference or for victim-offender mediation;
 - (g) placement under the supervision of a probation officer or correctional official as defined in section 1 of the Correctional Services Act, 1998 (Act No. 111 of 1998); 40
 - (h) a requirement that the child or any other person designated by the child justice court must again appear before that child justice court on a date or dates to be determined by such child justice court for a periodic progress report; and
 - (i) referral to any diversion option referred to in section 47(3)(d), (e), (f), (g), (h), (i), (j) or (k). 45
- (4) A child justice court that has postponed the passing of sentence in terms of subsection (1) on one or more conditions may request the probation officer concerned for regular progress reports indicating the child's compliance with the conditions.
- (5) The conviction of a child in respect of whom passing of a sentence has been postponed must be expunged from any record if the child has met all the conditions imposed or at the expiration of the period in question, as the case may be. 50

Penalty in lieu of fine or imprisonment

71. Notwithstanding any other law, a child justice court convicting a child of an offence for which a fine or imprisonment is prescribed as penalty may impose any one of the following penalties in place of that fine or imprisonment: 55
- (a) Symbolic restitution to a specified person, group of persons or institution;

- (b) payment of compensation not exceeding R500 to a specified person, group of persons or institution where the child or his or her family is able to afford this;
- (c) an obligation on the child to provide some service or benefit or to pay compensation to a community charity or welfare organisation identified by the child concerned or by the child justice court if there is no identifiable person to whom restitution or compensation can be made; or
- (d) any other competent sentence prescribed in this Act, but not imprisonment.

Prohibition of certain forms of punishment

72. (1) No sentence of life imprisonment may be imposed on a child.
- (2) A child who has been sentenced to attend a residential facility may not be detained in a prison or in police custody pending designation of the place where the sentence is to be served.

CHAPTER 9

LEGAL REPRESENTATION

Requirements to be complied with by legal representatives

73. (1) A legal representative representing a child must—
- (a) allow the child, as far as is reasonably possible, to give independent instructions concerning the case;
 - (b) explain the child's rights and duties in relation to any proceedings under this Act in a manner appropriate to the age and intellectual development of the child;
 - (c) promote diversion where appropriate, but may not unduly influence the child to acknowledge responsibility; and
 - (d) ensure that the trial is concluded without delay.
- (2) A legal representative representing a child in terms of this Act must have been admitted as an attorney or an advocate.
- (3) An attorney referred to in subsection (2) may delegate the power to represent a child to any candidate attorney under his or her supervision.

Access to legal representation

74. (1) A child has the right to give instructions to a legal representative in the language of his or her choice, with the assistance of an interpreter where necessary.
- (2) (a) The parent of a child or an appropriate adult may appoint a legal representative of his or her own choice, in which case the payment of the fees for the legal representation rests with that parent or appropriate adult, as the case may be.
- (b) A legal representative appointed in terms of paragraph (a) does not have to be accredited in terms of section 77.

Child to be provided with legal representation at State expense in certain instances

75. (1) Subject to the Legal Aid Act, 1969 (Act No. 22 of 1969), a child must be provided with legal representation at State expense at the conclusion of the preliminary inquiry if no legal representative was appointed by the parent or appropriate adult and if—
- (a) the child is in detention pending plea and trial in a child justice court;
 - (b) the proceedings are postponed for plea and trial in a child justice court and it is likely that a sentence involving a residential requirement may be imposed if the child is convicted of the offence in question; or
 - (c) the child is under the age of 14 years and a certificate contemplated in section 5(3) has been issued in respect of such child.
- (2) The prosecutor must indicate to the child justice court whether he or she is of the opinion that the matter is a matter contemplated in subsection (1)(b) before the child is asked to plead and if so, no plea may be taken until a legal representative has been appointed.

(3) If a child qualifies for legal representation at State expense a request for legal representation must be made to the Legal Aid Officer concerned in the prescribed manner as soon as is reasonably possible.

(4) The Legal Aid Board may designate an attorney or candidate attorney to represent a child. 5

(5) If the parent or guardian of a child who is granted legal representation at State expense under this Act would otherwise have been ineligible to receive legal representation at State expense due to the fact that the parent or guardian's income exceeds the means test applied by the Legal Aid Board, the Legal Aid Board may recover the costs of the legal representation from such parent or guardian. 10

Child may not waive legal representation in some circumstances

76. (1) A child contemplated in section 75(1) may not waive his or her right to legal representation.

