

CHILD JUSTICE BILL, 2002

To establish a child justice system for children accused of committing offences which aims 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 delineate the powers and responsibilities of members of the Namibian Police and child officers in relation to such children; to provide for the detention of such children and their release from detention; to incorporate diversion of cases from formal court procedures as a central feature of the process; to establish assessment of children and a preliminary enquiry as compulsory procedures in the process; to create special rules for a child justice court; to provide for legal representation for children; to extend the sentencing options available in respect of such children; to entrench the notion of restorative justice; to establish review procedures; to create monitoring mechanisms to ensure the effective operation of this legislation; and to provide for matters incidental thereto.

BE IT ENACTED by the Parliament of the Republic of Namibia, as follows: -

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CHAPTER 1
GENERAL

Definitions

1. In this Act, unless the context otherwise indicates -

"an appropriate adult" in relation to a child means an adult member of the child's family other than a parent; a custodian; a guardian who is not a parent or a person not related to a child who has taken responsibility for meeting the daily care needs of a child;

"assessment" means an evaluation by a child worker of a child for purposes of section 39;

"child" means any person who is subject to the provisions of

this Act in terms of section 2;

"child worker" means a person appointed or designated, whether by title of child worker or probation officer or by any other title, by or under any law, and in consultation with the Minister responsible for juvenile justice, to perform, either generally or in a specific case, any of the duties or functions of a child worker under this Act.

"Child Justice Centre" means a Child Justice Centre established in terms of section 86;

"children's court" means a court which is recognised as a children's court under the laws relating to the care and protection of children;

"community service" means compulsory work, without payment, for a community organisation or other compulsory work of value to the community, performed by a child;

"court" means a child justice court established in terms of section 85 or any other court acting in terms of the provisions of this Act;

"Criminal Procedure Act" means the Criminal Procedure Act, 1977, (Act No. 51 of 1977);

"designated prosecutor" in relation to a particular function, means a public prosecutor designated by the Prosecutor General to perform that function;

"detention" means the deprivation of liberty of a child including confinement in a lock-up, place of safety, place of detention, prison or other residential facility;

"Directorate for Child Justice" means the directorate in the Ministry responsible for the implementation of this Act;

"diversion" means the referral of cases of children alleged to have committed offences away from formal court procedures with or without conditions;

"diversion option" means a plan, programme or prescribed order with a specified content and of specified duration and includes an option which has been approved, in terms of the regulations to this Act, by the Directorate for Child Justice;

"family group conference" means a gathering convened by a child worker as a diversion or sentencing option to devise a restorative justice response to the offending child;

"independent observer" means a person included in the roster referred to in section 118(i);

"inquiry magistrate" means the magistrate presiding in a

preliminary inquiry;

"Minister" means the Minister responsible for child justice;

"ordinary court" means the court that would, but for this Act, have jurisdiction in respect of an offence alleged to have been committed;

"place of detention" means a place of detention as defined in section 1 of the Children's Act, 1960 (Act No. 33 of 1960);

"place of safety" means any place established or approved in terms of the Children's Act, 1960 (Act No. 33 of 1960) and includes any hospital, or any place suitable for the reception of a child, into which the occupier thereof is willing to receive a child;

"police official" means a member of the Namibian Police Force;

"preliminary inquiry" means the compulsory procedure described in Chapter 7 which takes place before plea and trial in a court;

"prescribed" means prescribed by regulation to this Act;

"residential requirement" means compulsory residence in a residential facility or a place other than the child's home;

"residential facility" means a residential facility established by the Minister responsible for basic education or the Minister responsible for health and social services which is designated to receive sentenced children;

"restorative justice" means the promotion of reconciliation, restitution and responsibility through the involvement of a child, the child's parent, family members, victims and communities;

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

"this Act" includes any regulations made under this Act.

Application of this Act

2. (1) This Act applies to any child in Namibia, irrespective of nationality, country of origin or immigration status, who -

- (a) is alleged to have committed an offence; and
- (b) was under the age of 18 years at the time of the alleged commission of the offence.

(2) The Prosecutor General or a designated prosecutor may direct that proceedings in terms of this Act be followed -

- (a) in respect of a person who is over the age of 18 years but not over the age of 21 years, and who is alleged to have committed an offence jointly with others, the majority of which are children;
- (b) in respect of an alleged offender whose age cannot be established but who is reasonably believed to be a child;
- (c) in respect of a person who is serving a residential sentence imposed in terms of this Act, and who allegedly committed a further offence after attaining the age of 18 years.

(3) This Act continues to apply if a child, before conclusion of proceedings instituted against him or her in terms of this Act, reaches the age of 18 years.

Application of this Act in relation to the Criminal Procedure Act

3. (1) If this Act does not provide for any matter or procedure for which the Criminal Procedure Act provides, the provisions of that Act apply with such changes as may be required to observe the principles set forth in section 5.

(2) To the extent that this Act is inconsistent with the Criminal Procedure Act, this Act prevails.

Objectives of Act

4. The objectives of this Act are to -

- (a) protect the rights of children, who are subject to the provisions of this Act, as contemplated in the Constitution and in international law;
- (b) provide for a code for dealing with children who are alleged to have committed offences so as to -
 - (i) secure for them the care, protection, control and guidance necessary for the proper development of their personality and for their reintegration and assumption of a constructive role in society;
 - (ii) ensure that they are dealt with in a manner which is culturally appropriate and recognises and enhances their cultural identity;
 - (iii) reinforce children's respect for human rights

and the fundamental rights of others by holding children accountable for their actions and safeguarding the interests of victims and the community; and

- (iv) support reconciliation by means of a restorative justice response;
- (c) ensure that authorities and courts dealing with children alleged to have committed offences deal with them according to the principles established by this Act;
- (d) recognise the importance of the participation of families of children and communities in -
 - (i) minimising the incidence of children who commit offences;
 - (ii) disciplining and managing children who commit offences; and
 - (iii) the provision of services designed to rehabilitate and reintegrate children who commit offences back into society;
- (e) promote co-operation between government ministries and other institutions in implementing an effective child justice system.

Principles of child justice

5. The general principles underlying the application of this Act are that-

- (a) the community must be protected from unlawful behaviour;
- (b) because a child tends to be vulnerable in dealings with persons in authority a child must be given the special protection allowed by this Act during an investigation or proceeding in relation to an offence committed or allegedly committed by the child;
- (c) a child should be addressed and dealt with in a manner appropriate to his or her age, maturity and cultural background;
- (d) procedures in terms of this Act must be conducted and concluded speedily;
- (e) parents and families have the right to assist children in proceedings under this Act, and wherever possible, to participate in decisions affecting their children;

- (f) wherever possible, the child must be allowed to remain in his or her family;
- (g) at every stage in the process of dealing with a child for an offence committed or allegedly committed by the child consideration must foremost be given to the using of diversion options provided for in this Act that will divert the child from the courts' criminal justice system; and
- (h) a child should not be detained in custody for an offence, either before or after the child is found to have committed the offence, except only where detention is necessary as a last resort, and if detained in custody a child should be held -
 - (i) in a facility suitable for children and at which the child is not exposed to contact with any adult detained at the facility; and
 - (ii) for as short a time as is necessary; and
 - (iii) with access to his or her family.
- (i) if proceedings are instituted against a child for an offence -
 - (i) the proceedings must be conducted in a fair and just way; and
 - (ii) the child must be given the opportunity to participate in and understand the proceedings;
- (j) any sanctions imposed on a child who commits an offence should -
 - (i) be based on the principle of restorative justice;
 - (ii) aimed at minimising the incidence of child crime;
 - (iii) take into account appropriate cultural factors;
 - (iv) take the form most likely to maintain and promote the development of the child within his or her family;
 - (v) be proportionate to the circumstances of the child, the nature of the offence and the interests of society;
 - (vi) be designed to give the child the opportunity to develop a sense of social responsibility and otherwise to develop in beneficial and socially

acceptable ways; and

- (vii) take the least restrictive form that is appropriate in the circumstances;
- (k) measures for dealing with a child that has committed an offence should be planned -
 - (i) to strengthen the family of the child; and
 - (ii) to foster the ability of the child's family to develop their own means of dealing with the child;
- (l) a victim of an offence committed by a child should be given the opportunity to participate in the process of dealing with the child in relation to the offence;
- (m) the parents of a child should be encouraged to fulfil their responsibility for the care and supervision of the child, and should be supported in their efforts to fulfil that responsibility;
- (n) a decision affecting a child should, if practicable, be made and implemented within a timeframe appropriate to the child's sense of time; and
- (o) the age, maturity and cultural background of a child are relevant considerations in a decision made in relation to the child under this Act.

CHAPTER 2

AGE, CRIMINAL CAPACITY AND AGE DETERMINATION

Age and criminal capacity

6. (1) It is conclusively presumed that a child under the age of 10 years cannot commit an offence.

(2) There is a rebuttable presumption that a child who is 10 years of age or older but not 14 years of age is incapable of committing an offence because the child does not have the capacity to distinguish between right and wrong.

(3) Prosecution of a child referred to in subsection (2) for the alleged commission of an offence may only be conducted if the Prosecutor General, after a preliminary inquiry, has issued a certificate confirming an intention to prosecute,

(4) If the certificate referred to in subsection (3) is not issued within 7 days after the preliminary inquiry, the charges against the child must be withdrawn.

(5) In deciding whether or not a certificate referred to

in subsection (3) should be issued the Prosecutor General must have regard to -

- (a) a child worker's assessment report;
- (b) the appropriateness of diversion of the child alleged to have committed an offence;
- (c) the educational level, cognitive ability, domestic and environmental circumstances, age and maturity of the child;
- (d) the nature and seriousness of the alleged offence;
- (e) the impact of the alleged offence upon any victim of the offence; and
- (f) any other relevant information.

(6) The common law pertaining to the criminal capacity of children under the age of 14 years is repealed.

Duties of police officials in relation to age estimation

7. (1) If a police official has doubt about the age of a person who is alleged to have committed an offence, but has reason to believe that the person is a child, the police official must take the person to a child worker for an estimation of age as soon as is reasonably possible.

(2) A police official who has reason to believe that a child who is alleged to have committed an offence is under ten years of age, may not arrest that child, and must take him or her to a child worker for estimation of age or action in terms of section 45.

Age estimation by child worker

8. (1) If the age of a person brought before a child worker is uncertain, such child worker must make an estimation of that person's age.

(2) A child worker to whom a person is brought for estimation of age must complete the prescribed form and obtain any relevant information as regards the age of the person concerned.

(3) In making an estimation of age, the following available information must be considered -

- (a) a previous determination of age by a magistrate under this Act or by any other authority in terms of any law;
- (b) statements from a parent, legal guardian, or person

likely to have direct knowledge of the age of the child or a statement made by the child or person who alleges that he or she is a child;

- (c) a baptismal certificate, school registration form, school report, and other similar information that may be relevant to establishing a probable age;
- (d) an estimation of age made by a medical practitioner.

(4) The child worker must attach any relevant documentation to the form referred to in subsection (2).

(5) If a child worker is unable to make an age estimation, or if the estimation is in dispute, the child worker may refer the person to a medical practitioner for estimation of age.

(6) The form referred to in subsection (2) must be available at the child's appearance at a preliminary inquiry to assist the inquiry magistrate to make a determination of the child's age in terms of section 9.

Age determination to be made by inquiry magistrate

9. (1) The inquiry magistrate must, on the available evidence and with due regard to section 8(3), make a determination of the age of an alleged offender to be entered into the record, which must be considered to be the correct age until any contrary evidence is placed before the inquiry magistrate or a court.

(2) For the purposes of a determination of age, an inquiry magistrate may -

- (a) require any documentation, evidence or statements relevant to an age determination from any person, body or institution to be furnished; and
- (b) take into account the opinion of the child worker in making an estimation of age in terms of section 8(3); and
- (c) subpoena any person to produce the documentation, evidence or statements.

(3) If an inquiry magistrate determines that a person being charged with the commission of an offence was over the age of 18 years at the time of the alleged commission of the offence, the inquiry magistrate must, except in the circumstances referred to in section 2(2)(a) or (c), close the preliminary inquiry and transfer the matter to an ordinary court for proceedings before that court.

Age assessment and determination by ordinary court

10. (1) If, in criminal proceedings before an ordinary court -

- (a) the accused person alleges that he or she was a child at the time of the alleged commission of the offence with which he or she is being charged; or
- (b) it appears to the court that the accused person may be a child,

the presiding officer must discontinue the proceedings and refer the person to a child worker for estimation of age in terms of section 8.

(2) An estimation of age by a child worker in terms of subsection (1) must be submitted to the court concerned to make a determination of age in respect of the accused person on the basis contemplated in section 9.

(3) If the Court determines the age of the person to be under 18 years, the presiding officer must -

- (a) if the trial has not commenced, transfer the matter to the inquiry magistrate having jurisdiction for further proceedings under this Act;
- (b) if the trial has commenced, continue with the trial, whereupon further proceedings must be conducted in terms of this Act.

(4) A presiding officer who, upon conclusion of a trial in terms of subsection (3)(b), convicts a child may refer the matter to the child justice court for sentence if it is in the best interests of the child.

(5) If, in proceedings commenced in terms of this Act before an inquiry magistrate or a child justice court in respect of a person who is alleged to have been a child at the time of the alleged commission of the offence with which the person is being charged, it is proved that the person was 18 years of age or older at the particular time, the inquiry magistrate or child justice court must -

- (a) if the person is appearing at a preliminary inquiry, close the inquiry and refer the matter to the prosecutor for arrangements to be made for the person to be tried in an ordinary court;
- (b) if a trial has not yet commenced in the child justice court, refer the matter to the prosecutor for arrangements to be made for that person to be tried in an ordinary court; or
- (c) if a trial has commenced in the child justice court, stop the trial and if the person has been convicted,

transfer the matter to an ordinary court for the purposes of sentence by that court.

CHAPTER 3

POLICE POWERS AND DUTIES

Methods of securing attendance of child at preliminary inquiry

11. (1) Subject to section 12, a proceeding at a preliminary inquiry against a child for an offence must be started by way of -

- (a) summons; or
- (b) any alternative method referred to in subsection (2).

