

# **SUPPLEMENT TO THE SWAZILAND GOVERNMENT GAZETTE**

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# PART A

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## CHILDREN'S PROTECTION AND WELFARE BILL, 2011

(Bill No. 6 of 2011)

(to be presented by the Deputy Prime Minister)

### MEMORANDUM OF OBJECTS AND REASONS

The object of this Bill is to further the provision and intentions of section 29 of the Constitution of Swaziland, 2005 and to extend, promote and protect the rights of children as defined in the 1989 United Nations Convention on the Rights of the Child, the African Charter on the Rights of and Welfare of the Child and other international instruments, protocols, standards and rules on the protection and welfare of children to which Swaziland is signatory and to provide for other incidental matters.

**J. M. DLAMINI**  
*ATTORNEY-GENERAL*

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**A BILL**  
**ENTITLED**

**AN ACT** to extend the provisions of section 29 of the Constitution and other international instruments, protocols, standards and rules on the protection and welfare of children, the care, protection and maintenance of children; and to provide for matters incidental thereto.

**ENACTED** by the King and the Parliament of Swaziland

**PART I**  
**PRELIMINARY**

*Short title and commencement.*

1. This Act may be cited as Children's Protection and Welfare Act, 2011 and shall come into force on such date as the Minister may fix by notice in the Gazette and the Minister may fix different dates for coming into force of different Parts or sections of this Act.

*Interpretation.*

2. In this Act, unless the context otherwise requires -

"abuse" in relation to a child, means any form of harm or ill-treatment deliberately inflicted on a child, and includes -

- (a) assaulting a child or inflicting any other form of deliberate injury or harm on a child;
- (b) sexually abusing a child;
- (c) committing an exploitative labour practice in relation to a child;
- (d) exposing or subjecting a child to behaviour that may socially, emotionally, physically or psychologically harm the child;
- (e) exposing a child to physical or mental neglect; and
- (f) abandoning or leaving a child without visible means of support;

"authorised person" means an official or other person authorised expressly or impliedly to perform the act in question;

"approved school" means a school designated as such under section 186 of this Act.

"approved school order" means an order made by a Children's Court requiring a child to be sent to an approved school;

“assessment” means a process of the evaluation of a child by a social worker, on the child’s development and competencies, the child’s family or home circumstances, the nature and circumstances surrounding the socio-economic circumstances of the child or the alleged commission of an offence and its impact upon the victim, the intention of the child to acknowledge responsibility for the alleged offence, and any other relevant circumstances or factors;

“auxiliary social worker” means a designated person who assist social workers with their tasks;

“Bill of Rights” means the rights and freedoms of individuals contained Chapter 3 of the Constitution;

“chief” has the meaning assigned to it in the Constitution;

“child” means -

(a) a person under the age of eighteen years;

(b) in relation to criminal proceedings, is a person who has attained the age of criminal responsibility as referred to under section 83.

“Children’s Court” has the meaning assigned to it under section 132;

“community service” means compulsory work for a community organisation or other compulsory work of value to a community, performed by a child with his consent and without remuneration;

“Constitution” means the Constitution of the Kingdom of Swaziland Act, 2005;

“contribution order” means an order made by the Children’s Court for a parent of a child who is sent to an institution to contribute financially for the welfare of the child;

“a child with disability” means a child who is affected by any disability of a physical, intellectual, sensory, or mental nature or other disability irrespective of its cause, whether temporary or permanent, to the extent that a child is unable to engage in activities in a normal way and is as a result hampered in his normal functions in certain areas of social life;

“detention” means the deprivation of liberty of a child including confinement in a police cell, lock-up, prison, approved school, probation hostel;

“diversion” means the referral of cases of children alleged to have committed offences away from the criminal justice system with or without conditions;

“diversion programme” means a programme which is intended to promote a child’s accountability and reintegration into society;

“early intervention services” means social development services which are provided to families with children in order to strengthen and build their capacity and self-reliance to address problems that may or are bound to occur in the family environment;

“emoluments” includes any salary, wages, allowances or any other form of remuneration, whether expressed in money or not;

