

H.B. 11, 2021.]

CHILD JUSTICE BILL, 2021

EXPLANATORY MEMORANDUM

This Bill will establish a child justice system for children in conflict with the law in accordance with the values and principles underpinning the Constitution and the international obligations of Zimbabwe.

The main clauses of the Bill are explained below:

Part I

Clause 1 sets out the short title and date of commencement.

Clause 2 provides the definition of terms used in the Bill.

Clause 3 provides for the application of the Act with regards to a child in Zimbabwe or a person who was below the age of 18 at the time of commission of an offence.

Clause 4 refers to the application of matters of procedural law provided in the Criminal Procedure and Evidence Act.

Clause 5 outlines the objects of the Act and *Clause 6* the principles of child justice that must be taken into account in application of the Act such as among others, that a child must not be treated more severely than an adult would have been treated in the same circumstances.

In terms of *Clause 7* child protection officers and diversion officers are appointed as officers of the child justice court.

Part II

Clauses 8, 9, 10 and 11 set out the manner in which police officers, child protection or diversion officer, and the courts may estimate the age of a child when there is doubt about the age of a person alleged to have committed an offence.

Clause 12 will provide that a child under the age of 12 may not be arrested and must be dealt with in accordance with the processes laid out in that clause which include handing the child over to his or her parents.

Part III

Clauses 13, 14 and 15 provide for the manner in which the attendance of a child at court is secured, including the arrest of a child.

Clause 16 provides for duties that a police officer has upon arrest of a child, these include informing the child of his or her rights upon arrest and explaining the nature of the allegation against the child.

In *Clause 18* a duty has been placed on a police officer, child protection or diversion officer to notify the child's parent or guardian of the arrest and the whereabouts of the child.

Clause 19 allows a police officer to issue an informal or a formal caution instead of institution criminal proceedings where the child has committed minor offences which would attract a prison sentence of not more than three months.

Clause 20 provides that pre-trial procedures such as an identification parade must only be carried out in the presence of a legal practitioner representing the child or his or her parent or guardian. The taking of fingerprints and other identifying material of child may only be done with the approval of magistrate or judge of the High court in terms of *Clause 21*.

Part IV

Clauses 22, 23 provide for the detention of a child in police custody prior to the child's first appearance in court as well as the duty of the Police to keep a register of every child in such detention.

Clause 24 provides for the procedure that must take place before a child's first appearance in court.

Clause 25 outlines the process to be followed upon the detention of a child after the child's first appearance in court due to the fact that the child may not be released into his or her parents' custody or any other place of safety or be released on bail.

Clause 26 provides for the principles that should govern the detention of children, in that no child should be further detained if a trial is not concluded within thirty days of plea.

Clauses 27, 28 and 29 provide for the duty of the police officer upon release of a child from detention; the power of the Prosecutor General to direct the release of a child from detention in police custody on special bail before the child makes a first appearance in court; and the release of a child by the court into the custody of his or her parent or guardian.

Clause 30 provides for conditions that may be imposed on the release of a child from detention.

Clause 31 provides that when a child is not in custody at the time of first appearing at court; the magistrate or judge may warn a child to appear in court when the matter is remanded for assessment.

Clause 32 will allow the court to release a child on own recognisances and *Clause 33* provides for the release of a child on bail.

Part V

Part V deals with the assessment of a child in conflict with the law.

Clause 34 provides for the purpose of assessment.

Clause 35 provides that assessment is to be conducted by a diversion officer or a child protection officer who must notify the child and parents or guardians of the assessment.

Clauses 36, 37, 38 and 39 provide for the time and place of assessment and the powers and duties of diversion officers and child protection officers, and procedure of assessment respectively. All assessments are to be conducted in a confidential manner and any breach of confidentiality attracts a criminal sanction in terms of *Clause 40*.

Part VI

This part deals with diversion and restorative justice.

Clause 41 outlines the purposes of diversion and the general principles of diversion options. The diversion committee considers all matters referred to it by diversion officer and determine whether a matter is suitable for diversion having due regard to several factors including the personal circumstances of the child, and the nature of the crime.

Clause 42 provides for the specific options of diversion.

Clause 43 provides for referral of matters to the diversion committee, and *Clause 44* provides for the Diversion Register.

Clause 45 gives power to the Prosecutor-General to divert a child alleged to have committed a Third Schedule offence if there are exceptional circumstances.

In *Clause 46* a child who fails to comply with a diversion order may be required to appear in court, and the court may enquire into the reasons for such failure.

Part VIII

In this part family group conferences are provided for, where a child who admits having committed an offence is brought together with a victim of the offence, the child's family and community, and persons to provide support to the victim to consider or deal with the offence in a way benefiting all who are concerned.

Clause 48 provides for victim offender mediation and other restorative justice processes as means of rehabilitation of a child offender.

Clauses 49 to 55 provide for who may attend a family group conference, the form of a family group conference plan and the report to be made by the convener of the conference.

Clause 56 provides that if a child fails to comply with a family group conference plan a detailed report must be submitted to a prosecutor having jurisdiction of the matter.

Part VIII

Clause 57 provides that a child has the right to legal representation and

Clause 59 provides that where a child cannot afford legal representation one may be appointed at the state's expense.

Part IX

Clause 61 designates a magistrates and High Court as a court having jurisdiction over child justice matters.

Clause 63 mandates parents, guardians or custodians of a child to attend proceedings of a child justice court.

Clause 65 provides that handcuffs may not be used on a child in court unless in exceptional circumstances.

Clause 66 provides for the separation of trials between child offenders and adults and only upon application can the trials be joined.

In *Clause 67* a court hearing a matter of accused children must conclude all trials as speedily as possible. *Clause 69* provides for information dealing with a child in terms of any proceedings in terms of the Act to be kept private and confidential.

Part X

In this Part sentencing of a child convicted of an offence is provided for.

Clause 73 provides that a pre-sentence report from a child protection officer or social worker must be considered before sentencing,

Clauses 74 and 75 provide for community based sentences and sentences that deprive the child of his or her liberty.

Clause 77 provides that Imprisonment may be used but only as a last resort and for the shortest period of time.

In *Clause 79* a court imposing a fine upon conviction must consider among other factors the ability of the child or his or her parents to pay the fine.

In *Clause 80* it is prohibited for a court to impose a prescribed mandatory sentence in terms of any Act but rather sentence the child in accordance with the principles of child justice taking into account the circumstances of the case. Records of a child's conviction maybe expunged in terms of *Clause 83*.

Part XI

This part provides for the monitoring of the child justice system through the establishment of Child Justice Committees at National, Provincial and District level.

Clause 89 provides for the office of the National Coordinator of Child Justice.

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In this Part the general provisions of the Bill are set out.

This part also sets out the recovery patrimonial loss from the State for damages caused by a child in the performance of community service.

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CHILD JUSTICE BILL, 2021

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FIRST SCHEDULE: Class 1 Offences.

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THIRD SCHEDULE: Class 3 Offences.

BILL

To establish a distinct criminal justice system for children who are in conflict with the law; to protect the rights of children entrenched in the Constitution and in international and regional instruments; to set out
5 principles relating to the best interest of children; to delineate the powers and responsibilities of members of the Zimbabwean Republic Police and of child protection officers in relation to children; to provide for the detention of children and their release from detention; to entrench the principles of rehabilitation and restorative justice as an integral part
10 of the child justice system; to incorporate the diversion of cases from formal court procedures; to establish procedures for the screening of children to create special rules for a child justice court; to provide for legal representation for children; to extend the sentencing options available for children; to establish review procedures; to establish
15 monitoring mechanisms to ensure effective operation of this Act through child justice committees at national, provincial and district level; to amend the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] with regards to age of criminal responsibility of a child; and to provide for matters incidental thereto.

20 ENACTED by the Parliament and the President of Zimbabwe.

H.B. 11, 2021.]

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PART I

PRELIMINARY

1 Short title and date of commencement

- (1) This Act may be cited as the Child Justice Act [*Chapter 7:21*].
- (2) This Act comes into operation on a date to be fixed by the Minister by notice in the *Gazette*. 5
- (3) Different dates may be fixed under subsection (2) in respect of different provisions of this Act.

2 Interpretation

- (1) In this Act, unless the context otherwise indicates— 10
- “assessment” means the evaluation undertaken by a child protection officer or diversion officer in terms of Part V;
- “appropriate adult” means any adult person, other than a parent, custodian or a guardian, who has taken responsibility for meeting the daily needs of a child; 15
- “child” means any person under the age of eighteen years.
- “child with disabilities” includes a child who has physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others; 20
- “community service” means compulsory work without payment, for a community organisation or other compulsory work of value to the community, performed by a child for purposes of rehabilitation;
- “child justice court” means a court established in terms of section 61 (“designation and jurisdiction of child justice court”) or any other court acting in terms of the provisions of this Act; 25
- “child protection officer” means a person appointed as a child protection officer in terms of section 46 of the Children’s Act [*Chapter 5:06*];
- “designated prosecutor” means a public prosecutor designated by the Prosecutor-General to perform functions provided for in this Act; 30
- “deprivation of liberty” in relation to a child means the confinement of a child by order of any judicial, or administrative authority in a lock-up, police cell, correctional facility or other public or private custodial institution which that child is not permitted to leave at will;
- “diversion” means the referral of cases of children alleged to have committed offences away from formal court procedures with or without conditions; 35
- “diversion option” means any of the diversion options referred to in section 42;
- “diversion officer” means a person appointed by the Minister responsible for Justice in terms of section 7(4), with the responsibility of ensuring that diversion is implemented effectively; 40
- “family group conference” means a gathering convened as a diversion or sentencing option to devise a restorative justice response to the offending behaviour of the child;
- “Legal Aid Directorate” means the Legal Aid Directorate established in terms of the Legal Aid Act [*Chapter 7:16*]; 45

- “legal aid” means legal aid provided in terms of the Legal Aid Act [*Chapter 7:16*];
- “legal practitioner” means a person registered in terms of the Legal Practitioners Act [*Chapter 27:07*];
- 5 “medical practitioner” means a person who is registered as such under the Health Professions Act [*Chapter 27:19*];
- “Minister” means the Minister responsible for Justice;
- “ordinary court” means the magistrate’s court, or High Court that has, due to the provisions of this Act, jurisdiction in respect of an offence alleged to
- 10 have been committed by a child;
- “parent”, means the biological father, mother, or an adopter of a child; and includes a step parent for the purposes of duty of care of the child;
- “place of safety” means a facility referred to in the Children’s Act [*Chapter 5:06*];
- 15 “police officer” means a member of the Zimbabwe Police Force;
- “police cell or lock-up” means any place which is used for the reception, detention or confinement of a person who is in custody of the police;
- “prescribed” means prescribed by regulation under this Act;
- “Prosecutor-General” means the person appointed as Prosecutor-General in
- 20 terms of section 259 of the Constitution of Zimbabwe;
- “remand home” means a remand home established in terms of section 28 of the Children’s Act [*Chapter 5:06*] for the reception and detention of children awaiting trial, sentence or removal to a certified institution or training institution;
- 25 “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;
- “social worker” means any person who has been registered as a social worker in terms of the Social Workers Act [*Chapter 27:21*];
- 30 “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;
- “training institute and institution” means a training institute and institution established under section 209 of the Children’s Act [*Chapter 5:06*].
- 35 (2) Wherever notice is required to be given by a police officer, a diversion officer, a child protection officer, the Prosecutor General or a prosecutor for the purposes of section 13, 14, 16, 18, 27, 35, 37, 48, 51, 56 or 68, such notice shall be—
- (a) by hand delivery by the notifying person to the person notified or to any responsible person to the place of residence, employment or business
- 40 of the notified person; if known, and the service of such notice shall be evidenced by the signature of the notified person or the responsible person on such notice:
- Provided that if for any reason the notified person refuses to sign the notice, the notifying person shall as soon as possible depose an
- 45 affidavit to that effect and file it on record at the police station, Ministry or the National Prosecuting Authority as the case may be;

- (b) by delivery through a commercial courier service to the person notified or to any responsible person to the place of residence, employment or business of the notified person if known, and service of such notice shall be evidenced by the return of the courier to that effect;
- (c) by electronic mail to the notified person whose electronic mail address is known to the notifying person, and service shall be evidenced by a hardcopy of the electronic mail message whereon it is indicated that delivery has been effected. 5

3 Application of Act

(1) This Act applies to a child in Zimbabwe irrespective of nationality, country of origin or immigration status— 10

- (a) who—
 - (i) is alleged to have committed an offence; and
 - (ii) was under the age of 18 years at the time of the alleged commission of the offence; 15
- (b) in relation to the procedures referred to in sections 14 (“Arrest of child”) (3), and 41, was above the age of 12 years at the time of the commission of the offence.

(2) This Act continues to apply if a child, before the conclusion of proceedings instituted against him or her in terms of this Act, reaches the age of 18 years. 20

4 Application of Act in relation to the Criminal Procedure and Evidence Act

(1) If this Act does not provide for any matter or procedure for which the Criminal Procedure and Evidence Act [*Chapter 9:07*] provides, the provisions of that Act shall apply with such changes as may be required to conform to the principles set forth in section 5. 25

(2) To the extent that this Act is inconsistent with the Criminal Procedure and Evidence Act, this Act shall prevail.