(2) An alternative method referred to in subsection (1) may consist of -

- (a) requesting the child in a manner appropriate to the age and intellectual development of the child to accompany the police official immediately to a place where an assessment of the child can be made or, if an assessment of the child is for any reason not possible, to a place where the matter can be considered by a prosecutor or an inquiry magistrate;
- (b) giving the child and, if available, the parents or family of the child an attendance notice in the prescribed manner to appear at a preliminary inquiry at a place and time specified in the notice;
- (c) taking the child to the child's home, and giving the child and his or her parent or family an attendance notice referred to in paragraph (b);
- (d) taking a child who is under the age of ten years to a child worker for assessment and further action in terms of section 45;
- (e) opening a docket for consideration by the Prosecutor General, or a prosecutor designated by the Prosecutor General, as to whether the matter should be set down for the holding of a preliminary inquiry

Arrest of child

12. (1) A police official may not arrest a child for an offence referred to in Schedule (1) and must consider any of the alternative methods of starting a proceeding referred to in section 11(2).

- (2) Section 11 does not affect the power of a police

official to arrest a child alleged to have committed an offence not referred to in Schedule 1.

(3) Before arresting a child for an offence referred to in subsection (2), a police official must consider any of the alternative methods of starting a proceeding referred to in section 11(2) and may arrest a child if the police official believes on reasonable grounds -

- (a) that arrest is necessary -
 - (i) to prevent a continuation or a repetition of the offence or the commission of another offence; or
 - (ii) to prevent concealment, loss or destruction of evidence relating to the offence; or
- (b) that the child is unlikely to appear at a preliminary inquiry before a child justice court in response to a summons or an attendance notice.

(4) The arrest of a child must be made with due regard to the dignity and well-being of the child, and only if a child cannot be arrested without the use of force, may the person effecting the arrest use such force as may be reasonably necessary and proportional in the circumstances to overcome resistance or to prevent escape.

(5) A private person who arrests a child must immediately take the necessary steps to hand the child over to the police.

(6) A summons to start proceedings against a child for an offence must be in the prescribed form and must, upon application of a prosecutor, be issued by the clerk of the court having jurisdiction.

Cautioning by police

13. (1) The Inspector General of the Namibian Police Force, with the concurrence of the Prosecutor General, may issue an instruction setting out the circumstances in which a police official, instead of starting a proceeding against a child for an offence, may consider using diversion options stipulated in the instruction, which may include -

- (a) the administering of a caution to the child;
- (b) the referral of the offence to an appropriate authority outside the criminal justice system;
- (c) an offer to the child and his or her parents or family of assistance for the child to undergo any treatment or attend any rehabilitation or similar programme as may be appropriate in the circumstances.

(2) A police official must, in circumstances prescribed in the instruction, and before he or she starts proceedings against a child for an offence, consider whether it is more appropriate to take any action as stipulated in the instruction.

(3) If necessary a police official may delay starting proceedings in order to consider the matters mentioned in subsection (2).

Warrant of arrest

14. (1) 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.

(2) The execution of a warrant of arrest issued in respect of a child may be held over by any inquiry magistrate or court for not more than 14 days.

(3) If the execution of a warrant of arrest is held over in terms of subsection (2), the inquiry magistrate or court may request the investigating police official to inform the child named in the warrant, if traced, of the issue of the warrant before the expiry of 14 days and an officer required to execute the warrant may, instead of arresting a child, act in accordance with section 11(2) and use one of the alternatives to arrest referred to in section 13(1).

Duties of police official upon arrest, use of alternative to arrest or issue of summons

15. (1) A police official who arrests a child must inform and explain to the child -

- (a) the nature of the allegation against him or her;
- (b) his or her rights in the prescribed manner; and
- (c) the immediate procedures to be followed in terms of this Act.

(2) A police official who arrests a child must -

- (a) promptly but not later than 24 hours after the arrest, in the prescribed manner, notify the arrest to a child worker of the district where the child was arrested;
- (b) promptly but not later than 24 hours after the arrest, take the child to the child worker, and if the period of 24 hours expires over a weekend or on a public holiday, the child must be taken to the child worker on the first working day after that weekend or public holiday.

(3) If in a case any alternative action contemplated in

section 11(2) is taken or a summons is issued in terms of section 11(1), the police official taking the alternative action or serving the summons must, not later than 24 hours thereafter, and in the prescribed manner, notify the child worker concerned of the alternative action taken or of the service of the summons.

Time limits pursuant to arrest, alternatives to arrest and summons

16. (1) A child who is arrested must, whether or not an assessment of the child has been effected, be taken by a police official to appear at a preliminary inquiry -

- (a) promptly but not later than 48 hours after the arrest;
or
- (b) if the 48 hours expire outside court hours or on a day which is not a court day, promptly but no later than the end of the first court day following the expiry of the 48 hours.

(2) A police official who arrests a child must provide an inquiry magistrate with a written report in the prescribed manner within 48 hours after the arrest, giving reasons why an alternative method to arrest was not used.

Duty of police to notify parent or appropriate adult

17. (1) A police official who arrests a child must promptly notify the child's parent or an appropriate adult of the arrest and whereabouts of the child, unless a parent or such an adult cannot be found or identified after reasonable inquiry.

(2) The arresting police official, or any other police official investigating the matter, must as soon as possible deliver a written notice in the prescribed manner to the child's parent or an appropriate adult referred to in subsection (1) requiring the parent or that person to attend a preliminary inquiry at a time and place specified in the notice.

(3) If, after reasonable inquiry, the police official is unable to find a parent of the child or an appropriate adult to whom the written notice referred to in subsection (2) can be delivered, the police official must deliver the notice to any other person as may be identified by a child worker.

(4) If in a case any alternative action referred to in section 11(2) is taken, the police official taking that action must promptly advise the child's parent or an appropriate adult of the action taken, unless a parent or such an adult cannot be found or identified after reasonable inquiry, in which event any other person as may be identified by a child worker must be advised thereof.

Pre-trial procedures and requirement that parent or an appropriate adult be present

18. (1) Evidence referred to in section 218 of the Criminal Procedure Act and rendered admissible in criminal proceedings by that section, may only be admitted in criminal proceedings against a child if a legal practitioner representing the child was present at the time when the child made a confession or statement or pointed out anything or gave information as contemplated in that section.

(2) Evidence of identification of a child at an occasion when the child was made available for identification in terms of section 37 of the Criminal Procedure Act may not be admitted in criminal proceedings against the child, unless the child's legal practitioner representing the child was present at that occasion.

(3) If a child is not represented by a legal practitioner, an independent observer included in a roster kept in terms of section 118(i) must be obtained to attend such proceedings and he or she may at such attendance assist the child in relation to the proceedings.

Taking of fingerprints and other identifying material

19. (1) Despite any power conferred by the Criminal Procedure Act or any other law, a police official may not, in relation to a child suspected of having committed an offence, take or cause to be taken an identifying material of the child, being -

- (a) the finger prints, palm prints or foot prints of the child;
- (b) a photograph of the child;
- (c) a recording of the voice of the child;
- (d) samples of the handwriting of the child; or
- (e) material from the body of the child,

unless to do so is-

- (i) essential for the investigation of the case;
- (ii) required for the purposes of establishing the age of the person in question; or
- (iii) necessary to establish the prior 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 or prison,

and a magistrate or a judge of the High Court has, under subsection (2), approved the taking of such identifying material.

(2) An application to a magistrate or a judge for approval in terms of subsection (1) to take identifying material of a child may be made by a police official -

- (a) in person; or
- (b) if it is not practicable for the police official to do so in person, by telephone.

(3) The magistrate or judge may, if he or she thinks it proper in the circumstances, give his or her approval in writing for the taking of specified identifying material and must send the writing to the police official concerned.

(4) The magistrate or judge may inform the police official by telephone of his or her approval and in that case the police official may proceed under the approval notwithstanding that the written approval has not been given.

(5) Identifying material that consists of material from the body of a child may not be taken by a person who is not a medical practitioner or a registered nurse acting on the instruction of a medical practitioner.

(6) If identifying material of a child is taken in terms of this section, the police official referred to in subsection (1) must as soon as practicable take all reasonable steps to cause the parent of the child or an appropriate adult to be notified of the action taken in relation to the child.

CHAPTER 4

DETENTION OF CHILDREN AND RELEASE FROM DETENTION

Principles relating to release of children from detention

20. A decision regarding the release of a detained child to be made by a police official, the Prosecutor General, a designated prosecutor, an inquiry magistrate or a judicial officer presiding in a court must be made with due consideration of the following principles -

- (a) preference must be given to the release of the child into the custody of a parent or an appropriate adult, with or without the imposition of any conditions;
- (b) if the release of the child into the custody of a parent or an appropriate adult or the release of the child upon conditions is not feasible, release of the child on bail must be considered;

- (c) if, as a measure of last resort, the child is to be detained in custody, the least restrictive form of detention appropriate to the child and the offence, and a facility suitable for children, must be selected.

Treatment and rights of children in detention in police custody

- 21.** (1) Whilst in detention in police custody, a child -
- (a) must be detained separately from adults and separately from persons of the opposite sex;
 - (b) must be detained in conditions which will reduce the risk of harm to the child, including risk of harm caused by other children;
 - (c) has the right -
 - (i) to adequate food and water;
 - (ii) to medical treatment;
 - (iii) of access to reasonable visits by parents, guardians, legal representatives, child workers, registered social workers, health workers, religious counsellors and other persons authorised by the Directorate of Child Justice;
 - (iv) of access to reading and educational materials;
 - (v) to adequate exercise; and
 - (vi) to be provided with adequate clothing and sufficient blankets and bedding.

(2) If a child in detention in police custody complains of an injury sustained during arrest or whilst in detention, the police official to whom the complaint is made must report the complaint to the station commander who must cause the child to be taken to a medical practitioner for examination and a report on the child's condition as soon as is reasonably possible and must retain the report of the medical practitioner in the appropriate police docket.

(3) If a child in police custody complains during a court appearance of an injury sustained during arrest or whilst in detention, a magistrate must order that arrangements be made to cause the child to be taken to a medical practitioner for examination and a report on the child's condition must be furnished to the magistrate as soon as is reasonably possible.

Duties of police relating to cell register

22. (1) The station commander of each police station must keep a cell register, in which details regarding the detention in police cells of children must be distinctively recorded, in the manner prescribed by regulations.

(2) The register may be examined by a parent, guardian, legal representative, magistrate, child worker, registered social worker, religious counsellor, health worker, a person authorised by the Directorate for Child Justice or a researcher.

Time limit relating to detention of children in police custody prior to preliminary inquiry

23. A child may not be held in detention in police custody for longer than 48 hours before appearing before an inquiry magistrate or, if the 48 hours expire outside court hours or on a day which is not a court day, no longer than the end of the first court day after the expiry of the 48 hours.

Duties of police relating to reporting on detention of children

24. Where a child accused of an offence in Schedule 1 has not been released as contemplated in section 25(1) prior to appearance at a preliminary enquiry, 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 such detention.

Powers of police to release child from detention in police custody prior to preliminary inquiry

25. (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, before the child's appearance at a preliminary inquiry, into the custody of the child's parent or an appropriate adult unless -

- (a) the child's parent or an appropriate adult cannot be located or is not available after reasonable inquiry;
- (b) the police official on reasonable grounds believes that there is a substantial risk that the child may be a danger to any other person or to himself or herself.
- (c) exceptional circumstances warrant detention;

(2) If a child referred to in subsection (1) is not released from detention the investigating police official must at the preliminary hearing furnish a written report in the prescribed manner to the inquiry magistrate giving reasons why the child was not released from detention.

(3) A police official, in consultation with the Prosecutor General or a designated prosecutor, may release a child who -

- (a) is in detention in police custody and who is accused of an offence referred to in Schedule 2; or
- (b) is accused of an offence in Schedule 1 but has not been released in terms of subsection (1)

into the custody of the child's parent or an appropriate adult, on one or more of the following conditions -

- (i) to appear at a specified place and time for an assessment or a preliminary inquiry, as the case may be;
- (ii) not to interfere with witnesses, to tamper with evidence or to associate with a person, persons or group of specified people;
- (iii) to reside at a particular address; and
- (iv) any further condition which the Court may deem fit.

Prosecutor General may direct release of child from detention in police custody

26. Despite a decision of a police official to the contrary, the Prosecutor General or a designated prosecutor may direct that a child referred to in section 25(3) who is detained in police custody be released into the custody of the child's parent or an appropriate adult on the conditions referred to in that section, and if such release is directed, the written notice referred to in section 27(1)(a) must be handed to the child and to the person in whose custody the child is released.

Duties of police upon release of child and persons into whose custody child is released

27. (1) A police official who releases a child from detention in accordance with section 25(1) or (3) or upon a direction give under section 26, must at the time of the release -

- (a) complete and hand to the child and to the person into whose custody the child is released, a written notice in the prescribed form specifying the offence in respect of which the child is being accused, any conditions relating to the child's release and the place where and time when the child must appear for a preliminary inquiry; and
- (b) warn that person to ensure that the child attends the preliminary inquiry at the specified place and time and that the conditions of the child's release are observed.

(2) If a warning given to a person in terms of subsection

(1) (b) is not complied with by that person, a court may -

- (a) issue a warrant for the arrest of the person;
- (b) upon the person's appearance before the court, enquire summarily into the reasons for the non-compliance; and
- (c) if the court is satisfied that the person was properly warned and that the non-compliance was due to fault on his or her part, convict that person and sentence him or her to a fine not exceeding N\$1000 or to imprisonment for a period not exceeding three months.

(3) If a child fails to comply with the requirements of a notice handed to him or her in terms of subsection (1) (a) a court may take the action referred to in subsection (2) (a) and (b) and may take any further action in accordance with this Act as the court may consider appropriate.

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

28. If for any reason a child cannot be released into the custody of a parent or an appropriate adult in accordance with section 24(1) or (2), or cannot be released on bail, the child must, in lieu of detention in police custody, be placed in a place of safety within a reasonable distance from the place where the child must appear for a preliminary inquiry.

Police may not release children accused of certain offences

29. (1) A police official may not release a child accused of an offence referred to in Schedule 3 from detention in police custody.