“family group conference” means a meeting involving the child, his parents and family members, the victim of the offence, his parents if the victim is another child, and any other relevant party to find ways to restore the harm and broken relationships caused by the child’s offending;

“foster parent” means a person, not being a parent of a child who undertakes the responsibility of providing for the care, accommodation and upbringing of the child, with or without financial reward;

“financial institution” has the meaning assigned to it under section 2 of the Financial Institutions (Consolidation) Order No. 23 of 1975;

“guardian” means any person who, in the opinion of the Children’s Court having cognizance of any case in relation to the child or in which the child is concerned, is for a time being in charge of or has control over the child;

“household member” means a person who ordinarily resides in the same household as the child;

“industrial undertaking” has the meaning assigned to it under section 234;

“inquiry magistrate” means the officer presiding in a preliminary inquiry;

“member of the family” includes a parent or a guardian, or a member of the extended family, who is a household member;

“Minister” means the Minister responsible for children’s issues or the Minister for the time being charged with the responsibility for that matter;

“person” means a natural person or juristic person;

“place of detention” -

(a) means any place of detention established or appointed under section 178; and

(b) includes accommodation in police station, police cell or lock-up, prison, approved school, probation hostel, separate or apart from adult offenders;

“place of safety” means any institution designated for the care and protection of children, foster home or any other suitable place the occupier of which is willing temporarily to receive a child;

“police officer” has the same meaning as in the Police Act No. of 29 of 1957.

“preliminary inquiry” means the compulsory procedure which takes place before charges are instituted in relation to the alleged offence and which is held in all cases involving a child over the minimum age of criminal responsibility, where diversion, conversion to a Children’s Court inquiry or a decision to decline to charge the child has not yet been taken in accordance with this Act;

“probationer” means a child for the time being under supervision by virtue of a probation order;

“probation hostel” means a hostel established or appointed as a place of residence for children required to reside there under section 186;

“probation period” means the period in which a probationer is placed under supervision by virtue of a probation order;

“recognisance” means a communication to the child by a police officer or social worker to appear at assessment on a specified date and at a specified place and time, or by a magistrate to appear at a preliminary inquiry or at a Children’s Court;

“sentence involving residential element” means a sentence or a programme referred to under section 161 where part of that sentence or programme involves compulsory residence in a residential facility or a place other than the child’s home;

“trafficking” means the recruitment, transportation, transfer, sale, harbouring or receipt of persons, by means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purposes of exploitation;

“social worker” means a person working as a social worker in the department of Social Welfare, including a probation officer.

## PART II GENERAL PROVISIONS

### *Principles for administration of Act.*

3. (1) This Act is to be administered under the principle that the welfare and best interests of a child are paramount.

(2) Subject to subsection (1), this Act is also to be administered under the following principles -

- (a) every child has a right to protection from harm;
- (b) families have the primary responsibility for the upbringing, protection and development of their children;
- (c) the preferred way of ensuring a child’s wellbeing is through the support of the child’s family;
- (d) powers conferred under this Act should be exercised in a way that is open, fair and respects the rights of people affected by their exercise, and, in particular, in a way that ensures -
  - (i) actions taken, while in the best interests of the child, maintain family relationships and are supportive of individual rights and ethnic, religious and cultural identity or values; and
  - (ii) the views of the child and the child’s family are considered; and
  - (iii) the child and the child’s parents have the opportunity to take part in making decisions affecting their lives;
- (e) if a child does not have a parent able and willing to protect the child, the Government has a responsibility to protect the child, but in protecting the child the Government shall not take action that is unwarranted in the circumstances;
- (f) if a child is removed from the child’s family -
  - (i) the aim of authorised persons working with the child and the child’s family is to safely return the child to the family if possible; and

- (ii) the child's need to maintain family and social contacts, and ethnic and cultural identity, shall be taken into account; and
  - (iii) in deciding in whose care the child should be placed, the Director of Social Welfare shall give proper consideration to placing the child, as a first option, with kin;
  - (g) a child should be kept informed of matters affecting him in a way and to an extent that is appropriate, having regard to the child's age and ability to understand;
  - (h) if a child is able to form and express views about his care, the views shall be given consideration, taking into account the child's, age, capacity and ability to understand;
  - (i) if a child does not have a parent able and willing to give the child ongoing protection, the child has a right to long-term alternative care.
- (3) Nothing in this Act is intended to prevent, discourage or displace the application of informal and traditional regimes that are more promotive or protective of the rights of children except where those regimes are contrary to the best interests of children.
- (4) Where there is anything to the contrary or less protective or less promotive in any law, the provisions of this Act shall apply.