(2) If a child provided with legal representation declines to give instructions to the appointed legal representative, the legal representative must bring that fact to the attention of the child justice court, whereupon the child justice court must question the child to ascertain the reasons for the child's declination and must note the reasons on the record of the proceedings. 15

(3) If the child does not wish to have a legal representative, the child justice court must instruct a legal representative to assist the child. 20

(4) A legal representative assisting a child in terms of subsection (3)—

(a) must—

- (i) attend all hearings pertaining to the case;
- (ii) address the child justice court on the merits of the case;
- (iii) note an appeal regarding conviction or sentence at the conclusion of the trial, if he or she considers it necessary; and 25
- (iv) have access to the affidavits and statements filed in the police docket pertaining to the case; and

(b) may—

- (i) cross-examine any State witness with the object of discrediting the evidence of such witness; and 30
- (ii) raise reasonable doubt about the admissibility of evidence led by the State and raise objections to the introduction of evidence by the State, when appropriate.

Accreditation of legal representatives 35

77. A legal representative appointed by the Legal Aid Board pursuant to section 75(1) must be accredited in the prescribed manner.

CHAPTER 10

AUTOMATIC REVIEW OF CERTAIN CONVICTIONS AND SENTENCES

Automatic review in certain cases 40

78. Any sentence by a magistrate's court, as defined in the Criminal Procedure Act and sitting as a child justice court, involving correctional supervision imposed in terms of section 66 and any sentence with a residential requirement imposed in terms of section 67, whether wholly or partially suspended, are subject to review in terms of section 302 of the Criminal Procedure Act. 45

Suspension of execution of sentence

79. The sentence of any child is suspended pending review or appeal and a child sentenced to imprisonment or sentenced to a penalty with a residential requirement must be released on any condition contemplated in section 33(3) pending review or appeal.

CHAPTER 11

MONITORING OF CHILD JUSTICE

Monitoring of child justice

80. (1) The Cabinet member responsible for the administration of justice must make regulations regarding procedures to be put in place to monitor and assess the proper application of and compliance with this Act. 5

(2) The regulations contemplated in subsection (1) must—

(a) direct that this Act be monitored by the Director-General of the Department of Justice and Constitutional Development, in conjunction with any other relevant department, annually or at such other interval as may be prescribed, with the object of assessing the implications, effectiveness and proper application of and compliance with this Act; and 10

(b) be made after consultation with the Cabinet members responsible for social development, for safety and security and for correctional services.

CHAPTER 12

15

RECORDS OF CONVICTION AND SENTENCE

Expungement of records

81. (1) The record of any sentence imposed upon a child convicted of any offence referred to in Schedule 3 may not be expunged.

(2) In respect of offences other than those referred to in Schedule 3, the presiding officer in a child justice court must make an order regarding the expungement of the record of the child's conviction and sentence and must note the reasons for the decision as to whether such record may be expunged or not when he or she imposes the sentence after consideration of any relevant factor, including— 20

(a) the nature and circumstances of the offence; and 25

(b) the child's personal circumstances.

(3) If a presiding officer decides that a record referred to in subsection (2) may not be expunged, such decision is subject to review or appeal on application by or on behalf of the child.

(4) If an order has been made in terms of subsection (2) that the record of the conviction and sentence of a child may be expunged, the presiding officer must set a date upon which the record of conviction and sentence must be expunged, which date may not exceed five years from the date of the imposition of the sentence. 30

(5) If a date for expungement of the record of the conviction and sentence has been set in terms of subsection (4), the presiding officer must impose, as a condition of expungement, a requirement that the child concerned must not be convicted of a similar or more serious offence between the date of imposition of the sentence and the date of expungement. 35

(6) The order contemplated in subsection (2) and the condition referred to in subsection (5) must be noted on the record of the conviction and sentence of the child and must be submitted to the South African Criminal Bureau as soon as is reasonably practicable, and that Bureau must, upon the date set for expungement, cause such record of conviction and sentence to be expunged unless another conviction of a similar or more serious offence has been recorded before the date set for expungement. 40

(7) If a presiding officer makes a decision regarding the expungement of the record of a conviction and sentence of a child as contemplated in this section, he or she must explain the decision and give his or her reasons for the decision, including any conditions relating to expungement of such record, to the child. 45

CHAPTER 13

GENERAL PROVISIONS

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Age assessment of person claiming to be a child

82. (1) If a person who is charged with an offence in a court at any time before the imposition of sentence alleges that he or she was under the age of 18 years at the time

of the alleged commission of the offence, the presiding officer must refer the person to a probation officer in the prescribed manner.

(2) The presiding officer of a court contemplated in subsection (1) may at any time before the imposition of sentence of his or her own accord refer a person charged with an offence in that court to a probation officer if it appears to the presiding officer that the person is under the age of 18 years. 5

(3) The probation officer must make an estimation of the age of the person in accordance with section 24 and must submit the prescribed form and any relevant documentation contemplated in that section to the presiding officer concerned.