(2) If a place of safety or a place of detention is available within a reasonable distance from the place where a child referred to in subsection (1) must appear at a preliminary inquiry, the child must, if accommodation is available, be placed in that place of safety or place of detention pending appearance at the preliminary inquiry.

Release of children accused of certain offences on bail prior to appearance at preliminary inquiry

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

(2) The Inspector-General of Police, after consultation

with the Prosecutor General, may issue instructions in relation to the determining of the amounts that may be set for bail as contemplated in subsection (1);

(3) The Prosecutor General or a designated prosecutor, acting in consultation with the police official charged with the investigation, may, if the release of a child accused of an offence referred to in Schedule 2 into the custody of the child's parent or an appropriate adult is for any reason not appropriate, authorise the release of the child on bail subject to reasonable conditions.

(4) In order to determine the amounts that may be set for bail as contemplated in subsection (3), the Prosecutor General may, after consultation with the Minister of Justice, issue directives.

(5) Bail granted in terms of this section by a police official or the Prosecutor General or a designated prosecutor, if effective at the time of the appearance of a child at a preliminary inquiry, subject to the provisions of section 36(2), continues after such appearance as if bail had been granted at the preliminary inquiry or by a court.

Release of child at preliminary inquiry or by a court into custody of a parent or an appropriate adult

31. (1) If a child, upon his or her first appearance at a preliminary inquiry, has not been released from detention in terms of section 25, 26 or 30, the inquiry magistrate must, if the case is not disposed of and it is in the interests of justice to do so -

- (a) order the release of the child into the custody of the child's parent or an appropriate adult, on any conditions as the magistrate may in terms of section 33 impose; and
- (b) warn the person into whose custody the child is released to ensure that the child attends the preliminary inquiry at the specified place and time and that the conditions of the child's release are observed.

(2) In making a decision in terms of subsection (1) whether a child should be released, the inquiry magistrate must have regard -

- (a) to the recommendations of the child worker in the assessment report; and
- (b) any further information which is placed before the magistrate by any person.

(3) Subsections (1) and (2) apply, with the changes

required by the context, to the release of a child by a court upon first appearance of the child in that court pending any further appearance.

Factors to be considered at preliminary inquiry or by court prior to decision to release or detain a child

32. In considering whether it would be in the interests of justice to release a child into the custody of the child's parent or an appropriate adult as contemplated in section 31(2), or on bail as contemplated in section 36, or to remand the child in detention as contemplated in section 37, the inquiry magistrate or court must have regard to all relevant factors, including -

- (a) the best interests of the child;
- (b) whether the child has previously been convicted of an offence;
- (c) the availability of the child's parent or an appropriate adult;
- (d) the likelihood of the child returning to the preliminary inquiry or court for a further appearance;
- (e) the period for which the child has been in detention since arrest;
- (f) the probable period of detention of the child until conclusion of the preliminary inquiry or trial;
- (g) the risk that the child may be a danger to any other person or to himself or herself;
- (h) the state of health of the child;
- (i) the reason for any delay in the disposal or conclusion of the preliminary inquiry or trial and whether such delay is 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;
- (k) the likelihood that, if the child is convicted of the offence, a substantial sentence of imprisonment will be imposed;
- (l) the fact that the child is between ten and 14 years of age and presumed to lack criminal capacity;
- (m) the receipt of a written confirmation by the Prosecutor General to the effect that he or she

intends to charge the child with an offence in Schedule 3; and

- (n) any other factor which the court may deem fit.

Conditions that may be imposed upon release of child into custody of parent or appropriate adult or on bail

33. An inquiry magistrate or court may, in releasing a child into the custody of the child's parent or an appropriate adult or on bail, impose upon the child one or more of the following conditions of release -

- (a) to appear at a specified place and time;
- (b) to report periodically to a specified person or place;
- (c) to attend a particular school;
- (d) to reside at a particular address;
- (e) to be placed under the supervision of a specified person;
- (f) not to interfere with witnesses, to tamper with evidence or to associate with any person or persons specified;
- (g) any other conditions as may be appropriate in a particular case.

Non-detained children appearing at preliminary inquiry

34. If, at preliminary inquiry in respect of a child who is not in detention, the matter -

- (a) is transferred to the children's court in terms of section 75(4); or
- (b) is referred by the prosecutor for plea and trial in a court in terms of section 75(5),

the inquiry magistrate must warn the child to appear at a date and time as specified, and may extend or confirm or amend any conditions of release previously imposed and of effect under this Act.

Release of child on own recognisance

35. An inquiry magistrate or the officer presiding in a court may release a child on his or her own recognisance after consideration of the factors referred to in section 32, with or without conditions imposed under section 33, and must order the child to appear at a preliminary inquiry or before a court at a specified place and time.

Release of child on bail by inquiry magistrate or court

36. (1) An inquiry magistrate or officer presiding in a court may, if the release of a child into the custody of the child's parent or an appropriate adult is for any reason not possible or desirable, and after consideration of the factors referred to in section 32, order the release of the child upon payment of bail and on any one or more of the conditions referred to in section 33.

(2) If bail has been granted previously for a child appearing at a preliminary inquiry or in a court by a police official in terms of section 30(1) or the Prosecutor General or a designated prosecutor in terms of section 30(3), the inquiry magistrate or court may extend the bail on the same or any amended or further condition, and may increase or reduce the amount of bail previously fixed.

(3) Bail granted in terms of subsection (1) has the effect contemplated in section 58 of the Criminal Procedure Act.

(4) If, in a bail application, the question arises whether a child is charged or to be charged with an offence referred to in Schedule 3, a written confirmation issued by the Prosecutor General under section 32(m) is, upon mere production, *prima facie* proof of the charge to be brought against that child.

(5) The written confirmation referred to in subsection (5) must be handed in at the preliminary inquiry or the court in question by the prosecutor as soon as possible and forms part of the record.

Detention of child after first appearance

37. (1) If at a child's first appearance at a preliminary inquiry or in a court, the inquiry magistrate or court, after consideration of the factors referred to in section 32, decides that the child should not be released into the custody of the child's parent or an appropriate adult, or should not be released on bail in terms of section 36, the child may -

- (a) in the case of appearance at a preliminary inquiry, if that inquiry is to be remanded, be remanded to a place of safety or place of detention which is available within a reasonable distance from the place where the preliminary inquiry is held, or, if a place of safety or place of detention is not available or there is no vacancy, and subject to the provisions of subsection (2), to a police cell pending conclusion of the preliminary inquiry;
- (b) in the case of conclusion of the preliminary inquiry and pending the conclusion of proceedings under this Act, be remanded to a place of safety, place of

detention or, subject to subsection (4), a prison; and

- (c) in the case of appearance at a court, if the proceedings are to be postponed, be remanded to a place of safety, place of detention or, subject to subsection (4), a prison.

(2) In the case of a remand, the inquiry magistrate may only order the detention of the child for a period of 48 hours and, subject to section 79(3), for one further period of 48 hours, or if either of those periods expires outside court hours or on a day which is not a court day, for a period not longer than the end of the first court day after the expiry of the 48 hours.

(3) In deciding whether the placement of the child should be in a place of safety or a place of detention as referred to in subsection (1), the inquiry magistrate or officer presiding in a court must have regard to the recommendation of the child worker in the assessment report.

(4) A child who is 14 years of age or older, and charged or to be charged with an offence referred to in Schedule 3, may be remanded for custody in a prison if the child's release or referral to a place of safety or a place of detention is not possible or because -

- (a) no such facility is situated within a reasonable distance of the place where the child is to appear at a preliminary inquiry or in a court;
- (b) no immediate accommodation is available at such a facility according to the person in charge thereof; or
- (c) the inquiry magistrate or court is satisfied, on evidence adduced, that there is a substantial risk that the child may cause harm to other children in a place of safety or place of detention.

(5) If a child is remanded to a place of safety, place of detention or prison in terms of subsection (1) or (4) -

- (a) the child must, if remanded to a place of safety or place of detention, appear at intervals of not more than 30 days, or, if remanded to a prison, at intervals of not more than 14 days before the court, to -
 - (i) inquire whether further detention is necessary;
 - (ii) record the reasons for any further detention ordered; and
 - (iii) consider a reduction of the amount of bail, if not paid;

- (b) the court must be satisfied that the child is being properly treated and kept in suitable conditions;
- (c) the court, if not satisfied that the child is being properly treated and kept in suitable conditions, must inspect and investigate such treatment and conditions and may make an appropriate remedial order;
- (d) the plea and trial must be concluded as speedily as possible.

(6) In making an order that a child be remanded to prison, the inquiry magistrate or court must record the reasons for remanding the child to prison.

Application for release from detention

38. (1) Nothing contained in this Act or any other law must be construed as precluding a detained child from applying for his or her release from detention at any stage before the passing of sentence, or when an appeal against a sentence is lodged, before the conclusion of the appeal.

(2) There is a right of appeal against any decision refusing an application for release from detention to the High Court, which appeal must be heard as a matter of urgency.

CHAPTER 5 ASSESSMENT

Purpose of assessment

39. (1) The purpose of this Chapter is to provide for a process of assessment of every child who is alleged to have committed an offence before the attendance of the child at a preliminary inquiry.

- (2) The purposes of assessment are -
 - (a) to obtain proof of a child's age or to estimate the probable age of a child whose age is not ascertainable;
 - (b) to establish the personal circumstances of the child;
 - (c) to establish whether the child accepts responsibility for the offence;
 - (d) to establish the prospects of diversion of the case, and if the case warrants diversion, which diversion option is suitable to the circumstances of the child;
 - (e) to formulate recommendations regarding release of the

child into the custody of a parent or an appropriate adult, or placement in a residential facility; and

- (f) in the case of children under ten years of age, to establish what measures, if any, which need to be taken.

Assessment to be conducted by child worker and notice to be given of assessment proceedings

40. (1) An assessment of a child must be conducted by a child worker.

(2) The investigating officer of a case involving a child who is alleged to have committed an offence must as soon as is reasonably possible after a date is secured for the appearance of that child at a preliminary inquiry, notify a child worker thereof.

(3) Upon being notified in terms of subsection (2) the child worker must determine the date, time and place for the holding of assessment proceedings and inform the investigating police official thereof.

(4) The investigating police official must -

(a) give notice of the date, time and place of the holding of assessment proceedings to -

(i) the child and the parents of the child; or

(ii) if, after reasonable enquiry, the whereabouts of a parent cannot be established, an appropriate adult of the child; and

(b) if necessary, ensure the provision of transport in order to secure the attendance at the assessment proceedings of the child, a parent of the child or an appropriate adult.

(5) If it appears that a parent of the child or an appropriate adult has not been notified to attend the assessment proceedings, the child worker must either by notice issued in the prescribed manner or, if the interests of justice so require, orally, notify that person to attend the assessment proceedings.

(6) A police official must, upon a request of the child worker -

(a) deliver a notice issued in terms of subsection (2) to the person or persons specified in the notice; and

(b) if necessary, ensure the provision of transport in order to secure the attendance at the assessment

proceedings of a parent of the child or an appropriate adult.

Place where assessment proceedings must be held

41. Assessment proceedings must be held -

- (a) at a prescribed place; or
- (b) at any other place determined by the child worker, which place must be suitable for protection of privacy and confidentiality.

Attendance at assessment proceedings

42. (1) An assessment proceedings must be attended -

- (a) by the child;
- (b) the child's parent, or if a parent of the child is not available, by an appropriate adult;

(2) If, after reasonable inquiry, the whereabouts of a child's parent or an appropriate adult cannot be established, a child worker may conclude the assessment proceedings interview in their absence.

(3) The child worker may permit to be present at the proceedings any other person, including -

- (a) the legal representative of the child in respect of whom the assessment is being conducted;
- (b) a police official;
- (c) a researcher;
- (d) any other person whose presence the child worker considers necessary or desirable for the purposes of the assessment and whose presence will not impede the proceedings and who the child worker has given notice to attend.

(4) A child worker may at any time during assessment proceedings exclude from the interview, or any part thereof, any person required or authorised to be present, other than the child, if the child worker considers that the person's presence impedes or may impede proceedings.

(5) At the request of a parent or an appropriate adult who has been notified to attend assessment proceedings, and if good reason exists, a child worker may in writing excuse that person from attending the proceedings.

(6) A parent or an appropriate adult commits an offence

who, having been notified to attend an assessment proceedings in respect of a child, without reasonable excuse or without being excused under subsection (5), fails to attend.

Powers and duties of child worker in relation to assessment

43. (1) For the purpose of an assessment a child worker may, by requisition notice issued in the prescribed manner, require the investigating police official or any other police official to -

- (a) bring a child forthwith to a specified place for assessment proceedings;
- (b) obtain and produce documentation relevant to proof of a child's age from a specified place or a specified person if the child's age is not known.

(2) A child worker may consult with any other person who has information relevant to a child's assessment, and must inform the child of any information so obtained.

Procedure at assessment proceedings

44. (1) At assessment proceedings the child worker must -

- (a) explain the purpose of assessment to the child;
- (b) inform the child of his or her rights in the prescribed manner; and
- (c) explain to the child the immediate procedures to be followed in terms of this Act.

(2) If the age of the child is not ascertainable, the child worker must obtain information relevant to the age estimation referred to in section 8 and must complete the form referred to in subsection 8(2).

(3) A child worker may -

- (a) consult individually with any person present at assessment proceedings; or
- (b) consult with any person not present at assessment proceedings who the child worker believes is able to provide information relevant for the assessment.

(4) If two or more children are alleged to be involved in the commission of the same offence, a child worker may conduct assessment proceedings in respect of them jointly.

(5) The child worker must encourage the participation of the child during the assessment process.

(6) Upon conclusion of assessment proceedings, the child worker must complete an assessment report in respect of the child in the prescribed manner with recommendations, and reasons for the recommendations.

(7) Recommendations made in terms of subsection (6) may include any recommendation relating to -

- (a) the prospects of using diversion, and in particular -
 - (i) the administering of a caution to the child in respect of the offence; and
 - (ii) referral of the matter to a family group conference;
- (b) starting a preliminary inquiry;
- (c) the release of the child into the custody of a parent or an appropriate adult;
- (d) if, as a last resort, detention in custody of the child is considered necessary, the placement of the child in a place of safety, place of detention or prison; or
- (e) the referral of the matter to a children's court for inquiry, stating the reasons for the recommendation, including reasons as referred to in section 84(3).