### PART III

#### RIGHTS OF THE CHILD AND RESPONSIBILITIES OF PARENTS AND THE STATE

##### ***Non-discrimination.***

4. A child shall not be discriminated against on the grounds of gender, race, age, religion, disability, health status, custom, ethnic origin, rural or urban background, birth, socio-economic status, refugee status or other status.

##### ***Right to name and nationality.***

5. A child has a right from birth to a decent name and to acquire nationality.

##### ***Right to birth registration and citizenship.***

6. A child has a right to be registered within three months of birth whether a child is born alive or still born.

##### ***Right of orphaned and vulnerable children to vital registration.***

7. (1) Orphaned and vulnerable children shall have a right to vital registration.

(2) The Department of Statistics shall maintain and administer a systematic and comprehensive disaggregated, quantitative and qualitative data in relation to all groups of orphaned and vulnerable children.

(3) The Department of Statistics shall put in place mechanisms and strategies for the collection, analysis and dissemination of data in respect of orphaned and vulnerable children.

***Right to knowledge of and grow with parents and in family environment.***

8. A child has a right to know and live with his parents and family and grow up in a caring and peaceful environment unless it is proved in court that living with his parents would -

- (a) lead to harm to the child; or
- (b) subject the child to abuse and neglect; or
- (c) not be in the best interests of the child.

***Right to education and well-being.***

9. (1) A child has a right to access education, preventive health services, adequate diet, clothing, shelter, medical attention, social services or any other service required for the child's development.

(2) A child shall not be denied or hindered from medical treatment by reason of religious or other beliefs.

(3) A child has a right to education regardless of the type or severity of the disability he may have.

***Right to social activity.***

10. A child shall not be deprived of or hindered from participating in sports, or in positive cultural and artistic activities or other leisure activities except where it is not in the best interest of the child.

***Rights of children with disabilities.***

11. A child with disability has a right to special care, medical treatment, rehabilitation, family and personal integrity, sports and recreation, education, and training to help him enjoy a full and decent life in dignity and achieve the greatest degree of self-actualisation, self-reliance and social integration possible.

***Right of opinion.***

12. (1) A child has the right to express his opinion freely and to have that opinion taken into account in any matter or procedure affecting the child.

(2) The opinion of the child shall be given due weight in accordance with the age and maturity of the child.

***Right to protection from exploitative labour.***

13. A child has a right to be protected from exploitative labour as provided for under section 236 of this Act and other international instruments on child labour.

***Right to protection from torture and degrading treatment.***

14. (1) A child has a right to be protected from torture or other cruel, inhumane or degrading treatment or punishment including any cultural practice which dehumanises or is injurious to the physical, psychological, emotional and mental well-being of a child.

(2) A child has the right to be disciplined in accordance with his age, physical, psychological, emotional and mental condition and no discipline is justifiable if by reason of tender age or otherwise the child is incapable of understanding the purpose of the discipline.

***Right to refuse harmful cultural rites and practices.***

15. A child has a right to refuse to be compelled to undergo or uphold any custom or practices that are likely to negatively affect the child's life, health, welfare, dignity or physical, emotional, psychological, mental and intellectual development.

***Right to be protected from harmful substances.***

16. A child has a right to be protected from the use of hallucinogens, narcotics, alcohol, tobacco products or psycho- tropic drugs and any other substances declared harmful and from being involved in their production, trafficking or distribution.

***Right to parental property.***

17. A child has a right to a reasonable provision out of the estate life, insurance or pension fund of a deceased parent whether or not born in wedlock or orphaned.