(4) The presiding officer must determine the age of the person, and for that purpose section 31 applies with the changes required by the context. 10

(5) If the age of the person is determined to be under 18 years and the trial has—

(a) not yet commenced, the presiding officer must transfer the matter to an inquiry magistrate having jurisdiction; or

(b) already commenced, the proceedings must continue before the presiding officer, but the remainder of the proceedings must be conducted in terms of this Act and the court must be regarded as a child justice court. 15

Liability for patrimonial loss arising from performance of community service

83. (1) If patrimonial loss may be recovered from a child on the ground of a delict committed by him or her in the performance of community service in terms of Chapter 6 or 8, that loss may, subject to subsection (3), be recovered from the State. 20

(2) Subsection (1) may not be construed as precluding the State from obtaining indemnification against its liability in terms of subsection (1) by means of insurance or otherwise.

(3) The patrimonial loss which may be recovered from the State in terms of subsection (1) must be reduced by the amount from any other source to which the injured person is entitled. 25

(4) In so far as the State has made a payment by virtue of a right of recovery in terms of subsection (1), all the relevant rights and legal remedies of the injured person against the child concerned must pass to the State. 30

(5) If any person as a result of the performance of community service in terms of Chapter 6 or 8 has suffered patrimonial loss which cannot be recovered from the State in terms of subsection (1), the Director-General of Justice and Constitutional Development may, with the concurrence of the National Treasury, as an act of grace pay such amount as he or she may deem reasonable to that person. 35

Offences and penalties

84. (1) Any person who—

(a) hinders or obstructs a police official or probation officer in the performance of his or her functions under this Act;

(b) fails to— 40

(i) comply with a notice contemplated in section 22(1); or

(ii) comply with a warning contemplated in section 13 or 42(3); or

(c) publishes information or reveals the identity of persons in contravention of section 60,

is guilty of an offence. 45

(2) Any person convicted of an offence referred to in subsection (1) is liable to a fine or to imprisonment for a period not exceeding three months.

(3) Any court convicting an adult of inciting, conspiring with or being an accomplice of a child in the commission of a crime or an offence must regard the fact of the child's involvement as an aggravating factor in sentencing the adult concerned. 50

(4) For the purposes of subsection (3)—

(a) "adult" means a person over the age of 21 years of age; and

(b) "child" means a person under the age of 18 years of age,

on the date of the commission of the crime or offence.

Regulations

85. The Cabinet member responsible for the administration of justice, in consultation with the Cabinet members responsible for social development, safety and security and correctional services, may make regulations regarding—

- (a) any matter which is required or permitted by this Act to be prescribed by regulation; 5
- (b) the accreditation of an independent observer;
- (c) the personnel to staff a child justice court;
- (d) the establishment of One-Stop Child Justice Centres; and
- (e) any other matter which it is necessary or expedient to prescribe in order to achieve or promote the objects of this Act. 10

Repeal of laws

86. Sections 50(4) and (5), 74, 153(4), 254, 290 and 291 of the Criminal Procedure Act are hereby repealed.

Short title and commencement

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87. This Act is called the Child Justice Act, 2002, and takes effect on a date fixed by the President by proclamation in the *Gazette*.

Schedule 1

(Sections 7, 11, 14, 62 and 69)

1. Assault where grievous bodily harm has not been inflicted.
2. Malicious injury to property where the damage does not exceed R500.
3. Trespass.
4. Any offence under any law relating to the illicit possession of dependence-producing drugs where the quantity involved does not exceed R500 in value.
5. Theft, where the value of the property involved does not exceed R500.
6. Any statutory offence where the maximum penalty determined by that statute is imprisonment for three months or a fine in equivalence with the Adjustment of Fines Act, 1991 (Act No. 101 of 1991).
7. Any conspiracy, incitement or attempt to commit any offence referred to in this Schedule.

Schedule 2*(Sections 11 and 14)*

1. Public violence.
2. Culpable homicide.
3. Assault, involving the infliction of grievous bodily harm.
4. Arson.
5. Any offence referred to in section 1 or 1A of the Intimidation Act, 1982 (Act No. 72 of 1982).
6. Housebreaking, whether under common law or a statutory provision, with intent to commit an offence, if the amount involved in the offence does not exceed R20 000.
7. Robbery, other than robbery with aggravating circumstances, if the amount involved in the offence does not exceed R20 000.
8. Theft, where the amount involved does not exceed R20 000.
9. Any offence under any law relating to the illicit possession of dependence-producing drugs where the quantity involved does not exceed R20 000 in value.
10. Forgery, uttering or fraud, where the amount in question does not exceed R20 000.
11. Kidnapping.
12. Any statutory offence where the penalty in question does not exceed R20 000.
13. Any conspiracy, incitement or attempt to commit any offence referred to in this Schedule.