(8) If it appears to the child worker that the child does not intend to accept responsibility for the alleged offence, that must be indicated in the assessment report.

(9) The report referred to in subsection (6) must as soon as is reasonable practicable after conclusion of the assessment proceedings be submitted to the prosecutor to decide, after consideration of the recommendations made in the report -

- (a) whether or not to withdraw any charges pending against the child for the offence; and
- (b) on any further action to be taken in relation to the child.

Powers of child worker in relation to child under the age of ten years

45. (1) In the case of a child younger than ten years who has committed an act which, but for section 6(1), would have constituted an offence, a child worker, upon conclusion of assessment proceedings in respect of the child, may decide -

- (a) to refer the child or the family of the child for

counselling or therapy;

- (b) to arrange for support services to the child or family of the child;
 - (c) to refer the child to the children's court on grounds set out in section 84(2); or
 - (d) to convene a conference for the purposes mentioned in subsection (2);
- (2) The purposes of a conference referred to in subsection (1) (d) are to assist the child worker -
- (a) to establish more fully the circumstances surrounding the allegations against the child; and
 - (b) to formulate a plan appropriate to the child and relevant to the circumstances of the case.
- (3) A conference convened in terms of subsection (1) (d) -
- (a) must be attended by the child and the child's parents or an appropriate adult;
 - (b) may be attended by -
 - (i) an alleged victim of the offence;
 - (ii) any other person whose presence the child worker considers necessary to provide information relevant to the purpose of the conference.
- (4) The plan referred to in subsection 2(b) must -
- (a) be formulated in writing;
 - (b) specify the objectives to be achieved for the child and the period within which they should be achieved;
 - (c) contain details of the services and assistance to be provided for the child and for the parents or an appropriate adult;
 - (d) specify the persons or organisations to provide such services and assistance;
 - (e) state the responsibilities of the child and of the parents or an appropriate adult;
 - (f) state personal objectives for the child and for the parents or an appropriate adult; and
 - (g) contain any other relevant matters relating to the education, recreation and welfare of the child.

(5) The child worker must prepare a report stating particulars of and the reason for -

- (a) any decision taken in terms of subsection (1); and
- (b) for any plan formulated in terms of subsection (2)

(6) The child worker concerned must submit the report referred to in subsection (5) to the Directorate for Child Justice for consideration not later than 30 days after the decision in terms of subsection (1) or the conclusion of a conference convened in terms of subsection (1)(d), as the case may be.

(7) If the child or the child's parent or an appropriate adult -

- (a) fails to attend a conference convened in terms of subsection (2); or
- (b) fails to comply with any obligation imposed upon the child or upon the parent or appropriate adult by virtue of a plan in accordance with subsection (3),

the child worker may request the children's court having jurisdiction to open an inquiry.

CHAPTER 6 DIVERSION

Object of this Chapter

46. The object of this Chapter is to set up diversion options to deal with a child of 10 years or older who is alleged to have committed an offence in order to divert the child from the courts' criminal justice system.

PART 1 PURPOSES AND OPTIONS FOR DIVERSION

Purposes of diversion

47. The purposes of diversion under this Part are to -

- (a) encourage the child to be accountable and accept responsibility for the unlawful behaviour and the results thereof in an appropriate way;
- (b) meet the particular needs of the individual child;

- (c) promote the reintegration of the child into his or her family and the community;
- (d) provide an opportunity to victims of an offence committed by a child to express their views on its impact on them and to participate in the process of dealing with the child;
- (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 any victim or the community affected by the harm caused;
- (g) prevent stigmatising the child and prevent adverse consequences flowing from being subject to the criminal justice system; and
- (h) facilitate dealing with unlawful behaviour of a child within the community and without government intervention or criminal proceedings.

General principles for diversion options

48. (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 of the age of fourteen years and over may be required to perform community service as an element of diversion, with due consideration to the child's age and development.

(3) Diversion options must -

- (a) promote the dignity and well-being of the child, and the development of his or her sense of self-worth and ability to contribute to society;
- (b) not be exploitative, harmful or hazardous to a child's physical or mental health;
- (c) be appropriate to the age and maturity of the child; and
- (d) not interfere with a child's education or lawful employment.

(4) Diversion options must, where reasonably possible -

- (a) impart useful skills;
- (b) include a restorative justice element which aims to heal relationships, including the relationship with a

victim;

- (c) include an element which seeks to ensure that the child understands the impact of his or her behaviour on others, and may include compensation or restitution; and
- (d) be presented in a location reasonably accessible to children, and children 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.

(5) Any diversion option that has a predetermined content and duration and either involves a service to groups of children or offers a service to individual children on a regular basis, which service is presented by government or a non-governmental organisation, must be registered in the prescribed manner.

Development of diversion options and keeping of register

49. (1) The Minister responsible for child justice is responsible for -

- (a) the development of suitable diversion options as contemplated in this Chapter; and
- (b) keeping, a register setting out the number of children diverted and the programmes to which they have been diverted.

(2) Subsection (1) must not be construed as precluding any other government ministry or any non-governmental organisation from developing suitable diversion options for children.

Conditions for diversion

50. (1) Diversion may be used to deal with a child only if -

- (a) the person who is considering to use such measures is satisfied that they would be appropriate, having regard to the needs of the child and the interests of society;
- (b) the child voluntarily accepts responsibility for the act or omission that forms the basis of the offence that the child is alleged to have committed;
- (c) the child understands his or her right to remain silent and has not been unduly influenced in acknowledging responsibility;
- (d) the child is advised of his or her right to be represented by a legal practitioner, and should he or

she wish to exercise such right, has been given a reasonable opportunity to consult with a legal practitioner;

- (e) the child and a parent of the child or an appropriate adult are informed of the diversion options and the child fully and freely consents to participate therein;
- (f) there is in the opinion of the prosecutor sufficient evidence to proceed with the prosecution of the offence; and
- (g) the prosecution of the offence is not in any way barred at law.

(2) Where circumstances as referred to in subsection (1) exist, diversion must be considered.

(3) Diversion must not be used to deal with a child alleged to have committed an offence if the child -

- (a) denies his or her involvement or participation in the commission of the offence; or
- (b) expresses his or her wish to have any charge against him or her dealt with by the child justice court.

(4) No admission, confession or statement accepting responsibility for any act or omission made by a child alleged to have committed an offence as a condition of his or her being dealt with by diversion options is admissible in evidence against the child in any criminal or civil proceedings.

Specific diversion options

51. (1) In selecting a diversion option for a particular child at a preliminary inquiry or in a court, consideration must be given to -

- (a) the selection of a diversion option from an appropriate level in terms of this section;
- (b) a child's cultural, religious and linguistic background;
- (c) the child's educational level, cognitive ability, 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
- (e) the child's age and developmental needs.

(2) For purposes of this Act a range of diversion options are set out in three levels for children aged ten years or older and, subject to the provisions of this Act, with level one comprising the least onerous and level three the most onerous options.

(3) Level one diversion options are -

- (a) an oral or 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;
- (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;
- (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;
- (i) the issue of an order prohibiting the child from visiting, frequenting or appearing at a specified place in the prescribed manner;
- (j) referral to counselling or therapy for a period not exceeding three months;
- (k) compulsory attendance at a specified Child Justice 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;
- (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 if the object concerned can be returned or restored.

- (3) Level two diversion options are -
- (a) any of the options mentioned in subsection (2), but the maximum period referred to in paragraphs (c), (d), (e), (f), (g), (h), (i), and (j) of that subsection may be fixed at a period not exceeding six months;
 - (b) compulsory attendance at a specified Child Justice 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;
 - (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 child worker effecting the assessment or by the Directorate for Child Justice for a maximum period of 50 hours, and to be completed within a maximum period of six months;
 - (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 N\$500 to a specified person, persons, group or institution if the child or his or her family is able to afford such payment;
 - (f) if there is no identifiable person or persons to whom restitution or compensation could be made, provision of some service or benefit or payment of a contribution to a community organisation, charity or welfare organisation;
 - (g) referral to appear at a family group conference, a victim-offender mediation or other restorative justice process approved by the Directorate for Child Justice referred to in section 69 at a specified place and time; and
 - (h) any two of the options listed used in combination.

(4) Level three diversion options may only be applied in respect of a child 14 years of age or older if there is reason to believe that a court, upon conviction of the child, would impose a sentence involving detention of the child for a period exceeding six months, and are -

- (a) referral to a programme with a residential element, if the duration of the programme does not exceed six months, and no portion of the residence requirement exceeds 21 consecutive nights with a maximum of 35

nights 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 child worker effecting the assessment or by the Directorate for Child Justice for a maximum period of 250 hours, to be completed within a maximum period of 12 months;
 - (c) if a child is over the age of compulsory school attendance fixed by the Education Act, 2001 (Act No. ?? of 2001), and is not attending formal training, compulsory attendance at a specified institution for a specified vocational or educational training for a maximum period of 35 hours per week, to be completed within a maximum period of six months;
 - (d) referral to counselling or therapeutic intervention in conjunction with any of the options listed in this subsection.
- (5) For purposes of subsection (3) -
- (a) "a supervision and guidance order" means an order placing a child under the supervision and guidance of a mentor or peer role model in order to monitor and guide the child's behaviour;
 - (b) "a reporting order" means an order requiring a child to report to a specified person at a time or at times specified in the order to enable that person to monitor the child's behaviour;
 - (c) "a compulsory school attendance order" means an order requiring a child to attend school every day for a specified period of time, and to be monitored by a specified person;
 - (d) "a family time order" means an order requiring a child to spend a specified number of hours with his or her family;
 - (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; and
 - (f) "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 stipulated standards of behaviour.
- (6) Upon the selection of a diversion option in terms of this section, the inquiry magistrate or court must designate a child worker or other suitable person to monitor the child's

compliance with the conditions of the diversion option, who must, in the event of the child's failure to comply with any conditions, notify the inquiry magistrate or court in writing of the failure.

PART 2
CAUTIONING

Purpose of caution

52. The purpose of this Part is to provide for a way of diverting a child who commits an offence from the courts' criminal justice system by allowing a formal caution to be given to the child instead of starting proceedings for the offence.

Cautioning by police official

53. (1) If cautioning a child for an offence is authorised under this Act the caution must be administered to the child by a police official who is of or above the rank designated by the Inspector General for the purpose, or if such a police official is not available, by the highest ranking police official available.

(2) A caution must be administered -

(a) at a prescribed place; and

(b) as far as is practicable, in the presence of -

(i) the parents of the child, or if a parent is not available, an appropriate adult; or

(ii) if neither a parent or an appropriate adult is available, a person chosen by the child.

Conditions for administration of caution

54. A caution may be administered to a child for an offence only if the child -

(a) admits committing the offence; and

(b) consents to being cautioned.

Explanation of caution procedure must be given

55. (1) A police official who cautions a child must take steps to ensure that the child and any other person present under section 53(2) understand the purpose, nature and effect of the caution.

(2) The steps that can be taken include -

(a) personally explaining those matters to the child;

- (b) having some person with training or experience in the cautioning of children give the explanation;
- (c) having an interpreter or other person able to communicate effectively with the child give the explanation; and
- (d) supplying an explanatory note in English or any other language understood by the child.

Caution procedure may involve apology to victim

56. (1) The procedure for administering a caution to a child for an offence may involve the child apologising to a victim of the offence if-

- (a) the person authorising the administration of a caution or the police official administering the caution considers that an apology is an appropriate course of action in the particular circumstances of the case;
- (b) the child is willing to apologise; and
- (c) the victim is willing to participate in the procedure.

Child must be given a notice of caution

57. (1) The police official who administers a caution to a child must as soon as is practicable thereafter give to the child a written notice of caution in a form approved by the Inspector General stating -

- (a) the fact that a caution has been given to the child;
- (b) the offence in respect of which the caution was given;
- (c) the name and address of the police official who administered the caution;
- (d) the place where the caution was given;
- (e) the names of all persons present when the caution was given; and
- (f) the nature and effect of a caution.

(2) In any proceeding, a document purporting to be a notice of caution or a copy of the notice is evidence that the child was administered a caution for the offence in the circumstances stated in the notice.

Dismissal of charge if caution should have been administered

58. (1) If in proceedings against a child before a Child Justice Court on a charge of the alleged commission of an

offence the child pleads guilty to the charge, the court must not accept the plea and dismiss the charge if the court is satisfied that the child should have been given a caution instead of being charged.

(2) If the court dismisses a charge under subsection (1), the court may -

- (a) administer the caution to the child; or
- (b) direct that a caution be administered to the child as directed by the court.

PART 3
FAMILY GROUP CONFERENCES

Object of this Part and process

59. (1) The object of this Part is to establish a family group conference process for a child who admits committing an offence or after a finding of guilt for an offence is made against the child by a court.

(2) The process allows the child, a victim of the offence, and the child's family and community to consider or deal with the offence in a way benefiting all concerned.

- (3) The process involves the following steps -
 - (a) the offence is referred to a family group conference in accordance with section 62;
 - (b) a family group conference convenor convenes a conference between the child and other concerned persons; and
 - (c) at the conference the offence is discussed and a plan formulated on what must be done because of the offence.

Who may benefit from a family group conference

60. (1) The benefits intended are-

- (a) the child may benefit by-
 - (i) meeting any victim and taking responsibility for the consequences of the offence in an appropriate way;
 - (ii) having the opportunity to make restitution and pay compensation for the offence; and
 - (iii) taking responsibility for the way in which the conference deals with the offence.

- (b) the victim may benefit by the opportunity -
 - (i) to meet and understand the child and understand why the offence was committed;
 - (ii) to express the victim's concerns;
 - (iii) to have questions answered;
 - (iv) to influence the way in which the conference deals with the offence; and
 - (v) to encourage the child's sense of responsibility;
- (c) the community may benefit by -
 - (i) fewer offences being committed because of effective early intervention by the community;
 - (ii) less public cost due to the unnecessary involvement of the courts' criminal justice system; and
 - (iii) increasing resolution of disputes within the community without government intervention or legal proceedings.