***Duties and responsibilities of parents and guardians.***

18. (1) A parent or guardian, whether -

- (a) married or not; or
  - (b) the parents of the child continue to live together or not,
- shall not deprive a child of his welfare.

(2) A parent or guardian has a responsibility, whether imposed by law or otherwise, towards the child which include the responsibility to -

- (a) protect the child from neglect, discrimination, violence, abuse, exploitation, exposure to physical and moral hazards and oppression;
- (b) provide good guidance, care, assistance and maintenance for the child to ensure the survival and development of that child;
- (c) ensure that during temporary absence, the child shall be cared for by a competent person;
- (d) exercise joint primary responsibility for raising the children, except where the parent or guardian has surrendered those rights and responsibilities in accordance with the law.

(3) A parent or guardian shall be responsible for the registration of the birth of his children and the name(s) of the parent(s) or guardian shall appear on the birth certificate.

***Offence.***

19. Any person who contravenes a provision of section 18 commits an offence and is liable on conviction to a fine of not less than ten thousand Emalangeni (E 10, 000) or to imprisonment for a term of not less than one year or both.

***Duties and responsibilities of children.***

20. A child shall subject to his age and ability and such limitations as may be contained in this Act, have due regard to his duties and responsibilities to -

- (a) work for the cohesion of the family, respect the parents, guardians, superiors and elders at all times and assist them in cases of need;
- (b) serve the national community by placing physical and intellectual abilities at its service;
- (c) preserve and strengthen social and national solidarity; and
- (d) uphold the positive values of the community in the relations of the child with other members of that community,

***General responsibility of all persons.***

21. (1) Every person shall have the responsibility to respect, protect and promote the rights of children contained in this Act and any other law to the extent that it is applicable, taking into account the nature of the right and duty imposed by that right and duty.

(2) All officials, employees and representatives of an organ of state shall respect, protect and promote the rights of children contained in this Act.

***General Functions of the Department of Social Welfare.***

22. (1) Without limiting any other functions of the Department of Social Welfare, for the proper and efficient administration of this Act, the functions of the Department of Social Welfare are -

- (a) provide or help provide, information for parents and other members of the community about the development of children and their needs; and
- (b) provide or help provide, preventative and support services to strengthen and support families and to reduce the incidence of harm to children; and

(2) For purposes of this Act, social workers shall by virtue of such status be officers of court.

**PART IV****CHILD IN NEED OF CARE AND PROTECTION*****Child in need of care and protection.***

23. (1) A child is in need of care and protection if -

- (a) a child has been or there is risk that the child will be physically, psychologically or emotionally injured or sexually abused by the parent or guardian or a member of the extended family or any other person;
- (b) the child has been or there is risk that the child will be physically injured or emotionally injured or sexually abused and the parent or guardian or any other person, knowing of such injury or abuse or risk, has not protected or is unlikely to protect the child from such injury or abuse;



- (c) the parent or guardian of the child is unfit, disabled or has neglected, or is unable, to exercise proper supervision and control over the child and the child is falling into bad association;
- (d) the parent or guardian of the child has neglected or is unwilling to provide for the child's adequate care, food, clothing and shelter, education and health;
- (e) the child -
  - (i) has no parent or guardian; or
  - (ii) has been abandoned by the parent(s) or guardian(s) and after reasonable inquiries the parent(s) or guardian(s) cannot be found, and no other suitable person is willing and able to care for the child;
- (f) the child needs to be examined, investigated or treated -
  - (i) for the purpose of restoring or preserving the child's health; and
  - (ii) the parent or guardian neglects or refuses to have the child so examined, investigated or treated;
- (g) the child behaves in a manner that is, or is likely to be, harmful to himself or to any other person and the parent or guardian is unable or unwilling to take necessary measures to remedy the situation or the remedial measures taken by the parent or guardian fail and as result the child cannot be controlled by his parent or guardian;
- (h) there is such a conflict between the child and the parent or guardian, or between the parent or guardian, that family relationships are seriously disrupted, thereby causing the child emotional injury;
- (i) the child is in the custody of a person who has been convicted of physically assaulting or committing a sexual offence in connection with that child;
- (j) the child frequents the company of any immoral or vicious person, or is living in circumstances calculated to cause or induce his seduction, corruption or prostitution;
- (k) the child is caused to be on any street, premises or place for the purpose of -
  - (i) begging or receiving alms, whether or not there is any pretence of singing, playing, performing or offering anything for sale and as a result the child becomes a habitual beggar;
  - (ii) carrying out illegal hawking, illegal lotteries, gambling or other illegal activities detrimental to the health and welfare or retard the educational advancement of the child.
- (l) the child is affected or infected by HIV/ AIDS and other life threatening conditions;
- (m) the child cannot be controlled by his parent (s) or guardian or the person in whose custody he is; and
- (n) the child is below the age of fifteen years and is engaged in regular economic activity detrimental to his health, educational advancement and development.