5 Principles of child justice

In the application of this Act, the following principles must be taken into account— 30

- (a) all consequences arising from the commission of an offence by a child should be proportionate to the circumstances of the child, the nature of the offence and the interests of society;
- (b) child offenders must be dealt with on a basis that is different from adults;
- (c) every child should, as far as possible, be given an opportunity to be heard and for their views as far as possible and expedient to be taken in any proceedings, particularly the informal and inquisitorial proceedings in terms of this Act, where decisions affecting him or her might be taken; 35
- (d) every child should be spoken to and be allowed to communicate in his or her language of choice, through an interpreter, if necessary; 40
- (e) a child should be addressed and dealt with in a manner appropriate to his or her age, maturity and cultural background and the special needs of children with disabilities must be properly provided for;
- (f) all procedures in terms of this Act should be conducted and completed without unreasonable delay; 45

- (g) parents, custodians, guardians and appropriate adults should be able to assist children in proceedings in terms of this Act and, wherever possible, participate in decisions affecting them;
- 5 (h) a child lacking in family support or educational or employment opportunities must have equal access to available services and every effort should be made to ensure that children receive similar treatment when having committed similar offences;
- 10 (i) adherence to the rights and obligations of children contained in international and regional instruments, with particular reference to the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child;
- (j) any action taken in relation to a child who is alleged as, accused of, or recognised as having committed a criminal offence is to be directed towards the eventual reintegration of the child;
- 15 (k) wherever possible and appropriate, the child must be allowed to remain in the care of his or her family;
- (l) diversion options as provided for in this Act that will channel the child away from formal criminal proceedings are, if appropriate and possible, to be used at every stage in the process of dealing with a child in relation to an offence committed or alleged to have been committed by the child;
- 20 (m) a child may not be deprived of liberty for an offence, before or after the child is convicted of having committed that offence except where detention is necessary as a last resort and then only for the shortest appropriate period of time.

25 6 Objects of Act

- (1) The objects of this Act are—
 - (a) to protect the rights of children, as contemplated in the Constitution and in international law to which Zimbabwe is subject;
 - 30 (b) to ensure that the best interests of the child are a paramount consideration in all actions concerning that child;
 - (c) to implement the child justice system, that is to say to provide a legal framework for dealing with children who are alleged to have committed an offence;
 - 35 (d) to ensure that authorities and courts dealing with children alleged to have committed offences deal with children according to the principles set forth in section 5;
 - (e) to provide for the special treatment of children in a child justice system designed to break the cycle of crime, which will contribute to safer communities, and encourage these children to become law-abiding and productive adults;
 - 40 (f) to recognise the importance of participation by families and communities in—
 - (i) minimising the incidence of children who commit offences;
 - 45 (ii) disciplining and managing in a humane manner the behaviour of children who commit offences; and
 - (iii) providing services designed to rehabilitate and reintegrate back into society children who commit offences;

- (g) promote co-operation between government ministries and other institutions in implementing an effective child justice system;
- (h) ensure that reactions to offences committed by children uphold the principle of proportionality of the response, bearing in mind children's youth and immaturity and their capacity for reintegration into society; 5
- (i) in recognition of the fact that different Ministries, departments, institutions, non-governmental organisations and communities are involved in the delivery of services provided for in this Act, to ensure cooperation among stakeholders and implementers in fulfilling the objects of this Act.

7 Appointment of child protection officers and diversion officers 10

(1) The Ministry responsible for Social Welfare must assign child protection officers to be attached to the child justice courts and to perform the duties imposed upon child protection officers in terms of this Act.

(2) A child protection officer as contemplated in the Children's Act [*Chapter 5: 06*] is an officer of the child justice court, the High Court, and the magistrate's court. 15

(3) The Ministry responsible for Social Welfare must submit to the National Child Justice Committee annually a list of appointed or designated child protection officers and the magisterial district for which they have been appointed or designated.

(4) The Minister responsible for Justice may by notice in the *Gazette* designate a registered social worker as a diversion officer or any other relevant professional as a diversion officer for the purposes of performing the functions set out in this Act (in this subsection relevant professional means any person having appropriate qualifications and experience in dealing with children in conflict with the law). 20

PART II

AGE DETERMINATION AND ASSESSMENT 25

8 Duties of police officer in relation to age and estimation of age

If a police officer has doubt about the age of a child who is alleged to have committed an offence, but has reason to believe that the person is a child below 12 years of age—

- (a) the police officer must make every reasonable effort to obtain confirmation of the child's age— 30
 - (i) by obtaining access to the child's birth certificate; or
 - (ii) by questioning the parents or guardians of the child as to the child's true age; or
 - (iii) by consulting other documentation which can support an estimation as to the child's age; or 35
 - (iv) by any other means capable of determining the child's age with reasonable accuracy;
- (b) the police officer cannot establish the child's age through one of the means specified in subsection (a), that police officer must cause the child to appear at assessment before— 40
 - (i) a diversion officer or a child protection officer; or
 - (ii) a child justice court as soon as is reasonably possible, and in any event not later than seven (7) days for an age determination to be made. 45

9 Age estimation by child protection officer or diversion officer

(1) If the age of the child at the time of the commission of the alleged offence is uncertain, a diversion officer or a child protection officer acting in terms of section 8(b)(i), must make an estimation of the child's age and must complete the prescribed report for submission to the appropriate diversion committee.

(2) In making the estimation, the diversion officer or child protection officer must consider any available information, including the following—

- (a) statements made by a parent, an appropriate adult, guardian or any other person, including a religious or community leader, likely to have direct knowledge of the age of the child;
- (b) a statement made by the child concerned;
- (c) a school registration form, school report, other document of a similar nature, or a baptismal or other similar religious certificate;
- (d) an estimation of age by a medical practitioner;
- (e) a previous estimation of age recorded by a Diversion Committee or a prosecutor; or
- (f) a previous determination of age by a magistrate.

(3) The diversion officer or child protection officer must submit the age estimation on the prescribed form, together with any relevant documentation, to the Diversion Committee, the prosecutor or the magistrate, before the child's appearance at a child justice court.

(4) Should evidence to the contrary emerge at any stage before sentence, the estimation of age by a diversion officer or child protection officer in terms of this section may be altered and a different estimation of age may be recorded.

(5) Where the diversion officer or child protection officer estimates that the child's age is below 12 years, the procedure specified in section 12 must be followed.

10 Age determination to be made by child justice court

(1) The child justice court must, on the available evidence, 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 court.

(2) If a child justice court determines that a person being charged with the commission of an offence was 18 years or over 18 at the time of the alleged commission of the offence, the court must transfer the matter to an ordinary court for proceedings to commence before that court.

(3) If the child justice court finds that the person being charged with the commission of an offence is below the age of 12 years, the matter must be stopped, and the child referred to child protection officer.

11 Age assessment and determination by ordinary court

(1) In criminal proceedings before an ordinary court, if at any time before sentence—

- (a) the accused person alleges that he or she was a child at the time of the alleged commission of the offence which he or she is being charged with; 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 medical practitioner or a child protection officer for estimation or determination of age within a time specified by the presiding officer, and upon such estimation or determination being made and produced before the court by the medical practitioner or child protection officer (whether by personal testimony or by means of an affidavit) subsection (2) shall apply. 5

(2) If the ordinary court determines the age of the person to be under 18 years, the presiding officer must, if the trial has —

- (a) not commenced, transfer the matter to the child justice court or other court having jurisdiction for further proceedings under this Act; or 10
- (b) commenced, continue with the trial, whereupon further proceedings must be conducted in terms of this Act.

(3) A presiding officer who, upon conclusion of a trial in terms of subsection (2)(b), convicts a child, may refer the matter to the child justice court for sentencing if it is in the best interests of the child. 15

(4) If an ordinary court after conviction establishes that an accused person was a child aged below 18 years, that court may impose a sentence upon the child in terms of this Act or, if it is in the best interests of the child to do so, refer the matter to the child justice court for the imposition of sentence.

(5) If the proceedings have commenced in terms of this Act before a child justice court or other court having jurisdiction in respect of a person who is alleged to have been a child at the time of the commission of the offence with which the person is being charged, and it is proved that the person was 18 years of age or older at time the offence was committed, the child justice court or other court must — 20

- (a) if a trial has not yet commenced in the child justice court, refer the matter to the Prosecutor-General for arrangements to be made for that person to be tried in an ordinary court; or 25
- (b) if a trial has commenced in the child justice court, stop the trial and refer the matter to the Prosecutor-General for arrangements to be made for that person to be brought before an ordinary court; or 30
- (c) if the person has been convicted in a child justice court, the matter must be transferred to an ordinary court for the purpose of sentence by that court.

12 Process for dealing with child aged below 12 years who is alleged to have committed offence 35

(1) Where a police officer has ascertained that a child suspected of having committed an offence is under the age of 12 years, he or she must not arrest the child, but must —

- (a) immediately (and in any case within 12 hours) convey the child to a suitable place of safety and notify in the prescribed manner a child protection officer of the placement of that child; and 40
- (b) immediately (and in any case within 12 hours) notify his or her parents or if there is no parent, an appropriate adult or a guardian of the fact that the child is in custody; and
- (c) secure the attendance of a child protection officer at the place of safety or hand the child over forthwith to a child protection officer for an assessment to be conducted. 45

(2) If in the course of an assessment for the purposes of subsection (1)(c) the child protection officer so thinks fit in the best interest of the child the child protection officer shall—

- 5 (a) hand over the child to his or her parent, or if there is no parent or if it is not in the best interests of the child for it to be handed over to the parent, to an appropriate adult or a guardian; or
- (b) convey the child to another place of safety.

(3) A child protection officer who receives notification from a police officer in terms of subsection (1), must not later than seven days after being notified assess the child as soon as possible, that is to say—

- (a) arrange a meeting which must be attended by the child, his or her parent or an appropriate adult or a guardian and any other person who may be likely to provide information to allow the child protection officer to ascertain the circumstances surrounding the conduct of the child; and
- 15 (b) decide on a course of action and draw up a written care plan on appropriate action, which written care plan must—
 - (i) specify the objectives to be achieved for the child and the period within which they should be achieved; and
 - (ii) contain details of the services and assistance to be provided for the child, as prescribed, and state the responsibilities of the child and of the parent, appropriate adult or a guardian; and
 - 20 (iii) give reasons justifying the need for the scope, nature and objectives of the plan.

(4) If in the course of assessing the child, the child protection officer finds that the child was wrongly implicated in a conduct that led to the child being referred to the child protection officer for assessment, the child protection officer shall immediately release the child and notify the referring police officer accordingly.

PART III

POLICE POWERS AND DUTIES

30 **13 Methods of securing attendance of child at child justice court**

Subject to section 14 (“Arrest of child”), a proceeding against a child for an offence must commence by way of—

- (a) a request to the child to accompany the police officer to the place where assessment will take place; or
- 35 (b) taking the child to his or her home where a written notice will be served upon the child in the presence of his or her parent, guardian or an appropriate adult; or
- (c) a summons served on the child to appear for assessment at a date and place specified in the summons; or
- 40 (d) opening a docket so that the matter may be referred to the Prosecutor-General’s office for a directive; or
- (e) arrest.

14 Arrest of child

(1) A police officer may not arrest a child for an offence referred to in the First Schedule (“Minor offences”), and must first consider any of the alternative methods

to arrest referred to in section 13 (“Methods of securing attendance of child at child justice court”), unless there are substantial and compelling reasons justifying the arrest, which may include the following circumstances—

- (a) that the police officer has reason to believe that the child does not have a fixed residential address and is unlikely to appear before a child justice court in response to a summons or a written notice or an alternative method to arrest; or 5
- (b) that the police officer has reason to believe that the child will continue to commit offences, unless he or she is arrested; or
- (c) that the police officer has reason to believe that the child poses a danger to any person. 10

(2) Before arresting a child for an offence referred to in the Second Schedule (“Class 2 offences”), a police officer must consider any of the alternative methods of starting a proceeding referred to in section 13, and may only arrest a child if the police officer believes on reasonable grounds— 15

- (a) that the arrest is necessary to prevent—
 - (i) a child from continuing to committing offences; or
 - (ii) that the child poses a danger to any person; or
 - (iii) concealment, loss or destruction of evidence relating to the offence; or 20
- (b) that the child has no fixed residential address and is unlikely to appear before a child justice court in response to a summons or written notice or an alternative method to arrest.

(3) 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 police officer effecting the arrest use such force as may be reasonably necessary and proportional to the circumstances to overcome resistance or to prevent escape. 25

(4) Any private person may without warrant arrest a child who commits or attempts to commit an offence in his or her presence or whom he or she reasonably suspects of committing an offence, but such a private person may not use force during arrest and must take necessary steps to hand the child over to the police as soon as is practicable. 30

15 Warrant of arrest

(1) A warrant of arrest issued under section 33 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] in respect of a child must direct that the child be taken to appear at a child justice court as soon as possible but not later than 48 hours after the arrest. 35

(2) The execution of a warrant of arrest issued in respect of a child may be held over by a child justice 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 court may request the investigating police officer to inform the child named in the warrant, if traced, of the issue of the warrant before the expiry of 14 days and the police officer executing the warrant may, instead of arresting a child, use one of the alternative methods of arrest referred to in section 13. 40

16 Duties of police officer upon arrest, use of alternative to arrest or issuing of summons or written notice

(1) A police officer who arrests a child must inform and explain to the child, and in the presence of the parent or guardian, custodian or an appropriate adult where possible— 45

- (a) the nature of the allegation against him or her; and
- (b) his or her right to remain silent; and
- (c) the right to have his or her parents, guardians or an appropriate adult contacted; and
- 5 (d) the right to legal representation; and
- (e) the right not to opt for diversion; and
- (f) the immediate procedures to be followed in terms of this Act.