Who may refer an offence to a family group conference

61. An offence may be referred to a family group conference by -

- (a) a child worker, if the prosecutor in terms of section XX(8), after consideration of an assessment report, in writing directs that the offence be referred to a family group conference;
- (b) an inquiry magistrate; or
- (c) a court.

(2) In deciding whether it is appropriate to refer an offence to a family group conference, a prosecutor, an inquiry magistrate or a court must have regard to -

- (a) the nature of the offence;
- (b) the harm suffered by anyone because of the offence; and

- (c) whether the interests of the community and the child would be served by having the offence considered or dealt with in an informal way.

Appointment of family group conference convenor

62. (1) The Minister, after consultation with the Minister responsible for social services, must appoint any child worker or other person who in the opinion of the Minister has appropriate experience or training to be a family group conference convenor for the purposes of this Act.

(2) If practicable, the person acting as convenor in a particular case must be independent of the circumstances of that case.

Notice of family group conference

63. (1) If an offence is referred to a family group conference, a convenor must forthwith be notified in writing of the referral in the prescribed manner by the child worker, inquiry magistrate or court who makes the referral.

(2) Not later than 21 days after receipt of the notice referred to in subsection (1) the convenor must -

- (a) convene a family group conference; and
- (b) ensure that all persons entitled to attend the conference in terms of section 64 are notified within a reasonable time, of the time and place fixed for the conference.

(3) The notice referred to in subsection (2)(b) need not be given to a person whose whereabouts cannot be established after reasonable inquiry, and failure to notify any person in accordance with that subsection does not affect the validity of the proceedings of a family group conference unless such failure is likely to affect the outcome of the conference materially.

(4) If a family group conference fails to take place, the child worker must arrange for an alternative date and notify the persons referred to in section 64.

Who may attend a family group conference

64. The persons entitled to attend and participate in a family group conference are -

- (a) the convenor;
- (b) the child;
- (c) the parents of the child or an appropriate adult;

- (d) a legal practitioner representing the child;
- (e) any other person requested by the child;
- (f) any victim of the offence and a legal practitioner representing the victim and, if the victim is a child, his or her parent or an appropriate adult;
- (g) the prosecutor or any other person from the Prosecutor General's office designated by the Prosecutor General;
- (h) the child worker who conducted the assessment in respect of the child, or any other child worker designated by the first-mentioned child worker;
- (i) the investigating police official or any other police official designated by the Inspector General;
- (j) any other person invited or authorised by the convenor, including a member of the community in which the child is normally resident.

Conduct of family group conference

65. (1) The participants at a family group conference must decide on the procedure to be followed at the conference.

(2) The conference must be directed towards formulating a plan as to how the child should be dealt with for the offence in accordance with the guidelines set out in section 66.

(3) The convenor may bring the conference to an end at any time if -

- (a) the child fails to attend the conference;
- (b) the convenor considers that agreement on the formulation of a plan will not be reached within a time the convenor considers appropriate; or
- (c) a plan is formulated and agreed to by the participants.

Form of family group conference plan

66. (1) Subject to subsection (2), a family group conference plan may include -

- (a) the application of any diversion programme referred to in section 51; or
- (b) any other resolution appropriate to the child, his or her family and to local circumstances which is consistent with the principles contained in this Act.

- (2) A family group conference plan must -
- (a) specify the objectives for the child and the period within which they are to be achieved;
 - (b) contain details of the services and assistance to be provided for the child and for a parent or an appropriate adult;
 - (c) specify the persons or organisations to provide those services and assistance;
 - (d) state the responsibilities of the child and of the child's parent or an appropriate adult;
 - (e) state personal objectives for the child and for the child's parent or an appropriate adult;
 - (f) include such other matters relating to the education, employment, recreation and welfare of the child as are relevant; and
 - (g) designate a child worker or other suitable person to monitor the child's compliance with the conditions of the diversion option.

Report of outcome of family group conference

67. (1) The convenor must prepare a report on the outcome of the family group conference which must set out, with reasons, any plan formulated at the family group conference.

(2) Within 14 days after conclusion of the conference, the convenor must submit the report referred to in subsection (1) to -

- (a) the prosecutor, the inquiry magistrate or the court, who referred the offence to the family group conference; and
- (b) to the Directorate for Child Justice for record purposes.

(3) The child worker must record, with reasons, any plan formulated at a family group conference, and must furnish a copy of the record -

- (a) to the child and the child's parent or an appropriate adult; and
- (b) to the person referred to in subsection 66(2) (g);

Failure of child to comply with family group conference plan

68. (1) The person designated in accordance with section

66(2)(g) to monitor compliance of a family group conference plan by a child must in writing report any breach of a substantial nature of that plan to the prosecutor.

(2) Upon receipt of a notice referred to in subsection (1) the prosecutor must -

- (a) if the matter was referred to the family group conference by the prosecutor or by an inquiry magistrate, open or reopen a preliminary inquiry; or
- (b) if the matter was referred to the family group conference by a court, set the matter down for trial,

and cause the child, by way of a written notice or a summons or, as a last resort, a warrant of arrest issued by the inquiry magistrate or court, to appear before the inquiry magistrate or at the trial.

(3) Upon the appearance of the child pursuant to subsection (2), the inquiry magistrate or the court may -

- (a) make inquiry into the reasons for the child's failure to comply with the family group conference plan; and
- (b) question and obtain the views of any person present or called by the inquiry magistrate or the court to appear before it for the purpose,

and may -

- (c) direct that the diversion option formulated in the plan be continued either with or without altered conditions as the inquiry magistrate or the court may specify;
- (d) direct that a different diversion option be applied as the inquiry magistrate or the court may specify;
- (e) make an appropriate order to assist the child and his or her parents or an appropriate adult to comply with a diversion option directed under paragraph (c); or
- (f) request the prosecutor to proceed with a trial.

Part 4
Other Diversion options

Victim-offender mediation or other restorative justice process

69. (1) If an inquiry magistrate or presiding officer in a court refers a child to a victim-offender mediation or other restorative justice process, the provisions of section 63, 65, 66, 67 apply with such changes as the context requires.

(2) A child worker must convene a victim-offender mediation or other restorative justice process and may regulate its procedure as the child worker may consider appropriate.

CHAPTER 7 PRELIMINARY INQUIRY

Nature and objectives of preliminary inquiry

70. (1) Subject to this Act, a preliminary inquiry must be held in respect of every child before the child is required to plead.

- (2) The objectives of a preliminary inquiry are to -
- (a) ascertain whether the child has been subjected to assessment and, if not, whether compelling reasons exist to dispense with assessment;
 - (b) establish whether the matter is appropriate for diversion;
 - (c) identify a suitable diversion option if applicable;
 - (d) establish whether the matter should be transferred to a children's court for an inquiry to be held in terms of the Children's Act, 1960 (Act No. 33 of 1960);
 - (e) provide an opportunity for the prosecutor to assess whether there are sufficient grounds for the matter to proceed to trial;
 - (f) 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;
 - (g) to ensure that the views of all persons present are considered before a decision is taken;
 - (h) encourage the participation of the child and his or her parent or an appropriate adult in decisions concerning the child; and
 - (i) 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.

Designation of inquiry magistrate

71. (1) A preliminary inquiry must be held before the inquiry magistrate designated for the district.

(2) The chief magistrate of each magisterial district must designate a district court magistrate to be the inquiry magistrate of that district, unless a Child Justice Centre has been established for a particular area in terms of section 86, in which case section 86 applies.

(3) The place where a child must appear at a preliminary inquiry, must be determined in accordance with section 90 of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), except if a Child Justice Centre has been established for a particular area in terms of section 86, in which case that section applies.

(4) A preliminary inquiry may not be held in a court room, unless no suitable place other than a court room is available.

(5) The inquiry magistrate must conduct the proceedings at a preliminary inquiry in an informal manner by asking questions, interviewing persons at the inquiry and eliciting information.

Attendance at preliminary inquiry

72. (1) Subject to subsections (2) and (3), a preliminary inquiry before an inquiry magistrate must be attended by -

- (a) the prosecutor;
- (b) the child;
- (c) the child's parent or, in the absence of the child's parent, an appropriate adult;
- (d) the child worker; and
- (e) any other person served with a subpoena or requested to attend the preliminary inquiry in terms of section 74(1)(a) or (b).

(2) If sufficient reasons exist, a preliminary inquiry may be proceeded with in the absence of the persons referred to in subsection (1)(c) and (d), but in the absence of the child worker, that officer's assessment report must be available at the inquiry, unless an assessment is dispensed with in terms of section 74(3).

(3) If it is considered desirable, the inquiry magistrate may exclude a person referred to in subsection 1(c) from the proceedings at the preliminary inquiry or any part thereof.

(4) Nothing in this section must be construed as

precluding from attendance at the preliminary inquiry -

- (a) a legal practitioner representing the child;
- (b) the arresting police official, the investigating police official or any other police official; or
- (c) any other person permitted to attend the preliminary inquiry as referred to in section 74(1)(b), including a researcher.

Procedure relating to holding of preliminary inquiry

73. (1) At the start of the preliminary inquiry, the inquiry magistrate must inform and explain to the child -

- (a) the purpose of the preliminary inquiry;
- (b) the nature of the allegation or allegations against him or her;
- (c) his or her rights in the prescribed manner; and
- (d) the immediate procedures to be followed in terms of this Act.

(2) At the start of the preliminary inquiry, the prosecutor or the child worker must ensure that the inquiry magistrate is in possession of the report on the child's assessment and an age assessment form referred to in section 8(2), with any relevant documents attached.

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

(4) A proper record must be kept of the proceedings of the preliminary inquiry.

(5) A decision taken at a preliminary inquiry is not subject to appeal, except a decision by the inquiry magistrate to remand a child in detention.

General powers and duties of inquiry magistrate

74. (1) The inquiry magistrate may -

- (a) cause a subpoena to be served on any person whose presence is necessary for the conclusion of the preliminary inquiry;
- (b) request or permit the attendance of any other person, who may be able to contribute to the proceedings;

- (c) request any further documentation or information to supplement that referred to in section 73 (2), which is relevant or necessary to the proceedings;
- (d) make a determination of age in terms of section 9;
- (e) after consideration of the information contained in the assessment report, elicit any information from the persons attending the inquiry to supplement or clarify the information in the assessment report; and
- (f) take such steps as are necessary to establish the truth of any statement or the correctness of any submission.

(2) If a dispute arises at the preliminary inquiry in relation to the conduct of proceedings or any other matter, the inquiry magistrate must make a ruling in a manner consistent with the provisions of this Act.

(3) If it is ascertained that an assessment of the child was not carried out, the inquiry magistrate may remand the preliminary inquiry in terms of section 79(1)(f) pending assessment, or may dispense with assessment if it is in the best interests of the child to do so.

(4) The inquiry magistrate must ensure that the persons present at the preliminary inquiry are informed of the recommendations made in the assessment report and may, if the child worker is present, request him or her to explain, elaborate upon or justify any recommendation or statement in the report, or to provide additional information.

(5) The correctness of any statement made in an assessment report may be challenged by any person present at the preliminary inquiry.

(6) The inquiry magistrate must ensure that the persons present at a preliminary inquiry are informed of diversion options available in the district or area of his or her jurisdiction as well as of their aims and content.

(7) The inquiry magistrate must consider the reports regarding arrest of the child and detention in police custody provided by the arresting police official and if the inquiry magistrate considers that an arrest or detention in a police cell was unnecessary, the Directorate for Child Justice must be notified for record purposes.

Decisions regarding diversion, prosecution or transfer to a children's court

75. (1) After consideration of -

- (a) the assessment report, unless assessment has been

dispensed with in terms of section 74(3);

- (b) opinions expressed or information provided by persons at the preliminary inquiry;
- (c) any further information requested or elicited in terms of section 74(1)(c); and
- (d) the willingness of the child to accept responsibility for the offence,

the inquiry magistrate must ascertain from the prosecutor whether the matter can be diverted.

(2) If the prosecutor indicates that the matter can be diverted, the inquiry magistrate must make an order regarding an appropriate diversion option or options.

(3) If the prosecutor decides to proceed with the prosecution of the child, the matter may be set down for plea and trial in a court.

(4) In addition to the diversion options set out in section 51, 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 47 and 48.

(5) If the inquiry magistrate has reason to believe that the child is in need of care in terms of section 84 (2), the magistrate may order that the preliminary inquiry be closed and the matter be transferred to a children's court.

Release or placement of child by inquiry magistrate

76. (1) The inquiry magistrate must make an order regarding release or placement of a child pending his or her further appearance at a preliminary inquiry or court, if -

- (a) the preliminary inquiry is remanded in terms of section 79 or 80;
- (b) the matter is to be transferred to the children's court in terms of section 75(4); and
- (c) the matter is to be set down for plea and trial in a court.

(2) When considering the placement of the child, the inquiry magistrate must, if the child is in detention, apply the provisions of Chapter 4 of this Act regarding detention and release from detention.

(3) If the matter is to be set down for plea and trial in a court or is to be transferred to the children's court, the

preliminary inquiry must be closed.

(4) If it is decided that the matter must be diverted, the prosecutor may withdraw the charges against the child, and the preliminary inquiry may be closed.

Evidentiary matters

77. (1) Information regarding a child's previous diversion or previous conviction may be furnished at the preliminary inquiry by any person.

(2) No information furnished at a preliminary inquiry by a person is admissible in any subsequent court proceedings.

Separation and joinder of proceedings of preliminary inquiry

78. (1) If the child in respect of whom the preliminary inquiry is held, is a co-accused with an adult, the case of the adult must be separated from that of the child, except if it is in the interests of justice,

(2) If two or more children are accused of having committed an offence, a preliminary inquiry may be held in respect of them jointly.

(3) At a joint preliminary inquiry, different decisions may be made in respect of the children involved.

Remanding of preliminary inquiry

79. (1) Subject to subsection (3), the inquiry magistrate may remand the preliminary inquiry for the purposes of -

- (a) securing the attendance of a person necessary for the conclusion of the inquiry;
- (b) obtaining information necessary for the conclusion of the inquiry;
- (c) establishing the attitude of the victim to diversion;
- (d) planning a diversion option;
- (e) finding alternatives to pre-trial residential detention; or
- (f) assessing the child, if an assessment has not previously been carried out and it is found that an assessment should not be dispensed with.