(2) For the purposes of this Part, a child is -

- (a) physically injured if there is injury to any part of the child's body as a result of the non-accidental application of force or an agent to the child's body that is evidenced by, amongst other things, a laceration, a contusion, an abrasion, a scar, a fracture or other bone injury, a dislocation, a sprain, a haemorrhaging, the rupture of a viscus, a burn, a scald, the loss or alteration of consciousness or physiological functioning or the loss of hair or teeth;
- (b) emotionally and psychologically injured if there is impairment of the child's mental or emotional functioning that is evidenced by, among other things, a mental or behavioural disorder, including anxiety, depression, withdrawal, aggression or delayed development;
- (c) sexually abused if he has taken part, whether as a participant or an observer, in any activity which is sexual in nature for the purposes of -
  - (i) any pornographic, obscene or indecent material, photograph, recording, film, videotape or performance; or
  - (ii) sexual exploitation by any person for that person's or other person's sexual gratification or for commercial gain.

***Taking a child into place of safety.***

24. (1) Any police officer, social worker, indvuna or any designated member of the community working with children who is satisfied on reasonable grounds that a child is in need of care and protection may take a child and place the child into places of safety.

(2) Any person or the affected child who is in need of care and protection may, on his own make an application to a social worker, chief or police officer for admission into a place of safety.

(3) A social worker at the place of safety shall satisfy himself that the child brought under subsection (1) is in need of care and protection, and if the circumstances so warrant, admit the child.

***Presentation before Children's Court.***

25. (1) Subject to section 26, a child who is taken into a place of safety under section 24 shall be brought before the Children's Court within forty- eight hours exclusive of the time necessary for the journey from the place the child was so taken into custody to the Children's Court.

(2) If it is not possible to bring a child before the Magistrate or Children's Court within the time specified under subsection (1), the child shall be brought before a magistrate who may direct that the child be placed in -

- (a) a place of safety; or
- (b) the care of a fit and proper person, until such time as the child can be brought before the Children's Court.

(3) If a child is in a place of safety or in the care of a fit and proper person under subsection (2) -

- (a) the person in charge of the place of safety or such fit and proper person shall have the like control over, and responsibility for the maintenance of the child as the parent or guardian of the child would have had; and
  - (b) the child shall continue in the care of the person referred to in paragraph (a) notwithstanding that the child is claimed by the parent or guardian or any other person.
- (4) A social worker, police officer, chief or any member of the community who takes a child into a place of safety under this section shall, immediately upon such taking, cause the parent or guardian of the child to be notified of such taking.
- (5) A police officer, chief or any member of the community who takes a child into temporary care under this section shall, immediately upon such taking, notify a social worker of such taking.

***Child in need of medical examination or treatment.***

26. (1) If a social worker, police officer, chief or any member of the community who takes a child into a place of safety under section 24 is of the opinion that the child is in need of medical examination or treatment, the social worker, police officer, chief or any member of the community may, instead of bringing the child before the Children's Court or magistrate, as the case may be, present the child before a medical officer.

(2) If a social worker, police officer or chief does not take a child into a place of safety under section 24 but is satisfied on reasonable grounds that the child is in need of medical examination or treatment, he may direct in writing the person who appears to him to have the care of the child for the time being to immediately take a child to a medical officer.

(3) If the person referred to under subsection (2) fails to comply within forty-eight hours with a direction made under that subsection, a social worker, police officer or chief may take the child into temporary care for the purpose of presenting the child before a medical officer.