(2) A police officer who arrests a child must promptly, but not later than 12 hours after the arrest, report the arrest to a diversion officer or a child protection officer
10 in the district where the child was arrested in the prescribed manner.

(3) In case any alternative action to arrest contemplated in section 13 is taken, the police officer taking the alternative action or serving the summons or written notice must, not later than 12 hours thereafter, notify in the prescribed manner the diversion officer or child protection officer concerned of the alternative action taken or summons
15 or written notice issued.

17 Time limits pursuant to arrest and written report of an arrest of a child

A police officer must take a child who is arrested, regardless of whether an assessment of the child has been effected by a child protection officer, to appear at a
20 child justice court not later than 48 hours after the arrest.

18 Duty of police officer, diversion officer or child protection officer to notify parent, guardian or appropriate adult

(1) A police officer who arrests a child, must promptly notify the child's parent, custodian, guardian or appropriate adult of the arrest and whereabouts of the child, unless
25 a parent, guardian or appropriate adult cannot be found or identified after reasonable enquiry:

Provided that if a police officer has failed for any reason to make the notification required by this subsection, then a diversion officer or child protection officer who assesses a child must make that notification on behalf of a police officer.

(2) The arresting police officer, or any other police officer investigating the matter, or the diversion officer or child protection officer, must as soon as possible deliver a notice (which notice may be the same notice as the one notifying the arrest of the child) in the prescribed manner requiring the child's parent, guardian or an appropriate adult referred to in subsection (1) to attend the assessment at a time and
30 place specified in the notice.

19 Police cautions

(1) In this section—

“formal caution register” means the register of formal cautions maintained at a police station for the purposes of this section;

40 “informal caution” means a verbal caution to desist from conduct that may be the subject of criminal proceedings, which caution may be administered by a officer of any rank, with or without conditions (as prescribed) and either at the scene of the conduct or at the police station, and the relevant particulars of which must be recorded in a special register kept at the
45 police station.

(2) A police officer may issue to a child who might otherwise be arrested an informal police caution rather than resorting to criminal proceedings for minor offences which would, if tried in a court, attract a prison sentence of no more than three months.

(3) A formal police caution for an offence for which the penalty is not more than twelve months imprisonment, with or without conditions (as prescribed), may be issued subject to the following conditions— 5

- (a) at the police station upon recommendation by a diversion committee; and
- (b) it must be administered by a police officer with the rank of inspector or above, or a member in charge of a police station, base or post, or his or her deputy; and 10
- (c) it must be in writing and effected in private but in the presence of a parent, appropriate adult, custodian or guardian or legal practitioner for the child, and in the presence of a diversion officer or child protection officer; and
- (d) it must be issued in the prescribed manner and recorded in the Formal Cautions Register. 15

(4) The Formal Cautions Register is open to inspection by the Prosecutor-General or his or her designate and national coordinator for child justice.

(5) Records of cautions must be expunged from the Formal Cautions Register after two years, provided that the person on whom the caution was served has not been served with another formal caution, or been convicted of an offence, within that two-year period (in which event the records of the cautions may be expunged after another two-year period subject to the same conditions). 20

20 Pre-trial procedures

(1) No child who is accepting responsibility for the alleged offence may be subject to an identification parade. 25

(2) Confessions, admissions and pointing out as provided for in the Criminal Procedure and Evidence Act [*Chapter 9:07*], may only be admitted in criminal proceedings against a child if a parent, custodian, guardian, child protection officer or a legal practitioner representing the child or other appropriate adult is present at the time when the child made the confession or statement or pointed out anything or gave inculpatory information. 30

(3) Evidence of identification of a child at an occasion when the child is available for identification pursuant to a criminal investigation may not be admitted in criminal proceedings against the child, unless the child's legal practitioner representing the child is present at that occasion, or, if the child does not have a legal practitioner representing him or her, the child's parent, guardian or another appropriate adult is present. 35

(4) Subject to section 21(1), if a child is accepting responsibility for the commission of an alleged offence, that child must not be subject to having his or her fingerprints, buccal or intimate sample taken pursuant to the Criminal Procedure and Evidence Act. 40

21 Taking of fingerprints and other identifying material

(1) Despite any powers conferred by the Criminal Procedure and Evidence Act [*Chapter 9:07*] or any other law, a police officer may not, in relation to a child suspected of having committed an offence, without prior approval on application from a magistrate or a judge of the court; take or cause to be taken any identifying material of the child, which may include— 45

- (a) the finger prints, palm prints or foot prints of the child;
 - (b) a photograph of the child;
 - (c) a voice recording of the child;
 - (d) samples of the handwriting of the child; or
 - 5 (e) buccal or intimate sample or other material from the body of the child, unless to do so is—
 - (i) required for the purposes of establishing the age of the child in question; or
 - 10 (ii) necessary to establish the prior convictions of the child for the purposes of making a decision on diversion, release from detention or placement in a particular remand facility, place of safety or prison.
- (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 officer in the prescribed form.
- 15 (3) On application being made under subsection (1) the magistrate or judge may, if he or she deems it appropriate according to the specific circumstances, make an order for the taking of specified identifying material.
- (4) Any identifying material that consists of material from the body of a child referred to in subsection (1)(e) may not be taken by a person who is not a registered medical practitioner in terms of the Health Professions Act [*Chapter 27:19*] or a registered nurse acting on the instruction of such a practitioner.
- 20 (5) If identifying material of a child is taken in terms of this section, the police officer referred to in subsection (1) must as soon as practicable take all reasonable steps to cause the parent custodian or guardian of the child, an appropriate adult, or the legal practitioner for the child, to be notified of the action taken pursuant to subparagraph (i) or (ii) in subsection (1) in relation to the child.
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PART IV

DETENTION AND RELEASE OF CHILDREN FROM DETENTION

22 Treatment and rights of children in detention in police custody prior to committal

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(1) A child detained in police custody before his or her first appearance in court has the right—

- (a) to adequate food and water; and
- (b) to medical treatment; and
- 35 (c) to the right of access to visits by parents, custodian, guardians, care-giver, legal practitioners, social workers, child protection officers and assistant child protection officers, health workers, religious counsellors, any other person who in terms of any law is entitled to visit the child, or any persons authorised to do so by the National Coordinator for Child Justice; and
- 40 (d) to be kept separate from adults; and
- (e) to be kept separate from children of the opposite gender; and
- (f) of access to reading and educational materials; and
- (g) to adequate exercise; and
- (h) if the child is a girl, the right to be provided with sanitary wear necessary for menstruation; and
- 45 (i) to be provided with adequate clothing, sufficient blankets and bedding.

(2) Any complaint that a child has been injured or severely traumatised while in custody in a police cell or that a child is being detained under unsuitable conditions made by —

- (a) the child concerned; or
- (b) a member of the police or other state official; or
- (c) legal practitioner; or
- (d) any other person who visited the child;

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shall be referred to the Zimbabwe Human Rights Commission for immediate investigation and action.

(3) Where a complaint or injury or trauma has been made, the officer in charge of the police station must produce a report and submit it, as soon as reasonably possible, to the Commissioner-General of the Zimbabwe Police service indicating —

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- (i) the nature of the injury sustained or severe trauma suffered by the child; and
- (ii) an explanation of the circumstances surrounding the injury or trauma; and
- (iii) a recommendation as to whether any further action is required.

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(4) A copy of the medical report, if applicable, must accompany the report of the injury or trauma and a further copy must be filed in the docket.

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

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23 Duties of police relating to child detention register

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(1) Each police station must keep a cell register in which the detention or presence of any child is detailed and recorded so as to be clearly identifiable.

(2) A person who wishes to examine the register must make application to the officer in charge or person authorised by him or her in the prescribed manner.

24 Procedure before first appearance of child in court

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(1) This section and section 27("Duties of police officer upon release of child into custody of person") applies to the procedure concerning the detention or release of a child in conflict with the law before the first appearance of that child in a court to answer for an alleged offence.

(2) A police officer must release a child who is in police custody and who is accused of an offence referred to in First Schedule, before the child's appearance in court or before a diversion committee, into the custody of the child's parent, custodian guardian or an appropriate adult unless —

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

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(3) If a child referred to in subsection (1) is not released from detention, the investigating police officer must at the first court appearance furnish a written report

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in the prescribed manner to the court giving reasons why the child was not released from detention.

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

- 5 (a) is in police custody and who is accused of an offence referred to in Second Schedule; or
- (b) is accused of an offence in First Schedule, but has not been released in terms of subsection (1) into the custody of his or her parent or an appropriate adult.

10 (5) A release ordered in terms of subsection (4)(a) or (4)(b) may be accompanied by one or more of the following conditions—

- (a) to appear at a specified place and time for an assessment by a diversion officer or a child protection officer to be completed, or to appear in court, as the case may be;
- 15 (b) not to interfere with witnesses, tamper with evidence or to associate with a person, persons or group of specified people;
- (c) to reside at a particular address;
- (d) the payment of bail; or
- (e) any further condition which the police officer and Prosecutor-General or
- 20 designated prosecutor may consider fit.

(6) Despite a decision of a police officer to the contrary, the Prosecutor-General or a designated prosecutor may direct in writing that a child who is detained in police custody be released into the custody of his or her parent custodian or guardian or an appropriate adult, and a written copy of any conditions referred to in section 30 must be handed to the child and to the person into whose custody the child is released.

(7) If for any reason a child cannot be released into the custody of a parent custodian or an appropriate adult in accordance with section 29(1), (3) or section 30, or cannot be released on bail, the child may, in lieu of police custody, be placed in a place of safety or remand home provided for in section 28 of the Children's Act [*Chapter 5:06*] if there is one situated within a reasonable distance from the place where the child must appear in court.

(8) A police officer may not release a child accused of an offence referred to in Third Schedule from police custody, but may transfer a child accused of the commission of a Third Schedule offence to a remand home prior to his or her appearance in court if such remand home is available within a reasonable distance from the place where the child must appear in court.

(9) Notwithstanding subsection (8), the Prosecutor-General may authorise the release of a child charged with a Third Schedule offence on such conditions as he or she may see fit.

40 **25 Detention of child after first appearance**

(1) If at a child's first appearance in a court for the purpose of committal proceedings or remand proceedings, the court, after consideration of the factors referred to in section 24(8), decides that the child may not be released into the custody of the child's parent, custodian or an appropriate adult, or into a place of safety or a remand home, or may not be released on bail in terms of section 31 ("Non detained child appearing in court"), the court shall, if the proceedings are to be postponed, order that

the child be detained in a separate section for children in a prison or a correctional facility.

(2) In deciding whether the placement of the child should be in a place of safety, remand home, or in a separate section for children in a prison or a correctional facility, the court must have regard to the recommendation of the diversion officer or child protection officer in the assessment report, if available. 5

(3) A child may be ordered to remain in custody in a separate section for children in a prison or a correctional facility if referral to a place of safety or remand home is not possible because —

- (a) there is no alternative to a prison situated within a reasonable distance of the place where the child is to appear in a court; or 10
- (b) accommodation is not immediately available at a place of safety or a remand home; or
- (c) the 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 remand home. 15

(4) In the case that the proceedings are postponed while the child is in detention in a place of safety, remand home or prison or correctional facility, the court may only remand the matter for a maximum period of 7 days, after which the child must be brought before the court again. 20

(5) At each appearance of the child who is in detention the court must —

- (a) inquire whether further detention is necessary; and
- (b) record the reasons for any further detention ordered; and
- (c) consider a reduction of the amount of bail, if it has not been paid.

(6) The court must be satisfied that the child is being treated properly and kept in suitable conditions whilst deprived of his or her liberty and if not so satisfied, must inspect and investigate such treatment and conditions and may make an appropriate remedial order. 25

(7) Where a child is in detention pending finalisation of the proceedings, the court must ensure that the plea and trial are concluded as speedily as possible. 30

26 Principles relating to release of child from detention

(1) If a trial is not concluded within thirty days of plea, during which period the child is in detention then consideration should be given for the release of the child from detention in terms of this section.

(2) A decision to release a detained child may be made by the court or on application by the Prosecutor General or designated prosecutor or the child's legal practitioner with due consideration of the following principles— 35

- (a) preference must be given to release of the child into the custody of a parent, guardian custodian or an appropriate adult, with or without the imposition of any conditions; 40
- (b) if the release of the child into the custody of a parent, custodian, guardian or an appropriate adult or the release of the child upon conditions is not feasible, release of the child on bail must be considered.

(3) 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, or on bail, the court must have regard to all relevant factors, including— 45

- (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, guardian or an appropriate adult;
- (d) the likelihood of the child returning to the court for further appearances;
- 5 (e) the likelihood of diversion;
- (f) the period for which the child has been in detention since the arrest;
- (g) the probable period of detention of the child until conclusion of the trial;
- (h) the risk that the child may be a danger to any other person or to himself or herself;
- 10 (i) the state of health of the child;
- (j) the reason for any delay in the disposal or conclusion of the 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;
- (k) whether detention would prejudice the child in the preparation of his or her case;
- 15 (l) the period of sentence or of imprisonment that is likely to be imposed on a child, if the child is convicted of the offence;
- (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 Third Schedule;
- 20 (n) any disability that the child may have; and
- (o) any other factor which in the case of an application for release made on behalf of the child by his or her legal practitioner the court may consider fit.