(2) If the preliminary inquiry is remanded for the purpose of noting a confession, 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 legal representative present during such proceedings.

(3) The remand of a preliminary inquiry in terms of subsection (1) may only be granted for a period of 48 hours, but a further remand for a further period of 48 hours may be granted if there is reason for believing that a further remand will increase the prospects of diversion.

(4) If the preliminary inquiry is not concluded on the day to which it was remanded, or if applicable, further remanded, in terms of subsection (3), the inquiry magistrate must close the preliminary inquiry and refer the matter to the prosecutor for set down and trial before a court.

(5) Section 27 applies to any failure of the child and his or her parent or an appropriate adult to comply with any condition of release of the child pursuant to a remand of the preliminary inquiry in terms of this section or section 80.

Remanding of preliminary inquiry for detailed assessment

80. (1) Any person may request the inquiry magistrate to remand the inquiry for purposes of a further detailed assessment of the child.

(2) The inquiry magistrate may, if satisfied that there are circumstances warranting a further assessment of the child and that such circumstances relate to -

- (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 absconding;
- (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
- (e) the possibility that the child may be a victim of sexual or other abuse,

remand the preliminary inquiry for a period of 14 days to enable a detailed assessment to be carried out.

(3) A detailed assessment ought to be conducted at the home of the child, unless there are circumstances causing an assessment at the home not to be in the best interests of the child or to be impossible, in which case an assessment may be conducted at any residential facility.

(4) Upon consideration of the child worker's report

following a detailed assessment of the child as contemplated in this section, any decision referred to in section 75 may be made, after which the preliminary inquiry must be closed.

Failure to appear at preliminary inquiry

81. If a child and his or her parent or an appropriate adult has been warned to appear at a preliminary inquiry by a police official in terms of section 27(1) and the child, parent or appropriate adult fails to appear at the inquiry, the provisions of section 27(2), and (3) apply, with the changes required by the context, to such failure.

Failure to comply with diversion orders

82. (1) If a child who has been diverted at a preliminary inquiry fails to comply with any order relating to diversion, the inquiry magistrate may, upon being notified in writing by the person referred to in section 51(6) of such failure, issue a written notice as the court may deem fit to appear in respect of the child.

(2) When a child appears before the inquiry magistrate subsequent to a warrant of arrest or written notice issued in terms of subsection (1), the inquiry magistrate must inquire as to the reasons for the child's failure to comply with the diversion order.

(3) The inquiry magistrate may, after consideration of the views of any person present at the inquiry referred to in subsection (2), decide to -

- (a) apply the same option with altered conditions;
- (b) apply any other diversion option referred to in section 51 ; or
- (c) make an appropriate order which will assist the child and his or her family to comply with the diversion option initially applied.

(4) Despite the provisions of subsection (3), the prosecutor may decide to proceed with the prosecution, in which case the matter must be set down for plea and trial in a court.

(5) The execution of a warrant of arrest referred to in this Chapter may be suspended by the inquiry magistrate, and the police official required to execute the warrant may, instead of arresting a child, employ one of the alternatives to arrest referred to in section 11(2).

Procedure upon referral of matter to court

83. (1) If at the conclusion of a preliminary inquiry, the matter has not been diverted or transferred to a children's

court, the prosecutor must inform the inquiry magistrate of the place and time when the child must appear for plea and trial in a court.

- (2) On being so informed, the inquiry magistrate must -
 - (a) if the child is not legally represented, explain to the child and the parent or an appropriate adult the provisions of Chapter 9 relating to legal representation;
 - (b) if the child indicates an intention to apply for legal representation at State expense in terms of section 100 and is in detention, assist the child, as far as is reasonably possible, to make application for legal aid in terms of the Legal Aid Act, 1990 (Act No. 29 of 1990);
 - (c) if the child is in detention, inform the child of the place and time of the next appearance in court and warn the child's parent or an appropriate adult to attend the proceedings at that place and time; and
 - (d) if the child is not in detention,
 - (i) extend or vary any condition imposed in terms of section 25(3) or section 33; and
 - (ii) warn the child, his or her parent or an appropriate adult to appear in court at a specified place and time.

(3) The inquiry magistrate may exercise the powers conferred upon a magistrate in terms of the Children's Act, 1960 (Act No. 33 of 1960)

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

Transfer to a children's court inquiry

84. (1) If it appears during proceedings at a preliminary inquiry or a court that a child is a someone contemplated in the definition of a "child in need of care" in section 1 of the Children's Act, 1960 (Act No 33 of 1960) and that it is desirable to deal with that child in terms of Chapter IV of that Act, the inquiry magistrate or court may stop the proceedings and order that the matter be referred to the children's court referred to in section 5 of that Act.

(2) Transfer of a matter to the children's court must be considered by -

- (a) a child worker when making a recommendation in terms of section 44(7)(d);
- (b) an inquiry magistrate when acting in terms of section 75(5);
- (c) a court,

if it becomes evident that the child concerned -

- (i) having been previously assessed on more than one occasion in regard to minor offences committed to meet the child's basic need for food and warmth and the child is again alleged to have committed or proved to have committed an offence of that nature;
- (ii) is the subject of a current order of the children's court;
- (iii) is abusing dependence-producing substances; or
- (iv) does reside at his or her own 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
- (v) is a child who is a child in need of care as contemplated in the Children's Act 1960.

(3) If in a particular case transfer of a matter to the children's court is considered not to be in the best interests of a child or will not serve the interests of justice, the procedures prescribed by this Act must be considered.

(4) If a decision is made not to transfer a matter to the children's court, the reasons must be noted -

- (a) on the assessment report, in the case of a person referred to in subsection (2)(a); and
- (b) entered on the written record of the proceedings by the inquiry magistrate or court, in the case of a person referred to in subsection (2)(b) or (c).

(5) In the event of the transfer of a matter to a children's court inquiry after conviction of the child, any finding of guilt must be considered not to have been made.

CHAPTER 8 CHILD JUSTICE COURT

Designation and jurisdiction of child justice court

85. (1) A child justice court is a court at district

court level which must adjudicate on all cases referred to that court in terms of this Act, subject to the provisions of subsection (3).

(2) In deciding whether cases should be heard in a child justice court, an ordinary magistrate's court, a Regional Court or a High Court, preference must be given to referral to the child justice court, subject to the provisions of subsection (3) and sections 87 and 94.

(3) The child justice court has jurisdiction to adjudicate in respect of all offences except treason, murder and rape in accordance with section 89 of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944).

(4) The child justice court in which a child must appear, must be determined in accordance with section 90 of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), and if a Child Justice Centre has been established for a particular area, the geographical jurisdiction of the child justice court at such Child Justice Centre must be determined in accordance with section 85 of this Act.

(5) The child justice court and the presiding officer of that court must be designated by the Chief Magistrate of each magisterial district and such court must, as far as is possible, be staffed by specially selected and trained personnel.

(6) The courtroom, if practicable, should be located and designed in a way conducive to the dignity and well-being of children, the informality of the proceedings and the participation of all persons involved in the proceedings.

(7) The child justice court has the sentencing jurisdiction of a district court.

Establishment and jurisdiction of Child Justice Centres

86. (1) The Minister, in consultation with the Minister responsible for social services and the Minister responsible for prisons services, may establish centralised services for child justice to be known as Child Justice Centres which may be situated at a place other than at a magistrate's court or a police station.

- (2) The premises of a Child Justice Centre must comprise -
- (a) offices for use by members of the Namibia Police Force;
 - (b) facilities to accommodate children temporarily pending the conclusion of a preliminary inquiry;
 - (c) offices for use by child workers; and
 - (d) a child justice court.

(3) The premises of a Child Justice Centre may provide for

- (a) offices for persons who provide legal assistance to children alleged to have committed offences;
- (b) offices for persons who are able to provide diversion and prevention services;
- (c) offices for persons authorised to trace the families of children alleged to have committed offences;
- (d) a children's court in terms of the Children's Act, 1960 (Act No. 33 of 1960); and
- (e) a court of regional jurisdiction.

(4) Each Ministry headed by the Ministers referred to in subsection (1) is severally responsible for the provision of such resources and services as may be required for the efficient functioning of a Child Justice Centre contemplated in this section.

(5) The Minister may determine, by notice in the *Gazette*, the boundaries of jurisdiction of Child Justice Centres that need not correspond to the boundaries of existing magisterial districts.

(6) If a 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 the geographical jurisdiction of the Child Justice Centre, the jurisdiction of the Child Justice Centre in relation to the hearing of cases in terms of this Act takes precedence.

Proceedings in terms of this Act by a court other than a child justice court

87. (1) If a court which is not child justice court hears the case of a child accused of committing an offence, that court must apply the provisions of this Act and has the powers conferred upon a child justice court by this Act.

(2) Despite section 89 of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), a Regional Court has jurisdiction to hear the case of an accused child who is charged with -

- (a) murder or rape; and
- (b) any other offence, excluding treason, if -
 - (i) in the opinion of the Prosecutor General or a designated prosecutor the sentence is likely to

exceed the jurisdiction of the child justice court;

(ii) there are multiple charges and the Regional Court has jurisdiction in respect of one or more of them in terms of this section; or

(iii) a decision has been made in terms of section 94 that there will be a joinder of trials and the adult co-accused is to be tried in the Regional Court.

(3) If the Prosecutor General or a designated prosecutor is satisfied that circumstances referred to in subsection (2)(b)(i) or (ii) exist, the matter may, before commencement of the trial, be referred to the Regional Court for plea and trial.

(4) A district court not being a child justice court has jurisdiction in respect of matters in which a child justice court has jurisdiction if a child is a co-accused with an adult and a successful application for joinder of trials has been made in terms of section 94.

(5) If a child justice court has convicted a child and is of the view that exceptional circumstances exist which indicate that the appropriate sentence is likely to exceed the sentencing jurisdiction of the court, that court may refer the matter to the Regional Court or the High Court for sentencing.

(6) If a matter is to the Regional Court or the High Court for sentencing in terms of subsection (5), that court must sentence the child in terms of the provisions of this Act.

Child to plead on instructions of Prosecutor General

88. In the circumstances contemplated in section 119 of the Criminal Procedure Act, relating to a plea in a magistrate's court on the instructions of the Prosecutor General, a charge may only be put to a child if the child is assisted by a legal practitioner.

Parent or an appropriate adult to attend proceedings

89. (1) Any parent of a child or an appropriate adult who has been warned by an inquiry magistrate in terms of section 83(2)(c) to attend proceedings, must be present at the proceedings unless exempted under subsection (3).

(2) If the child's parent or an appropriate adult has not been warned to attend the proceedings, the court may at any time during the proceedings direct a police official to warn that person, referred to, to attend.

(3) A person referred to in subsection (1) or (2) who has been warned to attend the proceedings may apply to the court in

which the child is to appear for exemption from the obligation to attend the proceedings in question, and if the court grants such exemption it must be given in writing.

(4) A person referred to in subsection (1) or (2) who has not been exempted under subsection (3), and a person who is present at criminal proceedings and who is warned by the court to remain in attendance, must remain in attendance until excused by the court before which the proceedings are pending.

(5) A person who fails to comply with subsection (1) or (4) without a reasonable excuse, is guilty of an offence and liable upon conviction to the penalty prescribed in section 123.

Parental assistance

90. (1) A child must be assisted by a parent or an appropriate adult at criminal proceedings in terms of this Act, but that requirement may be dispensed with if all reasonable efforts to locate such person have been exhausted and any further delay would be prejudicial to the best interests of the child.

(2) A child who is not assisted by a parent or an appropriate adult and who requests assistance, may be assisted during the proceedings by an independent observer referred to in section 118(i), if available.

(3) The court may in its discretion permit a parent or an appropriate adult to present the child's case to the court.

Conduct of proceedings in court

91. (1) At the start of proceedings in a court, the presiding officer must -

- (a) inform the child of the nature of the allegations against him or her;
- (b) inform the child of his or her rights in the prescribed manner;
- (c) explain to the child the further procedures to be followed in terms of this Act and the Criminal Procedure Act; and
- (d) in the case of a child who is at least ten but not yet 14 years of age, question the child to ascertain that the child has the capacity to understand the plea proceedings in terms of section 77 of the Criminal Procedure Act.

(2) Despite section 93ter of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), a court may not summon lay assessors for the court's assistance.

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

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

(5) The court must protect an accused child from hostile cross-examination which in the opinion of the court is prejudicial to the well-being of the child or the fairness of the proceedings.

Children in detention at court

92. (1) A child may not be subjected to the wearing of leg-irons when appearing in a court, and handcuffs may only be used in court if there are exceptional circumstances warranting their use.

(2) A child held in a cell in or at the court or who is being transported to court must -

- (a) be kept separate from adults;
- (b) be kept separate from children of the opposite gender;
- (c) in the case of a female child, be under the care of an adult female officer; and
- (d) be treated in a manner and kept in conditions which take account of his or her age.

(3) The Inspector General must issue an instruction on the treatment and conditions of children whilst in detention at court.

Establishment of criminal capacity

93. (1) The criminal capacity of a child who is ten years of age or older but not yet 14 years of age must be proved by the State beyond a reasonable doubt.

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

(3) A person identified to conduct the evaluation of a child in terms of an order referred to subsection (2), must furnish the court with a written report of the evaluation within 30 days of the date of the order.

(4) The evaluation must include an assessment of the

cognitive, emotional, psychological and social development of the child.

(5) The person who conducted the evaluation may be called to attend the court proceedings and give evidence and, if called, must be remunerated by the State according to a prescribed tariff.

Separation and joinder of trials involving children and adults

94. (1) If a child and an adult are alleged to have committed an offence jointly, they must be tried separately, unless there are compelling reasons for joinder of the trials.

(2) An application for a joinder of trials must be made to the court after notice to the child, the adult and their legal representatives.

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

(4) The court to which the matter is transferred must afford the child concerned all the benefits conferred upon such child by this Act as are reasonably consistent with the provisions of the Criminal Procedure Act.