***Medical examination and treatment.***

27. (1) A medical officer before whom a child is presented under section 26(1) or (3) -

- (a) shall conduct or cause to be conducted an examination of the child;
- (b) may, in examining the child and if so authorised by a social worker or police officer, administer or cause to be administered such procedures and tests as may be necessary to diagnose the child's condition;
- (c) may provide or cause to be provided such treatment as the medical officer considers necessary as a result of the diagnosis.

(2) The child who is presented before a medical officer under subsection (1) shall be exempted from medical fees with the authority of a social worker.

***Authorisation of hospitalisation.***

28. (1) If the medical officer who examines a child under section 26 is of the opinion that the hospitalisation of the child is necessary for the purposes of medical care or treatment, a social worker or police officer may authorise the child to be hospitalised.

(2) Where a police officer authorises the child to be hospitalised, he or she shall inform a social worker where an exemption for medical expenses is necessary.

***Control over hospitalised children.***

29. If a child is hospitalised under section 28, the Director of Social Welfare shall have the same control over, and responsibility for the maintenance of, that child as the person in charge of a place of safety would have had if a child had been placed in that place of safety.

***Authorisation of medical treatment.***

30. (1) If, in the opinion of the medical officer, the child referred to under section 26 requires treatment for a minor illness, injury or condition, a social worker or police officer may authorise such treatment.

(2) If, in opinion of the medical officer, the child referred to in section 26 is suffering from a serious illness, injury or condition or requires surgery or psychiatric treatment, a social worker or police officer -

- (a) shall immediately notify or take reasonable steps to notify and consult the parent or guardian of the child or any person having authority to consent to such treatment; and
- (b) may, with the written consent of the parent or guardian or such person, authorise such medical or surgical or psychiatric treatment as may be considered necessary by a medical officer.

(3) If a medical officer has certified in writing that there is immediate risk to the health of a child, a social worker or police officer may authorise, without obtaining the consent referred to in subsection (2), such medical or surgical or psychiatric treatment as may be considered necessary by the medical officer but only under any of the following circumstances -

- (a) that the parent or guardian of the child or any person having authority to consent to such treatment has unreasonably refused to give, or abstained from giving, consent to such treatment;
- (b) that the parent or guardian or the person referred to in paragraph (a) is not available or cannot be found within a reasonable time; or
- (c) the social worker believes on reasonable grounds that the parent or guardian or the person referred to in paragraph (a) has ill-treated, neglected, abandoned or exposed, or sexually abused, the child.

***Steps to be taken after medical examination or treatment.***

31. (1) A child who is taken into a place of safety under section 24 and is medically examined or treated under section 27 shall be brought before Children's Court within forty- eight hours -

- (a) of the completion of such examination or treatment; or
- (b) if the child is hospitalised, on his discharge from the hospital.

(2) If it is not possible to bring the child before a Children's Court within the time specified in subsection (1), the child shall be brought before a magistrate who may direct that the child be placed in -

- a) a place of safety; or

- b) the care of a fit and proper person,

until such time as the child can be brought before Children's Court.

(3) A child who -

- (a) is taken into care under section 26 (3); and
- (b) subsequently undergoes medical examination or treatment,

shall be returned to the person from whose care the child was taken upon the completion of such examination or treatment or, if the child is hospitalised, upon discharge from the hospital.

***No liability incurred for giving authorisation.***

32. (1) If a child is examined or treated pursuant to section 27 or 30 -

- (a) the social worker or police officer who authorises such examination or treatment;
- (b) the medical officer who examines or treats the child; and
- (c) all persons acting in aid of the medical officer,

shall not incur any civil or criminal liability at law by reason only that a child is examined or treated pursuant to that section.

(2) Nothing contained in subsection (1) relieves a medical officer from liability in respect of any negligent medical examination or treatment of a child.

***Duty of medical officer.***

33. (1) If a medical officer believes on reasonable grounds that a child he is examining or treating is physically, psychologically or emotionally injured as a result of being ill-treated, neglected, abandoned or exposed, or is sexually abused, he shall immediately inform a social worker or police officer.