25 **27 Duties of police officer upon release of child into custody of person**

(1) A police officer who releases a child from detention in accordance with section 29(1) or (3) or upon a written directive given under section 24(6), must at the time of the release—

- 30 (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, the place and time when the child must appear at an assessment by a diversion officer or a child protection officer or at court, as the case may be; and
- 35 (b) warn the person into whose custody the child was released to ensure that the child attends the assessment by a diversion officer or a child protection officer or court at the specified place and time and that the conditions of the child's release, if any, are adhered to.

(2) If a warning given to a person in terms of subsection (1)(b) is not complied with by that person, a court may on application by the police officer—

- 40 (a) issue a warrant of arrest for that person;
- (b) upon the person's appearance before the court, summarily enquire the reasons for the non-compliance; and
- 45 (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 level 6 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 referred to subsection (1)(a) a court may take the action referred to in subsection (2)(a) or issue a summons for the appearance of the child at court. 5

(4) When a child appears before a court pursuant to a warrant of arrest or summons referred to in this section, the presiding officer must enquire into the reasons for the child's failure to appear or to comply with the conditions and make a determination whether or not the failure is due to the child's fault.

(5) If it is found that the failure is not due to the child's fault, the court may — 10

(a) order the release of the child on the same conditions; or

(b) order the release of the child on any other conditions;

and if necessary, make an appropriate order which will assist the child and his or her family to comply with the conditions imposed.

(6) If it is found that the failure is due to the child's fault, the court may order the release of the child on different or further conditions or make an order that the child be detained, subject to section 24 ("Procedure before first appearance of child in court")(8). 15

28 Release of child accused of certain offences on special bail prior to appearance at court 20

(1) The Prosecutor-General or a designated prosecutor, acting in consultation with the investigating police officer, may authorise the release of the child accused of an offence referred to in First, Second or Third Schedule on bail subject to reasonable conditions prior to appearance in court, if the release of a child into the custody of the child's parent, custodian guardian or an appropriate adult without the payment of bail is for any reason not appropriate. 25

(2) The Prosecutor-General must issue an instruction in relation to the determining of the amounts that may be set for bail as contemplated in subsection (1).

(3) Despite the provisions of the Criminal Procedure and Evidence Act [*Chapter 9:07*], a police officer may, in consultation with the investigating police officer, authorise the release of a child charged with a First Schedule offence on bail prior to the child's appearance at court if release of the child into the custody of the child's parent custodian or an appropriate adult without the payment of bail is for any reason not appropriate. 30

(4) Bail granted in terms of this section by a police officer or the Prosecutor-General or a designated prosecutor must continue after first appearance in a child justice court or ordinary court as if bail had been granted by a court, unless that court amends the conditions of release. 35

29 Release of child by court into the custody of parent, custodian guardian or appropriate adult

(1) If a child, upon his or her first appearance at a court, has not been released from detention, the magistrate or judge must, if the case is not disposed of and it is in the interests of justice to do so — 40

(a) order the release of the child into the custody of the child's parent, custodian guardian or an appropriate adult, on conditions as may be imposed in terms of section 34; and 45

- (b) warn the person into whose custody the child was released to ensure that the child attends the hearing at the child justice court or ordinary court at the specified place and time and that the conditions of the child's release are adhered to.

5 (2) When making a decision about whether a child should be released in terms of subsection (1), the magistrate or judge must have regard to—

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

(3) Subsections (1) and (2) apply, with the changes required by the context, to any further appearance in court by the child.

30 Conditions imposed on release of child in custody of parent, custodian guardian or appropriate adult or on bail

15 A court may, in releasing a child into the custody of the child's parent, custodian guardian or an appropriate adult or on bail, impose upon the child one or more of the following conditions—

- (a) to appear at a specified place and time;
- (b) to report periodically to a specified person or place;
- 20 (c) to attend a specified school;
- (d) to reside at a specified 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;
- 25 (g) any other conditions as may be appropriate in a particular case.

31 Non-detained child appearing at court

If, at the first appearance in court in respect of a child who is not in detention, the matter is remanded for assessment to be effected, the magistrate or judge must warn the child to appear at court at a date and time as specified, and may extend, confirm or
30 amend any conditions of release previously imposed and effected under this Act.

32 Release of child on own recognisances

A court may release a child on own recognisances after consideration of the factors referred to in section 33, with or without conditions imposed under section 34, and must order the child to appear before the court at a specified place and time.

33 Release of child on bail at court

(1) 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 33, a magistrate or judge may order the release of the child upon payment of bail and on conditions referred to in section 34 if the interests of justice so
40 permit.

(2) Before setting an amount of bail, an enquiry must be held into the ability of the child or his or her parents, custodian guardians or an appropriate adult to pay the amount of money being considered or any other amount.

(3) If, after the inquiry referred to in subsection (2) it is found that the child or his or her parents, custodian guardian or an appropriate adult are unable to pay any amount of money, the magistrate or judge must set appropriate conditions that do not include an amount of money for the release of the child.

(4) If bail has been granted previously by a police officer or by the Prosecutor-General or a designated prosecutor to a child appearing in a court, the court may extend the bail on the same or further conditions, and may increase or reduce the amount of bail previously fixed. 5

PART V

ASSESSMENT OF CHILD OFFENDER 10

34 Purpose of assessment

(1) The purpose of this Part is to provide for a process of assessment of every child who is alleged to have committed an offence before a decision is taken on whether the matter can be diverted.

(2) The purposes of assessment are— 15

- (a) to obtain proof of, and estimate the probable age of a child, where the age of the child is not readily ascertainable, for consideration by the diversion committee or the child justice court; and
- (b) establish the personal circumstances of the child, his or her family, and the circumstances surrounding the commission of the offence; and 20
- (c) establish whether the child may be in need of care and protection in order to refer the child to a children's court in terms of the Children's Act [*Chapter 5:06*]; and
- (d) establish the reasoning capacity of the child and whether the child accepts responsibility for the offence; and 25
- (e) 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; and
- (f) where the child remains in detention, to formulate recommendations regarding release of the child into the custody of a parent, custodian or an appropriate adult, or placement in a place of safety or remand home or a police cell; and 30
- (g) establish any measures that need to be taken in the case of children over 12 years of age. 45

35 Assessment to be conducted by diversion officer or child protection officer and notice to be given of assessment 35

(1) An assessment of a child must be conducted—

- (a) by a diversion officer where the case qualifies for diversion;
- (b) by a child protection officer where the case has been referred for due process through the child justice courts or ordinary courts. 40

(2) Upon being notified in terms of section 12(1) or 18(1), the diversion officer or child protection officer must determine the date, time and place for the holding of an assessment and inform the investigating police officer thereof.

(3) The investigating police officer must give notice of the date, time and place of the holding of the assessment to— 45

- (a) the child and the parents custodian or guardians of the child; or
- (b) if, after reasonable enquiry, the whereabouts of a parent cannot be established, an appropriate adult.

(4) If it appears that a parent, custodian or guardian of the child or an appropriate adult has not been notified to attend the assessment, the diversion officer or child protection officer 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.

(5) An investigating police officer must, upon request by the diversion officer or child protection officer, deliver a notice issued in terms of subsection (4) to the person or persons specified in the notice.

36 Place where assessment proceedings must be held

Assessments must be held—

- (a) at a police station; or
- (b) at a place prescribed by the Minister responsible for Justice; or
- (c) at any other place determined by the diversion officer or child protection officer;

under circumstances (in the case where the assessment is held at a police station or prescribed place), or in a place, suitable for the protection of privacy and confidentiality of the child.

37 Attendance at assessment

(1) An assessment must be attended by—

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

(2) If, after reasonable enquiry, the whereabouts of a child's parent, custodian guardian or an appropriate adult cannot be established, a diversion officer or a child protection officer may conclude the assessment in their absence.

(3) The diversion officer or child protection officer may allow any other person with an interest in the assessment to attend the assessment, including—

- (a) the child's legal representative;
- (b) any other person—
 - (i) whose presence the diversion officer or child protection officer considers necessary or desirable for the purposes of the assessment; and
 - (ii) whom the diversion officer or child protection officer has given notice to attend.

(4) A diversion officer or child protection officer may at any time during the assessment exclude from proceedings, or any part thereof, any person required or authorised to be present, other than the child and the child's legal representative, if it is considered that the person's presence impedes or may impede proceedings.

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

(6) For the avoidance of doubt it is declared that an assessment may proceed in the absence of any person required under subsection (5) to attend.

(7) Subject to subsection (5), a parent, guardian or an appropriate adult who has been given notice to appear at an assessment and who fails to comply with section 35(3) or (4) commits an offence and on conviction is liable to a fine not exceeding level 6 or imprisonment for a term not exceeding three months, or to both such fine and such imprisonment. 5

38 Powers and duties of diversion officer or child protection officer in relation to assessment

(1) For the purpose of assessment a diversion officer or child protection officer may, by notice issued in the prescribed manner, require the investigating police officer or any other police officer— 10

- (a) to bring a child to a specified place for assessment;
- (b) to obtain and produce relevant documentation as proof of a child's age from a specified place or a specified person if the child's age cannot be readily ascertained (for which purpose if needed police are hereby empowered to seek the appropriate search warrant from a justice of the peace). 15

(2) Notwithstanding anything to the contrary, assessments are to be undertaken no later than seven days after the receipt of a notice issued under section 12 ("Process for dealing with child age below 12 years who is alleged to have committed an offence") (2) or (3) or upon referral by a court, and assessment reports as contemplated in section 39(" Procedure at assessment")(6) are to be compiled and submitted to the diversion committee, court or the designated prosecutor as soon as is practicable, but in any case no later than 48 hours after completion of the assessment. 20 25

39 Procedure at assessment

(1) At assessment proceedings the diversion officer or child protection officer must—

- (a) explain the purpose of assessment to the child; and
- (b) inform the child of his or her rights namely — 30
 - (i) the right to remain silent;
 - (ii) the right to make one telephone call to a relative, friend or any other person of choice;
 - (iii) the right if he or she so wishes to have any charge against him or her dealt with by the child justice court. 35
- (c) explain to the child the immediate procedures to be followed in terms of this Act.

(2) A diversion officer or child protection officer may—

- (a) consult with a person present at an assessment; or
- (b) consult with any person not present at an assessment who is believed to be able to provide relevant information and inform the child of the information so obtained. 40

(3) The diversion officer or child protection officer must encourage the participation of the child or children during the assessment process.

(4) Upon conclusion of the assessment, the diversion officer or child protection officer must complete an assessment report in respect of the child in the prescribed manner with recommendations, and motivated reasons for the recommendations.

(5) Recommendations made in terms of subsection (5) may include any recommendation relating to—

- (a) the prospects of using diversion, and in particular—
 - (i) referral of the matter to a family group conference;
 - (ii) referral of the child for any other specified diversion option or programme;
- or
- (b) the release of the child into the custody of a parent, custodian guardian or an appropriate adult where the child has not previously been released; or
- (c) if, as a last resort, detention of the child is considered necessary, the placement of the child in a specific place of safety or remand home or police cell; or
- (d) the referral of the matter to a children's court as contemplated in the Children's Act [*Chapter 5:06*] for an enquiry, stating the reasons for the recommendation.

(6) If it appears to the diversion officer or child protection officer that the child does not intend to accept responsibility for the alleged offence, this must be indicated in the assessment report.

(7) The assessment report referred to in subsection (6) must be submitted to the Diversion Committee or a prosecutor to decide—

- (a) whether or not to withdraw any charges pending against the child; or
- (b) to take any further action in relation to the child, including diversion or referral of the matter to a family group conference or restorative justice process in accordance with section 56 or setting the matter on the roll for plea and trial in a child justice court or other court.

40 Confidentiality of information obtained at assessment; admissibility of confessions etc

(1) A diversion officer or a child protection officer conducting the assessment and all persons present at the assessment are under a duty to keep confidential all information obtained at the assessment except when required to disclose it for a purpose and in a manner prescribed, and the person conducting the assessment shall advise all the participants of that duty.

(2) Any person who contravenes subsection (1) is guilty of an offence and, if convicted, liable to a fine up to level 6 or to imprisonment for a period not exceeding one year, or to both such fine and such imprisonment.

(3) 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 is admissible in evidence against the child in any subsequent criminal or civil proceedings.