Time limits relating to the conclusion of trials

95. (1) A court must conclude all trials of accused children as speedily as possible and must ensure that remands are limited in number and in duration.

(2) In a court which is not a child justice court, trials of accused children must receive priority on the roll.

(3) If a child is remanded to a place of safety, place of detention or a prison, the court must ensure that the requirements set out in section 37 regarding remands to places of safety, place of detention or prisons are complied with.

(4) If a child remains in detention in a place of safety, place of detention or prison pending trial in a court 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 the child is charged with an offence mentioned in Item 1, 2 or 3 in Schedule 3.

Court may divert matter

96. (1) If at any time before the conclusion of the case for the prosecution it comes to the attention of a court that a child acknowledges or intends to acknowledge responsibility for an alleged offence, the court may, subject to section 50, with

the consent of the prosecutor, refer the child to any diversion option referred to in section 51 and may postpone the matter to enable the child to comply with the diversion conditions.

(2) If a court refers a child to a diversion option in terms of subsection (1), the presiding officer must forthwith notify the child worker concerned in writing of the referral in the prescribed manner.

(3) If a child has been referred to a diversion option by a court, the court must, upon receipt of a report from a child worker that the child has successfully complied with the conditions of diversion, acquit the child, which acquittal may be made in the absence of the child.

(4) If a child has been referred to a diversion option by a court and the child fails to comply with the conditions of diversion, the child worker must notify the Prosecutor General or a designated prosecutor as soon as possible of the failure.

(5) Upon receipt of a notice from a child worker in terms of subsection (4), the Prosecutor General or a designated prosecutor may -

- (a) set the matter down for trial on the roll of the court that referred the child to a diversion option; and
- (b) issue a summons in respect of the child in order to proceed with the trial.

(6) If the court acts in terms of subsection (1) and the diversion option selected is a family group conference, victim-offender mediation or other restorative justice process, the child worker must, after such conference, mediation or process, furnish the court with the written recommendations emanating from the conference, mediation or process within the time period referred to in section 67(2).

(7) Upon receipt of the written recommendations referred to in subsection (6), the court may -

- (a) confirm the recommendations by making them an order of the court;
- (b) substitute or vary the recommendations and make an appropriate order; or
- (c) reject the recommendations and request the prosecutor to proceed with the trial.

(8) If an order in terms of subsection (7)(a) or (b) is made, the provisions of subsections (2), (3), (4) and (5) apply with regard to compliance with or failure to comply with such order.

Privacy and confidentiality

97. (1) When a child appears before a court, no person may be present during the proceedings in the court other than a person -

- (a) whose presence is necessary in connection with the proceedings; or
- (b) who is authorised by the court on good cause shown.

(2) No person may publish any information which reveals or may reveal the identity of -

- (a) a child under the age of 18 years who is accused of an offence; or
- (b) a witness under the age of 18 years appearing at any proceedings referred to in this Act.

(3) Subject to the provisions of subsection (4), no prohibition under this section precludes -

- (a) access to information pertaining to a child or children governed by this Act if such access would be in the interests, safety or welfare of any such child or of children in general;
- (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 a court on such question,
- (c) the publication, in the form of a report of a professional or technical nature, of research results and statistical data pertaining to a child or children governed by this Act if such publication would be in the interests, safety or welfare of any such child or of children in general; and
- (d) the lodging of the record referred to in section 45(6) with the Directorate for Child Justice referred to in section 117.

(4) A report referred to in subsection 3(b) or (c) and a record referred to in subsection (3) (d) may not disclose -

- (a) the identity of the person charged;
- (b) the identity of the person against whom or in connection with whom the offence in question was

alleged to have been committed;

- (c) the identity of any witness at the proceedings;
- (d) the place where the offence in question was alleged to have been committed.

(5) A person who contravenes any provisions of this section is guilty of an offence and liable on conviction to the penalties mentioned in section 123.

CHAPTER 9 LEGAL REPRESENTATION

Requirements to be complied with by legal representatives

98. (1) A legal practitioner representing a child in terms of this Act must -

- (a) allow the child, as far as he or she is capable of doing so, to give independent instructions concerning the case;
- (b) explain the child's rights and responsibilities in relation to any proceedings under this Act in a manner appropriate to the age and intellectual development of the child;
- (c) promote diversion when appropriate, whilst ensuring that the child is not unduly influenced to acknowledge responsibility; and
- (d) make every effort to ensure that a trial is concluded speedily.

(2) A legal practitioner instructed to represent a child is not precluded from delegating the power to represent the child to a candidate legal practitioner under his or her supervision who has at least 12 months experience as a candidate legal practitioner.

Access to legal representation

99. (1) A child has the right to give instructions to a legal practitioner in the language of his or her choice, with the assistance of an interpreter when necessary.

(2) The child, the parent or an appropriate adult may appoint a legal practitioner of his or her own choice.

(3) If a legal practitioner is appointed in terms of subsection (2) liability for the payment of fees for legal representation rests with the parent or adult.

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

100. (1) If a child is subjected to proceedings under this Act without being represented by a legal practitioner referred to in section 99(2), legal representation must, upon conclusion of the preliminary inquiry and subject to the Legal Aid Act, 1990 (Act No. 29 of 1990), be provided at State expense, if -

- (a) the child is remanded in detention pending plea and trial in a court;
- (b) the matter is remanded for plea and trial in a court in respect of any offence, and it is likely that a sentence involving a residential requirement may be imposed; or
- (c) the child is ten years of age or more but under 14 years of age and a certificate has been issued in terms of section 6(3) in respect of the child.

(2) The prosecutor must, prior to plea and trial in a court, indicate to the court whether, in his or her opinion, the matter is a matter contemplated in subsection (1)(b), and if so, the plea may not be taken until a legal representative has been appointed.

(3) If the parent or guardian of a child who is granted legal representation at State expense under this Act would be ineligible for entitlement to legal representation at State expense due to the fact that the income of the parent or guardian exceeds the means test applied in terms of the Legal Aid Act, 1990, the costs of the legal representation afforded to the child may be recovered from the parent or guardian as a debt owing to the State.

Means of securing legal representation at State expense

101. (1) If a child requires legal representation at State expense, the police official, child worker or prosecutor to whom the child communicates the request must assist the child to make application as soon as reasonably possible for legal aid in terms of the Legal Aid Act, 1990 (Act No. 29 of 1990).

(2) If a child is remanded in detention as referred to in section 100(1)(a), the legal representative appointed to represent the child must, before the next court date, consult with the child before the child's subsequent appearance at proceedings in relation to him or her.

Child may not waive legal representation in some circumstances

102. (1) A child in need of legal representation in terms of section 99(1) may not waive the right to legal

representation.

(2) If a child referred to in subsection (1) refuses to give instructions to the legal representative, that fact must be brought to the attention of the inquiry magistrate or the court, who must then question the child to ascertain the reasons for the child's refusal and must note the reasons on the record of the proceedings.

(3) If, after questioning the child in terms of subsection (2), the inquiry magistrate or court is of the opinion that such application would be appropriate, the child may be given the opportunity to make a further application to the Director of Legal Aid for the appointment of a substitute legal representative, if such person is available.

(4) If the questioning in terms of subsection (2) reveals that the child does not wish to have a legal representative, the inquiry magistrate or court must instruct a legal representative appointed in terms of section 3 of the Legal Aid Act, 1990 (Act No. 29 of 1990), to assist the child.

(5) A person assisting a child in terms of subsection (4) must -

- (a) attend all hearings pertaining to the case;
- (b) address the court on the merits of the case;
- (c) note an appeal regarding conviction or sentence if, at the conclusion of the trial, an appeal is considered by such person to be necessary; and
- (d) have access to the affidavits and statements filed in the police docket pertaining to the case.

(6) A person assisting a child in terms of subsection (4) may -

- (a) cross-examine any State witness with the object of discrediting the evidence of the witness;
- (b) raise reasonable doubt about the admissibility of evidence led by the State; and
- (c) raise objections to the introduction of evidence by the State.

CHAPTER 10 SENTENCING

Convicted children to be sentenced in terms of this Chapter

103. Upon conviction of a child a court must impose a

sentence in accordance with the provisions of this Chapter.

Pre-sentence reports required

104. (1) Upon conviction of a child a court must request a pre-sentence report from a child worker or any other suitable person before imposing a sentence in terms of this Act.

(2) A court may dispense with a pre-sentence report if the conviction is for an offence mentioned in Schedule 1, or if requiring the report would cause an undue delay in the conclusion of the case to the prejudice of the child, but a sentence with a residential requirement may not be imposed by a court, unless a pre-sentence report has been placed before the court.

(3) A sentence with a residential requirement includes a sentence of which the residential requirement thereof is suspended.

(4) A presiding officer of a court who imposes a sentence involving detention in a residential facility, must certify on the warrant of detention that a pre-sentence report has been placed before the court before imposition of the sentence.

(5) If the certification referred to in subsection (4) does not appear on a warrant of detention issued in terms of this Act, the persons admitting a child to the residential facility in question must refer the matter back to the court.

(6) If a court sentencing a person in terms of this Act requests a pre-sentence report, that report must be completed as soon as possible but no later than one calendar month following the date upon which the report was requested.

(7) If a court imposes a sentence other than that recommended in the pre-sentence report, reasons therefor must be recorded.

Purposes of sentencing

105. 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 harm caused by the offence;
- (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 can assist the child in the process of reintegration.

Community-based sentences

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

-

- (a) any of the options referred to in section 51(3)(a), (b), (d), (e), (f) and (h);
- (b) placement under a supervision and guidance order in the prescribed manner for a period not exceeding three years;
- (c) in cases which warrant such specialised intervention, referral to counselling or therapy in conjunction with any of the options mentioned in this section for such period of time as the court deems fit;
- (d) if a child is over the age of compulsory school attendance as prescribed by the Education Act, 2001 (Act No. ?? of 2001), and is not attending formal training, compulsory attendance at a specified Child Justice Centre or place for a specified vocational or educational purpose for no more than 35 hours per week, to be completed within a maximum period of 12 months;
- (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 court, or by a child worker or by the Directorate for Child Justice for a maximum period of 250 hours and to be completed within twelve months;
- (f) any other sentence, subject to section 112, which is appropriate to the circumstances of the child and in keeping with the principles of this Act, but any time period stipulated in connection with the sentence may not exceed 12 months in duration.

(2) If a child under 14 years of age receives a sentence in terms of subsection (1)(e), due consideration must be given to the child's age and development in determining the type of community service, the number of hours that the child may be required to perform such service and the extent of the child's duties.

Restorative justice sentences

107. (1) A court may, after convicting a child of an

offence, refer the matter to a family group conference, victim-offender mediation or other restorative justice process referred to in subsection (2).

(2) The provisions of -

- (a) sections 59 to 68 apply if a court refers a matter to a family group conference; and
- (b) section 69 apply if a court refers a matter to a victim-offender mediation or other restorative justice process.

(3) Upon receipt of the written recommendations from a family group conference in terms of section 67 or a victim-offender mediation or other restorative justice process in terms of section 69 by a court, the court may -

- (a) confirm the recommendations by making them an order of the court; or
- (b) substitute or vary any recommendations made and make an appropriate order.

(4) If the officer presiding in a court passing sentence in terms of this Act does not agree with the terms of the plan made at a family group conference, victim-offender mediation or other restorative justice process referred to in subsection (1) and imposes a sentence which differs in a material respect from that agreed to or decided upon, the reasons for deviating from the plan must be noted on the record of the proceedings.

(5) If a child has been sentenced in accordance with an order arising from a family group conference, victim-offender mediation or other restorative justice process, and fails to comply with that order, the child worker must notify the court issuing the order of the failure as soon as possible, upon which notification the court must issue a summons in respect of the child to appear before the court in order to impose an appropriate sentence.

Sentences with a compulsory residential requirement

108 (1) A sentence involving a compulsory residential requirement may not be imposed upon a child unless the presiding officer is satisfied that the sentence is justified by -

- (a) the seriousness of the offence, the protection of the community and the severity of the impact of the offence upon any victim; or
- (b) the previous failure of the child to respond to non-residential alternatives.

(2) A presiding officer who imposes on a child a sentence

involving a compulsory residential requirement must -

- (a) note the reasons for the sentence on the record; and
- (b) explain the reasons to the child.

(3) A sentence involving a compulsory residential requirement includes referral to a -

- (a) programme with a periodic residence requirement if 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;
- (b) residential facility, subject to the provisions of section 109; and
- (c) prison, subject to the provisions of section 110.

Referral to a residential facility

109. (1) A sentence to a residential facility may be imposed for a period not less than six months and, subject to subsection (2), a period not exceeding two years.

(2) A sentence referred to in subsection (1) may be imposed for longer than two years in respect of a child who is under 14 years of age, if the child, were it not for section 110(1)(a), would otherwise have been sentenced to imprisonment on account of the seriousness of the offence, but a child may not be required to reside in a residential facility after attaining the age of 18 years.

(3) Any child who has received a sentence as referred to in subsection (1) may not be required to reside in a residential facility beyond expiry of the sentence, which sentence may not be extended by administrative action.

(4) Upon completion of a sentence referred to 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 or person may request permission in writing in the prescribed manner from the head of the residential facility to continue to reside at the residential facility for the purposes of completing his or her education, and such permission may be granted if accommodation is available.

Referral to a prison

110. (1) A sentence of imprisonment may not be imposed in respect of a child, unless -

- (a) the child was 14 years of age or above at the time of commission of the offence; and

(b) substantial and compelling reasons exist for imposing a sentence of imprisonment because the child has been convicted of an offence which is serious or violent or because the child has previously failed to respond to alternative sentences, including available sentences with a residential element other than imprisonment.

(2) No sentence of imprisonment may be imposed on a child in respect of an offence mentioned in Schedule 1.

(3) No sentence of imprisonment may be imposed on a child in terms of this Act as an alternative to any other sentence specified in this Act.

(4) If a child fails to comply with any condition imposed in relation to a sentence, the child may be brought before the court which imposed the sentence for reconsideration of an appropriate sentence, which may, subject to subsections (1) and (2), include a sentence of imprisonment.

(5) If a term of imprisonment is imposed on a child as a sentence -

(a) the term of imprisonment must be announced in open court; and

(b) the coming into effect of the term of imprisonment must be antedated by the number of days which the child, before the passing of sentence, has spent in prison in connection with the charge to which the sentence relates.