Schedule 3

(Sections 15, 33, 36, 58 and 81)

1. Murder.
2. Rape.
3. Robbery—
 - (a) where there are aggravating circumstances; or
 - (b) involving the taking of a motor-vehicle.
4. Indecent assault involving the infliction of grievous bodily harm.
5. Indecent assault on a person under the age of 16 years.
6. Any offence referred to in section 13(f) of the Drugs and Drug Trafficking Act, 1992 (Act No. 140 of 1992), if—
 - (a) the value of the dependence-producing substance in question is more than R50 000; or
 - (b) the value of the dependence-producing substance in question is more than R10 000 and the offence was committed by a person, group of persons, syndicate or any other enterprise acting in the execution or furtherance of a common purpose or conspiracy.
7. Any offence relating to—
 - (a) the dealing in or smuggling of ammunition, firearms, explosives or armament; or
 - (b) the possession of a firearm, explosives or armament.
8. Any offence relating to exchange control, corruption, extortion, fraud, forgery or uttering—
 - (a) involving amounts of more than R50 000; or
 - (b) involving amounts of more than R10 000, if it is alleged that the offence was committed by a person, group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy.
9. Any conspiracy or incitement to commit any offence referred to in this Schedule or an attempt to commit any of the offences referred to in item 1, 2 or 3 of this Schedule.

MEMORANDUM ON THE OBJECTS OF THE CHILD JUSTICE BILL, 2002

1. PURPOSE OF BILL

The purpose of the Bill is to establish a criminal justice process which aims at protecting the rights of children entrenched in the Constitution and provided for in international instruments.

2. OBJECTS OF BILL

The Bill applies to any person under the age of 18 years who is alleged to have committed an offence. The Bill seeks to raise the minimum age of criminal capacity from seven to 10 years. It is presumed that children between the age of 10 and 14 years lack criminal capacity, but the State may prove such capacity beyond reasonable doubt. In order to keep children out of police cells and prisons, the Bill encourages the release of children into the care of their parents and entrenches the constitutional injunction that imprisonment should be a measure of last resort for a child. A probation officer will assess every child before the child appears at a preliminary inquiry. A preliminary inquiry is held in respect of every child within 48 hours of arrest and is presided over by a magistrate, referred to as the "inquiry magistrate". A decision to divert the child away from the formal court procedure to a suitable programme may be taken at the preliminary inquiry stage, if the prosecutor indicates that the matter may be diverted. If the child is not diverted, the matter will proceed to plea and trial. Any court before which a child appears for plea or trial is regarded as a child justice court. Provisions have also been proposed in the Bill for the establishment of One-Stop Child Justice Centres. The Bill provides a wide range of sentencing options for children as alternatives to prison sentences. Children who are 14 years or older may nevertheless be sentenced to imprisonment in certain specified circumstances. The Bill also proposes monitoring mechanisms to ensure the effective operation of this legislation, and promotes co-operation between all government departments and other organisations and agencies involved in implementing an effective child justice system.

3. DEPARTMENTS/BODIES/PERSONS CONSULTED

The South African Law Commission consulted with all the role players, including the relevant State Departments, during the consultative process leading up to the publication of its Report on Juvenile Justice. In addition, an Inter-sectoral Committee on Child Justice was set up in 2000, chaired by the Department of Justice and Constitutional Development, with representatives from the Departments of Social Development, of Correctional Services and of Education, the South African Police Service, the National Prosecuting Authority and The Presidency. This committee has met regularly and has undertaken detailed inter-sectoral planning for implementation of the Bill.

4. IMPLICATIONS FOR PROVINCES

An increase in financial expenditure by provincial departments of Social Development is expected and has been discussed with the National Treasury.

5. FINANCIAL IMPLICATIONS FOR STATE

The Bill has been subjected to a cost-effectiveness analysis, and was found to be cost-effective if viewed inter-sectorally. Since then the departments have embarked on a detailed implementation planning and budgeting process, linked to the MTEF. There has been regular contact with the National Treasury and the departments concerned have indicated to the National Treasury the additions to base-line expenditure that will be required for the implementation of the Bill.

6. PARLIAMENTARY PROCEDURE

The State Law Advisers and the Department of Justice and Constitutional Development are of the opinion that the Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.