PART VI

DIVERSION

41 Purposes of diversion and general principles for diversion options

- (1) The purposes of diversion under this Part are—
- (a) to promote the child's best interests by among other things— 5
 - (b) to promoting his or her dignity or wellbeing;
 - (c) to promoting the development of his or her sense of self-worth and ability to contribute to society;
 - (d) to encouraging the child to be responsible and accept responsibility for the unlawful conduct and the effects thereof in an appropriate way; 10
 - (e) to promote the reintegration of the child into his or her family and the community;
 - (f) to provide an opportunity to the victim or victims of an offence committed by a child to express their views on its impact on them and to participate in the process of rehabilitating or habilitating the child; 15
 - (g) to encourage the provision to the victim of some symbolic benefit or the delivery of some object or rendering of some service that has benefit as compensation for the harm;
 - (h) to promote reconciliation between the child and the victim or the community affected by the harm caused; 20
 - (i) to prevent stigmatising the child and prevent the adverse consequences that flow from being subject to the criminal justice system;
 - (j) to reduce the child's contact with the formal criminal justice system;
 - (k) to facilitate dealing with the unlawful conduct of a child within the community, and without resorting to government intervention or criminal proceedings. 25
- (2) Diversion options ought to be designed so as—
- (a) not to be exploitative, harmful or hazardous to a child's physical or mental health;
 - (b) to be appropriate to the age and maturity of the child; 30
 - (c) not to interfere with a child's education or lawful employment; and
 - (d) to meet the particular needs of the individual child;
 - (e) where reasonably possible—
 - (i) to impart useful skills;
 - (ii) to include a restorative justice element which aims to heal 35 relationships, including the relationship with the victim or victims;
 - (iii) to include an element which seeks to ensure that the child understands the impact of his or her behaviour on others; and
 - (iv) to be presented in a location reasonably accessible to children, and children who cannot afford transport in order to attend a selected diversion programme should be provided with the means to do so 40 as far as is reasonably possible.
- (3) In selecting a diversion option for a particular child, a diversion committee, Prosecutor-General, a designated prosecutor or a child justice court must give, consideration— 45

- (a) to the diversion option from an appropriate level in terms of section 42("Specific diversion options");
 - (b) to a child's cultural, religious and linguistic background;
 - (c) to the child's educational level, cognitive ability, domestic and environmental circumstances;
 - (d) to the proportionality of the option recommended or selected to the circumstances of the child, the nature of the offence, and the interests of society;
 - (e) to any disability the child may have; and
 - (f) to the child's age and developmental needs.
- (4) No child may be excluded from a diversion programme due to an inability to pay any fee required for such programme.
- (5) Subject to section 45 ("Powers of Prosecutor-General to divert child alleged to have committed Third Schedule offence")(1) and (2), a child may be diverted for any offence, where this is a suitable and desirable outcome.
- (6) A child who is twelve years and over may be required to perform community service as a method of diversion, with due consideration to the child's age and development.
- (7) The Provincial Diversion Committee have the responsibility to maintain a directory or a database of diversion options and programmes, and of partners who can assist with constructive use of diverted children's leisure time.
- (8) The directory or database referred to in subsection (6) above must contain at a minimum the name or the persons or organisations offering the diversion option, programme or activity, their contact details and broad areas of speciality.
- (9) No child may be referred to a diversion programme where he or she expresses his or her wish to have any charge against him or her dealt with by the Child Justice Court.

42 Specific diversion options and monitoring

- (1) A range of diversion options are set out in two levels for a child who is subject to the provisions of this Act, with level one comprising the less onerous and level two the more onerous options.
- (2) Level one diversion options are—
- (a) an oral or written apology to a specified person or persons or institution;
 - (b) referral to the police for a formal caution in the prescribed manner with or without conditions, provided that the offence for which the referral is made does not attract a penalty of more than six months imprisonment;
 - (c) referral to a specified person for counselling or therapy for a period not exceeding six months;
 - (d) placement under the supervision of a child protection officer, diversion officer or a specified person or organisation in the prescribed manner for a period not exceeding six months;
 - (e) requiring the child to report periodically to a child protection officer, diversion officer or police station for a period not exceeding six months;
 - (f) the issue of an order in the prescribed manner for a period not exceeding six months prohibiting the child from visiting, frequenting or appearing at a specified place;

- (g) referral to a specified person or organisation who will ensure that the child engages in activities intended to be undertaken as constructive use of his or her leisure time;
 - (h) compulsory attendance at a specified place for a specified vocational or educational purpose either on a full time basis or part time, for a maximum period of six months; 5
 - (i) symbolic restitution to a specified person, persons, group or institution;
 - (j) provision of some service or benefit to a specified victim or victims in an amount which the child or the family can afford;
 - (k) compensation, where the child or his or her family are in a position to effect this; 10
 - (l) restitution of a specified object to a specified victim or victims for the alleged offence if the object concerned can be returned or restored;
 - (m) 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. 15
 - (n) 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 protection officer or diversion officer for a maximum period of one hundred hours to be completed within six months; 20
 - (o) referral to appear at a family group conference, a victim-offender mediation or other restorative justice process approved by the National Child Justice Committee or the National Coordinator for Child Justice at a specified place and time 25
- (3) Level two diversion options are—
- (a) any of the options mentioned in subsection (2), but the maximum period referred to in subsections (c), (d), (e), (f), (h), and (n) of that subsection may be fixed at a period not exceeding twelve months; 30
 - (b) 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 protection officer or diversion officer for a maximum period of two hundred and fifty hours, and to be completed within a maximum period of twelve months; 35
 - (c) referral to appear at a family group conference, a victim-offender mediation or other restorative justice process approved by the National Child Justice Committee or the National Coordinator for Child Justice at a specified place and time;
 - (d) any of the options listed used in combination; 40
 - (e) referral to counselling or a therapeutic intervention in conjunction with any of the options listed in this subsection.

43 Referral to Diversion Committee and further role of diversion officers

- (1) After assessment by a diversion officer or a child protection officer, the assessment report referred to in section 39 (“Procedure at assessment”) (6) must be referred in the prescribed manner to a Diversion Committee established for the area in which the offence was committed. 45

(2) A Diversion Committee may consider diversion in respect of a child who has been charged with or is alleged to have committed an offence on First Schedule or Second Schedule, and may consider diversion in respect of a Third Schedule offence only subject to the receipt of the Prosecutor-General's written confirmation contemplated in section 45 ("Powers of Prosecutor-General to divert child alleged to have committed Third Schedule offence") (1).

(3) The Diversion Committee must consider whether the matter is suitable for diversion, provided that the child and the child's parent or guardian or an appropriate adult have been informed the diversion options and the child accepts responsibility for the commission of the offence, with due regard to—

- (a) the demographic details of the child;
- (b) the personal circumstances of the child;
- (c) the nature of the crime committed;
- (d) whether in the circumstances the case is suitable for diversion; and
- (e) what diversion activity as set out in section 42 ("Specific diversion options") and monitoring might be appropriate and for what length of time.

(4) Where the diversion committee agrees about the suitability of diversion and has selected an appropriate option for diversion, the diversion committee shall deliver its report to the diversion officer for implementation accordingly.

(5) Where the diversion committee does not agree about the suitability of diversion, that is to say where—

- (a) there is no consensus of the committee; or
- (b) the majority of the committee including the Prosecutor-General do not agree about the suitability of diversion;

the matter must be referred to the Prosecutor-General or a designated prosecutor for a decision on whether to proceed to diversion or deal with the matter through the child justice court.

(6) If before the first appearance of a child at a child justice court it is found that the child has for any reason been overlooked for assessment, the Prosecutor-General or a designated prosecutor may, at any time thereafter but before the plea, refer a child alleged to have committed an offence to the diversion committee for consideration.

(7) If an assessment of the child has not been conducted in accordance with Part V, the Prosecutor-General or designated prosecutor may dispense with assessment, if it is in the best interests of the child to do so.

(8) If, at the time of first appearance of a child in court, an assessment has not yet been completed, or the matter is to be referred to the diversion committee, the Prosecutor-General or designated prosecutor may set down the matter on the roll and request that the matter be remanded for a maximum period of 14 days for the assessment to be effected in accordance with Part V or for it to be referred to the diversion committee in accordance with this Part.

(9) Where an assessment report as contemplated in section 39(6) is available, the recommendations contained in the report must be taken into account by the diversion committee, the Prosecutor-General or designated prosecutor in deciding whether to divert a child.

(10) If the diversion committee, Prosecutor-General or designated prosecutor is of the opinion that the child alleged to have committed an offence is a child in need of care as contemplated in the Children's Act [*Chapter 5:06*], he or she must not divert the

matter but must arrange for the opening of children's court proceedings in accordance with section 19 of that Act.

(11) In deciding whether to divert the case of the child, the Diversion Committee, Prosecutor-General or designated prosecutor may take into account that the child has a record of previous diversions, but this does not automatically exclude a child from being considered for diversion a second or subsequent time. 5

(12) In addition to the conduct of assessments and service as a member of the Diversion Committee, diversion officers have the following powers and functions—

- (a) ensure public awareness of diversion programmes;
- (b) identify additional locations or institutions where diversion activities could be undertaken or performed; 10
- (c) monitor the fulfilment of diversion activities and report on progress and on completion;
- (d) provide basic training on this Act to members of the community, volunteers, civil society organisations and traditional leaders; and 15
- (e) to maintain the necessary records and registers as provided for in this Act.

44 Diversion Register

(1) There shall be a Diversion Register of children who have been placed on a pre-trial diversion programme in the custody of the Ministry responsible for this Act, which shall be administered by the National Coordinator as the registrar. 20

(2) The Diversion Register must contain information on—

- (a) the number of, and personal details relating to, children diverted annually; and
- (b) the details of the offences in relation to which the diversion order was made; and 25
- (c) the diversion programmes to which children have been assigned or details of diversion orders made; and
- (d) details relating to children's compliance with diversion orders.

(3) Access to the register referred to in subsection (2) may be obtained by— 30

- (a) a child protection officer or diversion officer for the purposes of assessment or for the purposes of compiling a child protection officer's report;
- (b) the diversion committee, Prosecutor-General or designated prosecutors acting in accordance with the provisions of this Part;
- (c) police officers when performing functions in terms of Part III; 35
- (d) the National Child Justice Committee or the National Coordinator for child justice; and
- (e) researchers, upon application in the prescribed manner, provided that details which reveal the identity of any child whose name appears on the register may not be made available to the researcher. 40

(4) The Ministry must expunge the details of any child on the diversion register after the expiry of two years, provided that the child has not been diverted or convicted of an offence within that period.

45 Powers of Prosecutor-General to divert child alleged to have committed Third Schedule offence

(1) The Prosecutor-General may, in the case of a child alleged to have committed a Third Schedule offence, indicate in writing that the matter may be diverted if exceptional circumstances exist.

(2) The Prosecutor-General may only indicate that the matter referred to in (1) may be diverted—

(a) once he or she has afforded the victim or any person who has a direct interest in the affairs of the victim, where it is reasonable to do so, an opportunity to express a view on whether or not the matter may be diverted, and if so, on the nature and content of the diversion option being considered, and the possibility of including in the diversion option a condition relating to the payment of compensation by the parent, guardian or custodian of the child or the rendering of some other specific benefit or service; and

(b) once he or she has consulted with the investigating officer.

(3) The Prosecutor-General may not delegate his or her power to decide whether a matter may be diverted in terms of subsection (1) other than to a Deputy Prosecutor-General.

(4) A child justice court may postpone a matter in order for the written indication of the Prosecutor-General referred to in subsection (1) to be obtained.

(5) The written indication of the Prosecutor-General referred to in subsection (1) must be handed to the presiding officer at the child justice court, and forms part of the record of the proceedings.

(6) The time limits imposed in relation to the diversion orders in section 43(“Referral to diversion committee and further role of diversion officers”) do not apply to a diversion for a Third Schedule offence as contemplated in (1), but any period for which a diversion option is imposed may not exceed five years.

46 Failure to comply with diversion orders imposed by the Diversion Committee, Prosecutor-General or designated prosecutor

(1) Upon the selection of a diversion option in terms of section 42(“Specific diversion options”), diversion committee, Prosecutor-General or designated prosecutor or court must appoint a diversion officer or child protection officer or 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 diversion committee, Prosecutor-General or designated prosecutor or court in writing of such failure.

(2) If a child who has been diverted by the Diversion Committee, the Prosecutor-General or a designated prosecutor fails to comply with any order relating to diversion, the Prosecutor-General or a designated prosecutor may, upon being notified in writing by a child protection officer or a diversion officer of such failure, place the matter on the roll of the child justice court and apply for the court to issue a written notice or a warrant of arrest, as the court may deem fit, for the child to appear in court.

(3) When a child appears before the court after a warrant of arrest or written notice has been issued in terms of subsection (1), the court must inquire into the reasons for the child’s failure to comply with the diversion order.

(4) The court may, after consideration of the views of any person present, decide to—

- (a) impose the same diversion option with altered conditions;
- (b) impose any other diversion option referred to in section 42; or
- (c) make an appropriate order which will assist the child and his or her family to comply with the diversion option initially imposed.

(5) Despite subsection (3), the Prosecutor-General or designated 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

(6) The execution of a warrant of arrest referred to in this Part may be suspended by the court, and the police officer required to execute the warrant may, instead of arresting the child, employ one of the alternatives to arrest referred to in section 12 (“Process for dealing with a child below 12 years old who is alleged to have committed an offence”). 10

47 Legal consequences of diversion

(1) If a matter has been diverted and the diversion order has been successfully complied with, a prosecution on the same facts may not be instituted. 15

(2) A diversion order made in terms of this Act does not constitute a previous conviction.

(3) A private prosecution may not be instituted against a child in respect of whom the matter has been diverted.

(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 is admissible evidence against the child in any subsequent criminal or civil proceedings. 20

PART VII

RESTORATIVE JUSTICE 25

48 Victim-offender mediation or other restorative justice processes

(1) A diversion officer or child protection officer must organise a victim-offender mediation or other restorative justice process and may serve as convenor or appoint a suitably qualified person to chair the mediation.