Postponement or suspension

111. (1) The passing of any sentence may be postponed for a period not less than three months and not more than three years, either without conditions or with any one or more of the conditions referred to in subsection (3).

(2) The whole or any part of any sentence may be suspended for a period not exceeding five years, either without conditions or with any one or more of the conditions referred to in subsection (3).

(3) Postponement or suspension of a sentence in terms of subsection (1) or (2) may be made subject to any condition relating to -

(a) restitution, compensation or symbolic restitution;

(b) 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;
 - (f) attendance at a specified time and place for victim-offender mediation, a family group conference or other restorative process;
 - (g) placement under the supervision of a child worker;
 - (h) periodical appearances at specified times by the child before the court for receipt and consideration of progress reports in respect of the child from a designated person;
 - (i) referral to any diversion option referred to in section 51(3)(d), (e), (f), (g), (h), (i), (j) or (k);
 - (j) any other condition appropriate to the circumstances of the child and in keeping with the principles of this Act, with the aim to promote the child's reintegration into society.
- (4) If a court has postponed the passing of sentence in terms of subsection (1) -
- (a) the court may request the child worker concerned for regular progress reports indicating the child's compliance with conditions applicable to the postponement; and
 - (b) the court, after expiry of the period of the postponement, is satisfied that the conditions imposed have been complied with, the conviction is considered rescinded and must be expunged from any record.

Fines

112. (1) No fine payable to the State may be imposed by a court as a sentence in respect of a child.

(2) If a penalty involving a fine and imprisonment in the alternative is prescribed for an offence, the presiding officer may impose -

- (a) symbolic restitution to a specified person, persons, group or institution;
- (b) payment of compensation with a maximum of N\$500 to a specified person, persons, group or institution if the child or his or her family can afford payment of that amount;
- (c) if there is no identifiable person or persons to whom

restitution or compensation can be made, an obligation on the child to provide some service or benefit or payment of compensation to a community organisation, charity or welfare organisation identified by the child or by the court; or

- (d) any other competent sentence other than imprisonment.

Prohibition on certain forms of punishment

113. (1) A sentence of life imprisonment must not be imposed on a child who, at the time of commission of the offence, was under the age of 18 years.

(2) A child who has been sentenced to attend a residential facility must not be detained in a prison or in police custody pending designation of the place where the sentence must be served.

CHAPTER 11

AUTOMATIC REVIEW OF CERTAIN CONVICTIONS AND SENTENCES

Automatic review in certain cases decided by a court

114. (1) A sentence with a residential requirement imposed in terms of section 108 is subject to review in terms of section 302 of the Criminal Procedure Act.

(2) Any sentence involving a residential requirement which is wholly or partially suspended, is subject to review in terms of subsection (1).

(3) Proceedings which fall within the ambit of this section for the purposes of review must be reviewed whether or not the accused was legally represented at any stage of the proceedings.

Suspension of execution of sentence

115. (1) On suspension of a sentence pending an appeal or review, a child is to be released on the conditions referred to in section 33, and in the case of a sentence without a residential requirement, the operation of the sentence is to be suspended pending an appeal or review.

(2) If execution of a sentence is suspended in terms of subsection (1), the suspension may be made, if appropriate subject to the condition that the convicted child -

- (a) must report at a specified place and time; and
- (b) upon service on him or her, in the manner prescribed by the rules of court, of a written order upon him or her in order that effect may be given to any sentence

in respect of the proceedings in question.

**CHAPTER 12
RECORDS OF CONVICTION AND SENTENCE**

Expungement of records

116. (1) The presiding officer in a court must, at the time of sentencing a child in respect of an offence and after consideration of -

- (a) the nature and circumstances of the offence; and
- (b) the child's personal circumstances or any other relevant factor,

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.

(2) If a presiding officer decides that a record referred to in subsection (1) may not be expunged, the decision is subject to review or appeal upon application by or on behalf of the child.

(3) If an order has been made in terms of subsection (1) that the record of the conviction and sentence of a child may be expunged, the officer presiding in the court must set a date upon which the record of conviction and sentence must be expunged, which date may not be less than three months and may not exceed five years from the date of the imposition of the sentence.

(4) Where 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.

(5) The order contemplated in subsection (1) and the condition referred to in subsection (4) must be noted on the record of the conviction and sentence of the child and must be submitted to the Namibian 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: Provided that no other conviction of a similar or more serious offence has been recorded during the period of time referred to in subsection (4).

(6) Whenever a court makes a decision regarding the expungement of the record of a conviction and sentence of a child as contemplated in this section, the court must explain such decision and its reasons, as well as any conditions

relating to expungement of such record, to the child.

**CHAPTER 13
MONITORING OF CHILD JUSTICE**

Establishment and regulation of Child Justice Committees at district level

117. (1) The inquiry magistrate appointed in respect of a magisterial district in terms of this Act must convene meetings of a Child Justice Committee in that district to meet not less than four times annually.

(2) The members of the Child Justice Committee established under subsection (1) who are required to attend the meetings of that committee are -

- (a) an inquiry magistrate;
- (b) an officer presiding in a child justice court;
- (c) the prosecutor or prosecutors of the district having responsibility for child justice;
- (d) the child worker or child workers of the district having responsibility for child justice or a child worker who represents that office;
- (e) a representative from the Namibian Police Force; and
- (f) a representative from the Prison Service established under section 2 of the Prisons Act, 1998 (Act No. 17 of 1998);

(3) The following persons, organisations or institutions may attend the meetings of the Child Justice Committee -

- (a) those providing diversion services;
- (b) those providing assistance in non-custodial placement of children who are awaiting trial;
- (c) those providing assistance in the prevention of juvenile crime or providing services to children who are at risk;
- (d) those involved in the management or monitoring of places of safety, places of detention, or other State institutions relevant to the administration of child justice;
- (e) representatives from organisations providing services aimed at the improvement of the community;

- (f) representatives from the office of the Director of Legal Aid, or persons concerned with the legal representation of children in terms of this Act;
- (g) representatives of a legal profession's controlling body; and
- (h) any other person who, in the opinion of the Committee, can play a role in furthering or supporting child justice development, including judges of the High Court and researchers.

Duties and role of Child Justice Committees

118. The Child Justice Committee must -

- (a) monitor the extent to which police officials use alternatives to arrest;
- (b) monitor the extent to which procedures relating to release from police custody before assessment are used;
- (c) receive and consider information from the police concerning the extent to which parents or appropriate adults were successfully notified by the police prior to assessment;
- (d) monitor the situation of children in police custody pending the conclusion of the preliminary inquiry, including the conditions under which children are held in police custody, and the length of time that children spend in police custody before being brought for assessment;
- (e) receive and consider the reports from child workers in relation to children under the age of ten years;
- (f) receive and consider reports from child workers on the holding of family group conferences held as a diversion option;
- (g) receive and consider reports from child workers on the extent to which recommendations for diversion have been made and the extent to which they were accepted by a court;
- (h) support the development of diversion options appropriate to the district, and ensure the continued development of diversion and alternative sentencing opportunities;

- (i) identify persons, representatives from communities or organisations who are not in the full-time employ of the State, who can act as independent observers during proceedings in terms of this Act and maintain a roster of such persons;
- (j) receive and consider reports from child justice magistrates on the extent to which children appearing in a court are legally represented;
- (k) receive and consider statistics collected in respect of child offenders that are applicable to the particular magisterial district and facilitate the collection of such statistics;
- (l) promote local public awareness regarding the application of this Act and issues involving children in conflict with the law in any manner that is feasible, including the issuing of media statements;
- (m) investigate and promote measures to reduce the involvement of children in criminal activities; and
- (n) identify persons and places suitable for the temporary placement of children in conflict with the law as alternatives to detention.

Powers of Child justice Committees

119. (1) A Child Justice Committee may receive complaints concerning matters relating to this Act from any person or organisation involved in or affected by the administration of child justice within its area of jurisdiction, and must attempt to resolve such complaints.

(2) A Child Justice Committee may, when appropriate, refer a matter, complaint or question to the Directorate for Child Justice referred to in section 121 for assistance.

(3) Any member of a Child Justice Committee may notify the Judge President of the High Court that the proceedings in which a sentence was imposed by a court were not in accordance with justice as contemplated in section 304(4) of the Criminal Procedure Act.

Remuneration

120. No remuneration is payable for attending meetings or for the performance of services for the Child Justice Committee, except a person acting on behalf of or at the request of the committee as an independent observer who may be entitled to payment of witness fees as referred to in section 191(1) and (3) of the Criminal Procedure Act.

Establishment of the Directorate for Child Justice

121. (1) A Directorate for Child Justice must be established.

(2) The Minister responsible for child justice must, subject to the Public Service Act, 1995 (Act No. 13 of 1995), appoint to the Directorate for Child Justice -

- (a) a person to be the Director for Child Justice; and
- (b) such other staff members as may be required to effectively carry out the duties imposed upon this Directorate.

(3) The functions of the Directorate, must include -

- (a) monitoring and assessing the policies and practices of the Ministry responsible for child justice regarding the implementation of this Act;
- (b) inquiring into, and reporting on, any matter, including any law or enactment or any procedure regarding child justice;
- (c) keeping under review and making recommendations on the operation of this Act;
- (d) assisting with the implementation of training of personnel charged with the administration of child justice and police officials concerned with the application of the provisions of this Act;
- (e) increasing public awareness of matters relating to the administration of child justice;
- (f) encouraging the development within the Ministry responsible for child justice policies and services designed to ensure the effective application of this Act;
- (g) on own initiative or at the request of the Minister responsible for child justice, advising the Minister on any matter relating to the administration of this Act; and
- (h) contributing to the annual report referred to in subsection (4).

(4) The Directorate for Child Justice must produce an annual report on the operation of this Act, including qualitative and statistical information necessary for reviewing the progress made in implementation of the child justice system.

CHAPTER 14
GENERAL PROVISIONS

Liability for patrimonial loss arising from performance of community service

122. (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 Chapter 10, that loss may, subject to subsection (3), be recovered from the State.

(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.

(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.

(5) If any person as a result of the performance of community service in terms of Chapter 6 or Chapter 9 has suffered patrimonial loss which cannot be recovered from the State in terms of subsection (1), the Permanent Secretary: Ministry responsible for child justice may, with the concurrence of the Treasury, as an act of grace pay such amount as he or she may deem reasonable to that person.

Offences and penalties

123. (1) Any person who -

- (a) hinders an authorised person in the performance of his or her functions or the carrying out of his or her duties under this Act, or hinders the execution of any of the processes established under this Act;
- (b) fails to -
 - (i) attend an assessment in terms of section 42(5);
 - (ii) comply with a warning to attend proceedings as referred to in section 89(5);
- (c) publishes information or reveals the identity of persons in contravention of section 97;

is guilty of an offence.

(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 adult who incites, persuades, induces or encourages a child to commit an offence is, in addition to any other offence for which such adult may be charged, guilty of an offence and is liable upon conviction to a fine or to imprisonment not exceeding two years.

Repeal

124. Sections 50(4) and (5), 71, 72(1)(b), 72(2)(b), 74, 153(4), 254, 290 and 291 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), are hereby repealed.

Regulations

125. (1) The Minister responsible for juvenile justice, in consultation with the Ministers of Health and Social Services, Prisons and Correctional Services and Home Affairs, may make regulations on -

- (a) any matter which is required or permitted in terms of this Act to be prescribed;
- (b) the monitoring of this Act and the establishment of the Directorate for Child Justice;
- (c) any other matter which may be necessary for the application of this Act; and
- (d) the establishment of Child Justice Centres as referred to in section 86.

(2) The Minister responsible for child justice may from time to time adjust any of the amounts prescribed in Schedules 1, 2 and 3 by notice in the *Gazette*.

Short title and commencement

122. (1) This Act is called the Child Justice Act, 2002 and comes into operation on a date to be fixed by the Minister responsible for child justice by notice in the *Gazette*.

(2) Different dates may be fixed under subsection (1) in respect of different provisions of this Act or in respect of different magisterial districts.

Schedule 1

(Sections 11(5), 23, 24, 29(1), 85(2), 92(2))

1. Assault where grievous bodily harm has not been inflicted.
2. Malicious injury to property where the damage does not

exceed N\$500.

3. Trespass.
4. Any offence under any law relating to the illicit possession of dependence producing drugs where the quantity involved does not exceed N\$500 in value.
5. Theft, where the value of the property involved does not exceed N\$500.
6. Any statutory offence where the maximum penalty determined by that statute is a fine of less than N\$1 500 or three months imprisonment.
7. Conspiracy, incitement or attempt to commit any offence referred to in this Schedule.

Schedule 2

(Sections 24(2), 29(3))

1. Public violence.
2. Culpable homicide.
3. Assault, including assault involving the infliction of grievous bodily harm.
4. Arson.
5. Any offence referred to in section 1 of 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 N\$20 000.
7. Robbery, other than robbery with aggravating circumstances, if the amount involved in the offence does not exceed N\$20 000.
8. Theft, where the amount involved does not exceed N\$20 000.
9. Any offence under any law relating to the illicit possession of dependence producing drugs.
10. Forgery, uttering or fraud, where the amount concerned does not exceed N\$20 000.
11. Any conspiracy, incitement or attempt to commit any offence referred to in this Schedule.
12. Any statutory offence where the penalty concerned does not exceed N\$20 000.

Schedule 3

(Sections 28, 31(m), 35(5), 36(4), 81(4), 115)

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 child under the age of 16 years.
6. Any offence referred to in section 13(f) of the Drugs and Drugs Trafficking Act, 1992 (Act No. 140 of 1992) if it is alleged that -
 - (a) the value of the dependence producing substance in question is more than N\$50 000; or
 - (b) the value of the dependence producing substance in question is more than N\$10 000 and that 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 an automatic or semi-automatic firearm, explosives or armament.
8. Any offence relating to exchange control, corruption, extortion, fraud, forgery, uttering or theft-
 - (a) involving amounts of more than N\$50 000; or
 - (b) involving amounts of more than N\$10 000, 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 Items 1, 2 or 3 of the Schedule.