(2) The convenor or chairperson may regulate the procedure of the victim-offender mediation or other restorative justice process as he or she may consider appropriate. 30

(3) Victim-offender mediation provides an opportunity for the victim of an offence to tell the person accused of committing the offence about its impact upon him or her or his or her family, premises, or business. 35

(4) A victim or victims must be invited to attend the victim-offender mediation at the time and place set by the diversion officer or child protection officer, and must consent to attend the mediation.

(5) An alleged offender must be given notice of the time and place of the mediation by the diversion officer or the child protection officer, and must consent to attend the mediation. 40

(6) Mediation provides an opportunity for the offender to take responsibility for his or her actions, to make an apology, and to make amends.

(7) The amends referred to in subsection (6) include compensation, restitution, symbolic restitution, performance without remuneration of some service for the benefit of the victim, or any other outcome consistent with the principles of this Act, the child's best interests, and the need to minimise harm to all parties.

5 (8) Mediation sessions may be postponed if a satisfactory outcome is not at first achieved.

(9) It is not to be a requirement that restitution be made or compensation paid, for mediation to be concluded and the matter finalised.

10 (10) A record of the outcome of mediation must be kept by the convener and if that person is someone other than a diversion officer or a child protection officer, it must be forwarded to the diversion officer or child protection officer of the area where the offence took place.

15 (11) The record of the outcome of mediation must contain details of any conditions to be fulfilled, and the diversion officer or child protection officer must monitor that these conditions are fulfilled.

(12) Once the victim-offender mediation is concluded and any specified conditions are fulfilled, the diversion officer must inform the diversion committee or the designated prosecutor in the prescribed manner in order for formal charges against the offender to be withdrawn.

20 (13) Where victim-offender mediation has been ordered by a court, the court must be provided with the record of the outcome referred to in subsection (11) within 14 days of the conclusion of the mediation.

49 Family Group conferences and intended benefits thereof

25 (1) A family group conference process for a child who admits having committed an offence or after conviction by a court brings together the child, a victim of the offence, the child's family and community, and persons to provide support to the victim to consider or deal with the offence in a way benefiting all who are concerned.

(2) The benefits intended for participants of a family group conference are—

(a) the child may benefit by—

- 30 (i) meeting the victim and taking responsibility for the consequences of the offence in an appropriate way;
- (ii) having the opportunity to make restitution or pay compensation for the offence.

(b) the victim may benefit by being given the opportunity to—

- 35 (i) meet and understand the child and to understand why the offence was committed;
- (ii) express his or her concerns;
- (iii) have questions related to the offence answered;
- 40 (iv) influence the way in which the family group conference deals with the offence; and
- (v) encourage the child's acceptance of responsibility.

(c) the community may benefit by—

- (i) having fewer offences being committed because of effective early intervention by the community;

- (ii) incurring less public costs due to the unnecessary involvement of the criminal justice system; and
- (iii) increasing resolution of disputes within the community.

50 Who may refer an offence to family group conference

- (1) An offence may be referred to a family group conference by — 5
- (a) a diversion committee;
 - (b) the Prosecutor-General or a designated prosecutor, acting in terms of 6, after consideration of an assessment report, if he or she directs that the offence may be referred to a family group conference; or
 - (c) a court. 10
- (2) In deciding whether it is appropriate to refer an offence to a family group conference, the diversion committee, Prosecutor-General, designated prosecutor, or a court must have regard to—
- (a) the nature of the offence;
 - (b) the harm suffered by anyone in the community because of the offence; 15
 - (c) whether the interests of the community and the child would be served by having the offence considered or dealt with in an informal and participative way; and
 - (d) whether a family group conference is particularly beneficial because of the fact that there is no identifiable victim of the offence. 20

51 Notice of family group conference

- (1) The Prosecutor-General, designated prosecutor or court who refers an offence to a family group conference, must notify a child protection officer, diversion officer, or other suitable convenor in writing of the referral in the prescribed manner.
- (2) The convenor must not later than twenty-one days after receipt of the notice referred to in subsection (1), convene a family group conference and ensure that all persons entitled to attend the conference in terms of section 61 are notified within a reasonable time of the time and place fixed for the conference. 25
- (3) The notice referred to in subsection (2) does not need to be given to a person whose whereabouts cannot be established after reasonable enquiry, and failure to notify any person in accordance with that section 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. 30
- (4) If a family group conference fails to take place, the child protection officer or diversion officer must arrange for an alternative date and notify the persons referred to in section 61. 35

52 Who may attend family group conference

The persons entitled to attend and participate in a family group conference are—

- (a) the convenor;
- (b) the child; 40
- (c) the parents or guardians of the child or an appropriate adult, including a social worker acting in loco parentis if the child is without parental care;
- (d) a legal practitioner or registered para-legal representing the child;

- (e) any other person requested by the child;
- (f) any victim of the offence and a legal practitioner or support person assisting such victim and, if the victim is a child, his or her parent, guardian or an appropriate adult;
- 5 (g) the designated prosecutor or the Prosecutor-General;
- (h) the child protection officer or diversion officer who conducted the assessment in respect of the child, or any other child protection officer or diversion officer;
- 10 (i) the investigating police officer or any other police officer appointed by the Commissioner-General;
- (j) any other person invited or authorised by the convenor, including a member of the community in which the child is normally resident.

53 Conduct of family group conference

15 (1) The family group conference must to the extent possible be conducted in a neutral venue.

(2) The conference must be directed towards formulating a plan as to how the child ought to be dealt with for the offence in accordance with the provisions of section 56 ("Failure of child to comply with family group conference plan.").

20 (3) The convenor or authorised person may bring the conference to an end at any time if—

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

54 Form of family group conference plan

(1) Subject to subsection (2), a family group conference plan may include—

- (a) the application of any diversion programme referred to in section 42; or
- 30 (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 person, persons or organisations that will provide services and assistance to enable fulfilment of the outcomes agreed to in the plan;
- 35 (b) state the responsibilities of the child, the child's parent or guardian or an appropriate adult;
- (c) state the personal objectives to be achieved for the child;
- (d) include such other matters relating to the education, employment, recreation and welfare of the child as are relevant; and
- 40 (e) designate a child protection officer, diversion officer or other suitable person to monitor the child's compliance with the conditions of the diversion option or other outcomes detailed in the plan.

55 Report of outcome of family group conference

(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 the diversion committee, the Prosecutor-General or designated prosecutor, or the court which referred the offence to the family group conference. 5

(3) The convenor must furnish a copy of the report referred to in subsection (1) to the child, the child's parent or guardian or an appropriate adult. 10

56 Failure of child to comply with family group conference plan

(1) The person designated in accordance with section 54("Form of family group conference plan") (2)(e) to monitor compliance with a family group conference plan must write a report concerning any breach of a substantial nature to be submitted to the designated prosecutor having jurisdiction. 15

(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 a diversion committee, a designated prosecutor or the Prosecutor-General, set the matter down on the court roll and cause the child, by way of written notice or a summons or, as a last resort, a warrant of arrest issued by the court, to appear before the court; or 20

(b) if the matter was referred to the family group conference by a court, set the matter down and cause the child, by way of written notice or a summons or, as a last resort, a warrant of arrest issued by the court, to appear before the court. 25

(3) Upon the appearance of the child in court pursuant to subsection (2), the court may—

(a) make enquiry into the reasons for the child's failure to comply with the family group conference plan; 30

(b) question and obtain the views of any person present or called by the court to appear before him or her;

(c) direct that the diversion option or outcome formulated in the plan be continued either with the same conditions or with such altered conditions as the court may specify; 35

(d) direct that a different diversion option or outcome be applied as 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 or outcome directed under paragraph (c) or (d); or 40

(f) request the prosecutor to proceed with a trial.

PART VIII**LEGAL REPRESENTATION****57 Access to legal representation**

(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. 45

(2) The child, the parent custodian, guardian or an appropriate adult may engage a legal practitioner of his or her own choice to represent a child who is to be tried for an offence.

(3) Where the parent, custodian, guardian or an appropriate adult do not have the financial means to engage a legal practitioner to represent a child and no legal practitioner has been appointed at State expense in terms of section 59, any child rights or human rights organisation who has on their staff a legal practitioner registered in terms of the Legal Practitioner Act [*Chapter 27:07*] may, with the consent of the child, parent custodian, guardian or appropriate adult, provide their legal practitioner to represent the accused child without charge.

58 Requirements to be complied with by legal practitioners

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 to 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, while ensuring that the child is not unduly influenced to acknowledge responsibility; and
- (d) make every effort to ensure that a trial is concluded speedily.

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

(1) Whenever a child is subjected to proceedings under this Act without being represented by a legal practitioner, legal representation may be provided at the State's expense, if the matter is not diverted prior to first or second appearance in court, but is set down pending trial in a child justice court.

(2) Where legal representation at the State's expense is not available for court proceedings in terms of this Act, a child protection officer may fulfil the role of an adviser to the child in lieu of legal representation.

(3) The plea may not be taken until a legal representative has been appointed.

60 Means of securing legal representation at State expense

(1) If a child requires legal representation at State expense, the police officer, child protection officer, diversion officer, prosecutor or court 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 [*Chapter 7:16*].

(2) If a child is remanded in detention, the legal practitioner appointed to represent the child must consult with the child before the child's subsequent appearance at court proceedings.

PART IX

CHILD JUSTICE COURT

61 Designation and jurisdiction of child justice court

(1) A Provincial or Regional Magistrates court or High Court shall for the purposes of this Act be a child justice court which must adjudicate on all matters in respect of an offence alleged to have been committed by a child referred to that court, subject to the provisions of subsection (3).

(2) In deciding which child justice court should hear a case, preference must be given to referral to the provincial or regional magistrates court in which the offence alleged to have been committed by the child took place, subject to the provisions of Magistrates' Courts Act [*Chapter 7:10*].

(3) The child justice court in which a child must appear, must be determined in accordance with the Magistrates' Courts Act [*Chapter 7:10*] and High Court Act [*Chapter 7:06*]. 5

(4) The courtroom, if practicable, should be located and designed in a way, which—

- (a) is conducive to the dignity and well-being of children; 10
- (b) allows for the proceedings to be informal; and
- (c) allows for the participation of all persons involved in the proceedings.

(5) To the extent practicable, the proceedings in a child justice court should be done in an informal manner, and all officers of the child justice court are enjoined to act in a child friendly manner. 15

(6) The child justice court has the sentencing jurisdiction of a provincial or a regional magistrate's court, subject to Part X.

62 Proceedings by a court

(1) A child justice court must apply the provisions of the Criminal Procedure and Evidence Act [*Chapter 9:07*] relating to plea and trial, or as may be otherwise prescribed by the rules of court. 20

(2) An ordinary 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 68 ("Court may divert matter"). 25

(3) 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.

(4) If a matter is referred to the regional court or the High Court for sentencing in terms of subsection (3), that court must sentence the child in terms this Act. 30

63 Parent, custodian, guardian or appropriate adult to attend proceedings

(1) Subject to subsection (3) a child must be assisted during proceedings of the child justice court or ordinary court by a parent, custodian, guardian or an appropriate adult, where such person can reasonably be located. 35

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

(3) A person referred to in subsection (1) 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. 40

(4) A person referred to in subsection (1) 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. 45

(5) A person referred to in subsection (1) who has not been exempted under subsection (3), who contravenes or fails to comply with subsection (4), commits an offence and on conviction is liable to a fine not exceeding level four or to imprisonment for a term not exceeding three months, or to both such fine and such imprisonment.

5 (6) If a parent, custodian, guardian or an appropriate adult has not been warned to attend proceedings of the child justice court or ordinary court, the court may, at any stage of the proceedings, subpoena or cause to be subpoenaed any parent custodian, guardian or an appropriate adult, in which cases subsections (3), (4) and (5), shall apply with necessary changes.

10 (7) The assistance of a parent custodian, guardian or appropriate adult does not replace the direct participation of the child and that of the child's legal representative or a child protection officer in the proceedings against that child.

64 Conduct of proceedings in court

- (1) At the start of proceedings in a court, the magistrate or judge must—
- 15 (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 and Evidence Act [*Chapter 7:07*];
- 20 (d) if the child is not legally represented or assisted by or a child protection officer, explain to the child and the parent custodian, guardian or an appropriate adult the provisions of Part VIII relating to legal representation;
- (e) if the child indicates an intention to apply for legal representation at the State's expense in terms of section 59, assist the child, as far as is reasonably possible, to make an application for legal aid in terms of the Legal Aid Act [*Chapter 7:16*];
- 25 (f) 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, custodian, guardian or an appropriate adult to attend the proceedings at that place and time; or
- 30 (g) if the child is not in detention—
- (i) extend or vary any condition of release imposed in terms of Part IV of this Act; and
- (ii) warn the child, his and her parent custodian, guardian or an appropriate adult to appear in court at a specified place and time.

35 (2) The court may, if it is in the best interests of the child, participate in eliciting the truth from any person involved in the proceedings.

(3) 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 that of the child's parent custodian, guardian or an appropriate adult.

40 (4) The court must protect an accused child from a 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.

(5) The proceedings of the court must be conducted in a manner that is appropriate to the age and understanding of the child.

45 (6) There shall be prescribed detailed mechanisms to cater for the special needs of a child with disabilities to ensure that they receive a fair trial.

(7) There must be interpreters with capacity to elicit testimony from children with disabilities, including in the use of sign language to communicate with a child having a hearing impairment or a child with a speech impairment.

(8) Where a child with a hearing impairment does not know sign language but his or her parent, custodian or an appropriate adult have developed a method of communicating with the child, special evidential rules must be prescribed to enable parents to act as intermediaries in eliciting testimony from their child after warning the parents of their obligation to ensure that they accurately convey what their child is saying. 5

(9) And if any issue or question is raised with respect to the admissibility of such evidence— 10

- (a) such evidence shall be presumed to be true if elicited in the prescribed manner unless the contrary is shown; and
- (b) such evidence shall be admissible if there is other corroborative evidence which in the court's opinion is adequate to support the questioned evidence. 15

(10) No person may be present at any sitting of a child justice court, unless his or her presence is necessary in connection with the proceedings of the court as determined by the relevant court procedures, or the presiding officer has granted him or her permission to be present. 20

65 Children in detention at court

(1) No person shall use handcuffs on a child in court unless there are exceptional circumstances warranting their use.

(2) A child held in a cell at the court or who is being transported to court must be— 25

- (a) kept separate from adults;
- (b) kept separate from children of the opposite sex;
- (c) under the supervision of an officer of the same sex;
- (d) treated in a manner, and kept in conditions which take account of his or her age. 30

66 Separation and joinder of trials involving children and adults

(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 the child, the adult and their legal representatives or a child protection officer have been notified. 35

(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 rights and privileges conferred upon such child by this Act. 40

67 Time limits relating to the conclusion of trials

(1) A court must endeavour to 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 in detention, the court must ensure that the requirements set out in section 28 (“Release of children accused of certain offences on special bail prior to appearance at court”) (4) are complied with.

68 Court may divert matter

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

(2) If a child has been referred to a diversion option by a court, the court must, upon receipt of a report from a diversion officer or a child protection officer that the child has successfully complied with the conditions of diversion, conclude the proceedings as if the charge against the child had been withdrawn before plea.

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

(4) Upon receipt of a notice from a diversion officer or child protection officer in terms of subsection (3), the Prosecutor-General or a designated prosecutor may —

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

(5) 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 diversion officer or child protection officer 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 sections 48(13) and 51(2).

(6) Upon receipt of the written recommendations referred to in subsection (5), 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.

(7) If an order in terms of subsection (6)(a) or (b) is made, the provisions of section 56 apply with regard to failure to comply with such order.

69 Privacy and confidentiality

(1) Subject to this section, no person shall publish the name of a child, or any other information related to a child, if it would identify the child as a child dealt with under this Act:

Provided that this section does not apply in a case where the publication of information is made in the course of the administration of justice, if it is not the purpose of the publication to make the information known in the community.

(2) A child referred to in subsection (1) may, after he or she attains the age of eighteen years, publish or cause to be published information that would identify him or her as having been dealt with under this Act: 5

Provided that he or she is not in custody pursuant to this Act at the time of the publication.

(3) A child justice court shall, on the *ex parte* application of a prosecutor make an order permitting any person to publish information that identifies a child as having committed or allegedly committed an indictable offence, if the judge is satisfied that— 10

- (a) there is reason to believe that the child is a danger to others; and
- (b) publication of the information is necessary to assist in apprehending the child.

(4) An order made under subsection (3) shall cease to have effect five days after it has been made. 15

(5) A child justice court or any other court may, on the application of a child referred to in subsection (1), make an order permitting the child to publish information that would identify him or her as having been dealt with under this Act, if the court is satisfied that the publication would not be contrary to the child's best interests or the public interest. 20

(6) Subject to this section, no person shall publish the name of a child, or any other information related to a child, if it would identify the child as having been a victim of, or as having appeared as a witness in connection with, an offence committed or alleged to have been committed by a child.

(7) Information that would serve to identify a child referred to in subsection (6) as having been a victim or a witness may be published, or caused to be published, by— 25

- (a) that child after he or she attains the age of eighteen years or before that age with the consent of his or her parents; or
- (b) the parents of that child if he or she is deceased. 30

(8) The child justice court or other court may, on the application of a child referred to in subsection (1), make an order permitting the child to publish information that would identify him or her as having been a victim or a witness if the court is satisfied that the publication would not be contrary to his or her best interests or the public interest. 35

(9) A person who contravenes or fails to comply with the provisions of this section commits an offence and on conviction is liable to a fine not exceeding level 10 or to imprisonment for a term not exceeding 2 years, or to both such fine and such imprisonment.

70 Transfer to children's court 40

(1) If it appears during proceedings at a court that a child is a person contemplated in the definition of a 'child in need of care or protection' in terms of the Children's Act [Chapter 5:06] and that it is desirable to deal with that child in terms of that Act, the court may stop the proceedings and order that the matter to be referred to the children's court to be dealt with in accordance with that Act. 45

(2) It may be found that a child is a child in need of care for the purposes of referral of a matter to a children's court where

- (a) the child is without parental or family support, or is orphaned;
- (b) the child has a behavioural or conduct disorder or a significant intellectual disability; or
- (c) the child has previously been the subject of a children's court process.

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

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

PART X

SENTENCING

71 Convicted children to be sentenced in terms of this Part

- Upon the conviction of a child or a person who was a child at the time of commission of the offence, a court must impose a sentence in accordance with this Part.

72 Purposes of sentencing

- (1) 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; and
 - (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; and
 - (c) promote restorative justice responses and 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; and
 - (e) use deprivation of liberty only as a last resort and for the shortest appropriate period of time.

(2) When imposing a sentence involving deprivation of liberty the court must take into account—

- (a) whether the harm caused by the offence is of such a serious nature that it warrants the imposition of such sentence;
- (b) the culpability of the child in causing the harm;
- (c) the protection of the community;
- (d) the impact of the offence upon the victim;
- (e) the failure of the child to respond to previous orders which did not involve deprivation of liberty, if applicable; and
- (f) the desirability of keeping a child out of prison.

73 Pre-sentence reports required

(1) Subject to subsection (2), upon conviction of a child a court must request a pre-sentence report from a child protection officer or social worker 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 the First Schedule, or if requiring the report would cause an undue delay in the conclusion of the case to the prejudice of the child, but a court may not impose a sentence involving deprivation of liberty unless a pre-sentence report has been placed before the court. 5

(3) A sentence involving deprivation of liberty includes a sentence in which the period for which the detention is imposed is suspended. 10

(4) A presiding officer who imposes a sentence involving deprivation of liberty 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 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 thirty days following the date upon which the report was requested. 15

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

74 Community-based sentences 20

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

- (a) any of the options referred to in section 42(2) or (3), provided that the time limits provided for the maximum duration of the order may be extended to three years where the offence for which the child has been convicted was a Second Schedule offence and five years where the child has been convicted of a Third Schedule offence; 25
- (b) 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 protection officer for a maximum period of five hundred hours, and to be completed within a maximum period of three years. 30

(2) If a child under 16 years of age receives a sentence in terms of subsection (1)(b), 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. 35

(3) When imposing a community-based sentence, a court must appoint a community service officer, diversion officer or a child protection officer to monitor the fulfilment of the conditions of the community-based sentence, unless no conditions are attached to the sentence. 40

75 Sentences involving deprivation of liberty

(1) A magistrate or judge who imposes on a child a sentence involving deprivation of liberty must—

- (a) note the reasons for the sentence on the record; and
- (b) explain the reasons to the child. 45

(2) A sentence involving deprivation of liberty includes referral to a—

(a) place of safety or remand home, subject to the provisions of section 78 (“Postponement or suspension of sentence”); and

(b) prison, subject to the provisions of section 79 (“Fines”).

5 (3) No child may be deprived of his or her liberty in a police cell or lock up as a sentence.

76 Referral to place of safety or remand home

(1) A sentence to a place of safety or a remand home may be imposed for a period of not less than six months and, subject to subsection (2), a period not exceeding
10 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 fourteen years of age or older, if the child 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 place of safety or a remand home
15 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 place of safety or remand home 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
20 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 facility to continue to reside at the facility for the purposes of completing his or her education, and such permission may be granted if accommodation is available.

77 Imprisonment as sentence imposed on child

25 (1) Imprisonment as a sentence imposed on a child is to be used only as a last resort and then only for the shortest appropriate period of time.

(2) A sentence of imprisonment may not be imposed in respect of a child unless—

(a) the child was above the age of 12 years at the time of commission of the
30 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 involving deprivation
35 of liberty other than imprisonment.

(3) A sentence of imprisonment may not be imposed on a child in respect of an offence mentioned in First Schedule.

(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
40 reconsideration of an appropriate sentence, which may, subject to subsections (1) and (2), include a sentence of imprisonment.

(5) The maximum period for which a child may be sentenced to imprisonment in terms of this Act is 12 years.

- (6) 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 due account must be taken of the number of days which the child has spent in any form of detention whilst awaiting finalisation of the matter to which the sentence relates. 5

78 Postponement or suspension

(1) The passing of any sentence may be postponed for a period of 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). 10

(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; 15
- (b) apology;
- (c) the obligation not to commit a further offence of a similar nature;
- (d) good behaviour;
- (e) attendance at a specified time and place for victim-offender mediation, a family group conference or other restorative process; 20
- (f) placement under the supervision of a child protection officer;
- (g) 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 child protection officer;
- (h) referral to any diversion option referred to in section 42(“Specific diversion options”) (2) or (3) for a period not exceeding three years; 25
- (i) 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) the court— 30

- (a) may request the child protection officer concerned to provide regular progress reports indicating the child’s compliance with conditions applicable to the postponement; and
- (b) if, after expiry of the period of the postponement, is satisfied that the conditions imposed have been complied with, the conviction may be considered rescinded and may be expunged from any record. 35

79 Fines

(1) A court convicting a child of an offence for which a fine is an appropriate sentence must, before imposing a fine— 40

- (a) inquire into the ability of the child or his or her parents, guardian or an appropriate adult to pay the fine, whether in full or in instalments; and
- (b) consider whether the failure to pay the fine may cause the child to be deprived of his or her liberty, in which case subsection (2) applies.

(2) A court may consider the imposition of any other the following options as an alternative to the payment of a fine—

- (a) symbolic restitution to a specified person, persons, group or institution;
- 5 (b) placing an obligation on the child to perform some service or benefit to a specified person, persons, group of persons or community, or welfare organisation or institution;
- (c) payment of compensation as determined by the court to a specified person, persons, group or institution if the child or his or her family can afford payment of that amount;
- 10 (d) in case of default of payment, if the child or his or her family cannot afford payment of that amount, an identified person or persons may pay restitution or compensation to specified person, persons, group or institution on behalf of the child and his or her family.

80 Prohibition on certain forms of deprivation of liberty and other sentences

(1) A child who has been sentenced to attend a place of safety or a remand home may not be detained in a prison or in police custody pending designation of the place where the sentence must be served.

(2) A court convicting a child of an offence for which a mandatory minimum term of imprisonment is the appropriate penalty prescribed, shall regard the age of the child as a special circumstance justifying a lesser sentence.

81 Automatic review in certain cases decided by court

(1) A sentence involving deprivation of liberty by a child justice court or ordinary court whether or not the whole or any portion of it is suspended, is subject to review by a judge of the High Court in chambers within sixty days of the sentence being imposed, and clerk of the court must cause the record of the matter to be placed before the Judge.

(2) The judge of the High Court must certify that the proceedings were in accordance with justice, but if he or she finds that the proceedings were not in accordance with substantial justice, the matter must be remitted to the child justice court or ordinary court for reconsideration.

(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.

(4) The execution of sentence is not suspended pending the review by a judge of the High Court.

82 Suspension of execution of sentence upon noting of appeal

(1) A court may after hearing any representations by the Prosecutor-General or his or her designate suspend the execution of a sentence involving deprivation of liberty pending an appeal, in which case a child is to be released on the conditions referred to in Part IV.

(2) In the case of a sentence which does not involve deprivation of liberty the court may after hearing any representations by the Prosecutor-General or his or her designate, the operation of the sentence is to be suspended pending an appeal or review.

83 Expungement of records

(1) The presiding officer in court may, at the time of sentencing a child in respect of an offence and after consideration of the—

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

5

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.

10

(3) If an order in terms of subsection (1) that the record of the conviction and sentence of a child may be expunged has been made, 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 twelve months and not more than five years from the date of the imposition of the sentence.

15

(4) Where a date for expungement of the record of the conviction and sentence has been set in terms of subsection (3), the presiding officer may 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.

20

(5) 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 to the child such decision and its reasons, as well as any conditions relating to expungement of such record.

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(6) A child or a person who wishes to ascertain whether his or her criminal record has or has not been expunged in accordance with this section may apply in writing to the Zimbabwe Republic Police to that effect.

PART XI

30

MONITORING OF CHILD JUSTICE**84 Establishment of National Child Justice Committee**

(1) There is hereby established a Committee to be known as the National Child Justice Committee.

(2) The following persons are to be members of the National Child Justice Committee—

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- (a) the Secretary responsible for Justice, who shall be the deputy chairperson of the Committee, or a person appointed by him or her with the approval of the Minister to represent the Secretary; and
- (b) the Minister responsible for Justice, or a person appointed by the Minister to represent him or her;
- (c) one staff member each, from the Ministries responsible for Police, Social Welfare, Prisons and Education;

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- (d) one staff member from the Office of Prosecutor-General, one member appointed by the Judicial Service Commission who is not a serving judicial officer, and one staff member appointed with the approval of the Minister from the Legal Aid Directorate;
- 5 (e) the person in charge of diversion officers (the National Coordinator);
- (f) five other persons who are not in the full-time or part-time employment of the State, who have an interest in and expertise related to the development of child justice, the development of diversion programmes, or other issues relevant to the furtherance of this Act.
- 10 (3) The persons referred to in subsection (2)(c) are to be nominated by the Ministers concerned and the persons referred to in subsections (2)(d) and (f) must be appointed by the Minister.
- (4) The term of office of the persons referred to in subsection (2)(f) is three years.
- 15 (5) A member of the Committee who is not in the full-time employment of the Public Service must be paid such remuneration and allowances as the Minister responsible for Justice determines, in consultation with the Minister responsible for Finance.
- (6) The Committee must meet at least four times annually and must keep
- 20 minutes of such meetings.
- (7) At a meeting of the Committee, a majority of the members of the Committee holding office at that time must constitute a quorum.
- (8) The Minister responsible for Justice must appoint a chairperson, who must be qualified to be a judge of the High Court but must not be a sitting judge.
- 25 (9) The Minister responsible for Justice must appoint a deputy chairperson who will be the Secretary to the Minister responsible for Justice or a person appointed by the Minister to represent him or her.
- (10) The Committee may in its discretion establish one or more sub-committees which must consist of two or more members of the Committee nominated for such
- 30 purpose by the Committee to advise it on any of its functions.
- (11) A person referred to in subsection (2) must vacate his or her office if—
- (a) such person, by writing under his or her hand addressed and delivered to the chairperson resigns from his or her office as a member of the Committee;
- 35 (b) such person is convicted of an offence and sentenced to imprisonment without the option of a fine;
- (c) such person is by reason of his or her physical or mental illness or for any other reason incapable of acting as a member of the Committee;
- (d) such person is removed from office by reason of his or her misconduct by
- 40 the Minister responsible for Justice, after such member has been informed of the reasons and has been given an opportunity to be heard.
- (12) The Minister may at any time revoke the appointment of a person referred to in subsection (2) and, as regards a person nominated by another Minister, upon receiving recommendation for revocation from the Minister who nominated such person.
- 45 (13) Any casual vacancy on the Committee caused by the death or vacation of office by any member of the Committee must, with due regard to the provisions of subsection (2) be filled.

85 Functions of National Child Justice Committee

- (1) The National Child Justice Committee must—
- (a) advise the Minister or any other relevant Minister concerning the implementation of this Act;
 - (b) receive and consider reports from the Provincial Child Justice Committee referred to in section 86; 5
 - (c) implement training programmes for persons involved in the application of this Act;
 - (d) advance diversion, restorative justice and community-based sentencing in Zimbabwe; and 10
 - (e) compile an annual report on the functioning of the child justice system for tabling in Parliament.
- (2) The Committee may—
- (a) receive a report or complaint from any other body, institution, organisation or individual concerning the implementation of the provisions of this Act; 15
 - (b) require any person or representative who is a member of the Committee to investigate, provide further information or take steps to resolve any complaint, difficulty or problem affecting the implementation of this Act;
 - (c) receive information concerning the implementation of this Act from Prosecutor-General, the Zimbabwe Human Rights Commission, the Courts, the Law Society of Zimbabwe, The Legal Aid Directorate, civil society organisations delivering legal, or diversion services to children in conflict with the law, or the Judicial Service Commission; 20
 - (d) refer to any complaint, difficulty or matter that has been brought to the attention of the Committee to the Provincial Child Justice Committee having jurisdiction or to another relevant authority for resolution. 25

86 Establishment of Provincial Child Justice Committees

- (1) There is hereby established a Provincial Child Justice Committee for each respective province.
- (2) The most senior magistrate in the province, or a chief magistrate, or a magistrate designated by such magistrate, must convene meetings of a Provincial Child Justice Committee in that province to meet not less than four times annually. 30
- (3) The members of the Provincial Child Justice Committee established under subsection (1) who are required to attend the meetings of that committee are—
- (a) all officers presiding in child justice courts in the province or their representative; 35
 - (b) the designated public prosecutors in the province having responsibility for child justice;
 - (c) the child protection officer or child protection officers of the province having responsibility for child justice or a child protection officer who represents that office; 40
 - (d) a representative from the Zimbabwe Republic Police from each magisterial district in the province;
 - (e) the District Administrator;

- (f) the officer in charge of the prisons within the province or his or her nominee;
- (g) the diversion officers for that province;
- (h) such other persons from the community as may be appointed by the chairperson of the Provincial Child Justice Committee; and
- (i) representatives of civil society organisations with an interest in child justice operating in the province.

(4) The functions of the Provincial Child Justice Committee are to provide oversight on the implementation of this Act in that province, and to that end, the Provincial Child Justice Committee must compile an annual report on the functioning of the Act in that province to be furnished to the National Child Justice Steering Committee.

(5) The Provincial Child Justice Committee must provide oversight over the functioning of Diversion Committees to ensure that their decisions are in accordance with justice.

87 District Child Justice Committees

(1) There is hereby established a District Child Justice Committee for each magisterial district.

(2) The magistrate of a district, or a magistrate designated by such magistrate, must convene meetings of a District Child Justice Committee in that district to meet not less than four times annually.

(3) The designated prosecutor of the magisterial district concerned with child justice and each member of the diversion committee for the district must attend the meetings of the District Child Justice Committee.

(4) The persons, organisations or institutions who may attend the meetings of the District Child Justice Committee are—

- (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 crime committed by children or who are providing services to children who are at risk of offending;
- (d) those involved in the management or monitoring of places of safety, remand homes or any other private or State institutions which are relevant to the administration of child justice;
- (e) representatives from organisations providing services aimed at the development of the community, vocational training and leisure activities for children which occupy their free time;
- (f) representatives from the office of the Legal Aid Directorate, or persons concerned with the legal representation or to children in terms of this Act;
- (g) diversion officers and, where applicable, child protection officers; 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.

88 Duties and role of District Child Justice Committees

- (1) A District Child Justice Committee must —
- (a) monitor the extent to which police officers use alternatives to arrest;
 - (b) monitor the extent to which procedures relating to release from police custody before assessment are used; 5
 - (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 trial, 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; 10
 - (e) receive and consider the reports from child protection officers in relation to children under the age of twelve years who have come into contact with the law; 15
 - (f) receive and consider reports from child protection officers or diversion officers on the family group conferences held as a diversion option;
 - (g) receive and consider reports from diversion officers and child protection officers on the extent to which recommendations for diversion have been made and the extent to which they were accepted by a court; 20
 - (h) support the development of diversion options appropriate to the district, and ensure the continued development of diversion and community based sentencing opportunities;
 - (i) receive and consider reports from child justice magistrates on the extent to which children appearing in a court are represented by a legal practitioner; 25
 - (j) receive and consider statistics collected in respect of children subject to this Act that are applicable to the particular magisterial district, and facilitate the collection of such statistics;
 - (k) 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; 30
 - (l) investigate and promote measures to reduce the involvement of children in criminal activities;
 - (m) identify persons and places suitable for the temporary placement of children in conflict with the law as alternatives to detention; and 35
 - (n) submit quarterly reports on its activities and issues relevant to child justice in the magisterial district for which it has been convened to the Provincial Child Justice Committee.

(2) A District Child Justice Committee may receive complaints concerning matters relating to administrative issues of 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 (in which event a District Child Justice Committee must, refer a matter, complaint or question to the National Coordinator for Child Justice referred to in section 89 for assistance). 40

89 National Coordinator for Child Justice and staff of department 45

(1) There shall be a National Coordinator employed in the Ministry responsible for Justice whose office shall be part of the Public Service (of a grade not be less than

that of a Director) and whose duties shall be the administration of the Diversion Register and such other duties specified by this Act or any other law.

(2) The National Coordinator must—

- (a) coordinate, promote and develop diversion and restorative justice;
- 5 (b) liaise with magistrates' courts and persons concerned with the operation of this Act in order to achieve an efficient and effective child justice system;
- (c) attend meetings of the National Child Justice Committee and provide secretariat services to the Committee;
- 10 (d) offer guidance on policy implementation, the development of guidelines or directives, and any necessary legal amendments;
- (e) perform such other duties as may be assigned to him or her by the National Child Justice Committee;
- 15 (f) facilitate training on a regular basis of all stakeholders on the implementation of the Act, on children's rights and on child development; and
- (g) be responsible for the continued development of suitable diversion options with as wide a geographical spread as is practicable for the furtherance of diversion as contemplated in this Act:

20 Provided that this function must not be construed as precluding any other offices, ministries and agencies of government or any non-governmental.

(3) The National Coordinator shall in addition serve as the secretary to the National Child Justice Committee.

25 (4) There is hereby established a National Coordinator of Child Justice Department under the Ministry responsible for Justice, whose staff shall form part of the Public Service.

(5) Anyone being employed full time under the National Coordinator at the time of the promulgation of this Act shall be deemed to in the employed in the department in terms of this Act without diminution of conditions or remuneration.

30 **90 Remuneration**

No remuneration is payable to members mentioned in section 84(2) or 86(3), or 88(4) for attending meetings or for the performance of services for the relevant National, Provincial or District Child Justice Committee.

PART XII

35 **GENERAL PROVISIONS**

91 Liability for patrimonial loss arising from performance of community service

40 (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 this Act, that loss may, subject to subsection (3), be recovered from the State.

(2) The State is not precluded, in terms of subsection (1) from obtaining indemnification by means of insurance or otherwise against its liability.

45 (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 must be pursued against the State and not the child.

(5) If any person as a result of the performance of community service in terms of Part VII or Part X has suffered patrimonial loss which cannot be recovered from the State in terms of subsection (1), the Permanent Secretary of the Ministry responsible for Justice may, with the concurrence of the Treasury, make a gratuitous payment of such amount as he or she may deem reasonable to that person. 5

92 Regulations

(1) The Minister, where necessary in consultation with the Minister responsible for social welfare, the Minister responsible for prisons and the Minister responsible for police, may make regulations on— 10

- (a) any matter which is required or permitted in terms of this Act to be prescribed;
- (b) the monitoring of this Act, what information and statistics need to be recorded, and the contents of the annual report on the functioning of the child justice system; and 15
- (c) any other matter which may be necessary for the application of this Act.

(2) The Minister responsible for justice may from time to time adjust any of the amounts prescribed in the First, Second, and Third Schedule by notice in the *Gazette*. 20

93 Offences and penalties

A person who hinders a child protection officer, diversion officer community service officer or police officer in 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 process established under this Act is commits an offence and is liable to a fine not exceeding level 5 or to imprisonment for a term not exceeding three months, or to both such fine and such imprisonment. 25

94 Amendment of [Chapter 9:23]

(1) Section 6 of the Criminal Law (Codification and Reform Act) [Chapter 9:23] is amended by the deletion of the word “seven” and substitution with “twelve”. 30

(2) Section 7 of the Criminal Law (Codification and Reform Act) [Chapter 9:23] is repealed and the following section is substituted—

“7 Criminal capacity of children between twelve and fourteen years of age

A child who is of or over the age of twelve years but below the age of fourteen years at the time of conduct constituting any crime which he or she is alleged to have committed shall be presumed, unless the contrary is proved beyond reasonable doubt— 35

- (a) to lack the capacity to form the intention necessary to commit the crime; or 40
- (b) where negligence is an element of the crime concerned, to lack the capacity to behave in the way a reasonable adult would have behaved in the circumstances.”.

FIRST SCHEDULE
CLASS 1 OFFENCES

1. Assault where grievous bodily harm has not been inflicted.
2. Malicious damage to property
3. Trespass.
4. Any offence under any law relating to the illicit possession of dependence producing drugs.
5. Theft.
6. Any statutory offence where the maximum penalty determined by that statute is a fine of less than level 4 or three months imprisonment.
7. Conspiracy, incitement or attempt to commit any offence referred to in this Schedule.

SECOND SCHEDULE
CLASS 2 OFFENCES

1. Public violence.
2. Culpable homicide.
3. Assault, including assault involving the infliction of grievous bodily harm.
4. Malicious damage to property involving the use of fire.
5. Indecent assault including where the indecent assault is committed against a child.
6. Unlawful entry into premises with intent to commit an offence, and where the offence committed inside the premises is theft.
7. Robbery, other than robbery with aggravating circumstances.
8. Any offence under any law relating to the illicit possession of dependence producing drugs.
9. Forgery or fraud.
10. Any conspiracy, incitement or attempt to commit any offence referred to in this Schedule.
11. Any statutory offence where the penalty concerned does not exceed level 6 or three years imprisonment.

THIRD SCHEDULE
CLASS 3 OFFENCES

1. Murder.
2. Rape.
3. Aggravated indecent assault.
4. Robbery —
 - (a) where there are aggravating circumstances; or
 - (b) involving the taking of a motor-vehicle.
5. Indecent assault on a child.
6. Any offence referred to in section of the Dangerous Drugs Act [*Chapter 15:02*], if it is alleged 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 the —

- (a) dealing in or smuggling of ammunition, firearms, explosives or armaments;
or
 - (b) possession of an automatic or semi-automatic firearm, explosives or
armament.
- 8. Any offence relating to exchange control, corruption or extortion.
- 9. Forgery, uttering or fraud.
- 10. Any statutory offence where the penalty concerned exceeds level 10 or three years
imprisonment.
- 11. Any conspiracy or incitement or attempt to commit any offence referred to in this
Schedule.