(2) Any medical officer who fails to comply with subsection (1) commits an offence and is liable on conviction to a fine not exceeding ten thousand Emalangeni or to imprisonment to a term not less than six months or both.

***Duty of member of the family.***

34. (1) If any member of the family of a child believes on reasonable grounds that the child is physically, psychologically or emotionally injured as a result of being ill-treated, neglected, abandoned or exposed, or is sexually abused, he shall immediately inform a social worker.

(2) Any member of the family who fails to comply with subsection (1) commits an offence and shall on conviction be released on a binding agreement on conditions to be determined by the court.

***Duty of child care provider.***

35. (1) If a child care giver believes on reasonable grounds that a child is physically, psychologically or emotionally injured as a result of being ill-treated, neglected, abandoned or exposed, or is sexually abused, he shall inform a social worker or a police officer.

(2) Any child care giver who fails to comply with subsection (1) commits an offence is liable on conviction to a fine not exceeding five thousand emalangeneni or to imprisonment for a term not exceeding three months or both.

***Duty of member of the community.***

36. (1) If any member of the community believes on reasonable grounds that a child is physically, psychologically or emotionally injured as a result of being ill-treated, neglected, abandoned or exposed, or is sexually abused, he shall immediately inform a chief, police or social worker.

(2) Any member of the community who fails to comply with subsection (1) commits an offence is liable on conviction to a fine not exceeding three thousand Emalangeneni or to imprisonment for a term not exceeding two months or both.

***Functions of Children's Court in cases of children in need of care.***

37. (1) If the Children's Court is satisfied that any child brought before the Children's Court under section 25 or 31 is a child in need of care and protection, the Children's Court may -

- (a) order the parent or guardian to enter into a binding agreement to exercise proper care and guardianship for a period specified by the Children's Court;
- (b) make an order placing the child in the custody of a fit and proper person for a period specified by the Children's Court;
- (c) without making any other order or in addition to an order made under paragraph (a) or (b), make an order placing the child under the supervision of -
  - (i) a social worker; or
  - (ii) some other person appointed for the purpose by the Children's Court, for a period specified by the Children's Court;
- (d) make an order placing the child in a place of safety for a period of two years from the date of the order or until he attains the age of eighteen years, whichever is the shorter; or
- (e) in the case of a child who has no parent or guardian or who has been abandoned, make an order placing the child in the care, custody and guardianship of a foster parent found to be suitable by the Director of Social Welfare for a period of two years or until the child attains the age of eighteen years, whichever is the shorter, and pending that, place the child in a place of safety.

(2) If the Children's Court makes an order under subsection (1) (e), the Director of Social Welfare shall, in order to give effect to the order, immediately endeavour to place the child in the care, custody and control of a foster parent.

(3) If at any subsequent time the foster parent intends to return the child who has been placed in his care, custody and guardianship under subsection (1) (e), he shall report in person to a social worker and bring the child before the social worker, and the social worker shall place the child temporarily in a place of safety and inform the Children's Court.

(4) If during the period mentioned under subsection (1) (e) the parent or guardian of the child concerned has not claimed the child or made any appearance, the Children's Court may -

- (a) at the expiry of that period; and
- (b) if the Children's Court is satisfied that reasonable steps have been taken by a social worker to trace the parent or guardian of the child,

make an order placing the child for adoption by the foster parent or any person who wishes to adopt the child, and in any such case, the parent's or guardian's consent for the adoption of the child shall be dispensed with.

(5) Before making an order under subsection (1) or (4), the Children's Court shall consider and take into account a report prepared by a social worker which -

- (a) shall contain such information as to the social background, general conduct, home surrounding, school record and medical history of a child as may enable the Children's Court to deal with the case in the best interests of the child; and
- (b) may include any written report of a registered medical practitioner or any other person whom the court thinks fit to provide a report on the child.

(6) In order to enable a social worker to prepare and submit the report referred to in subsection (6), the Children's Court may -

- (a) adjourn the case for a period not exceeding two months; and
- (b) make in respect of the child, as an interim order having effect only during the period of adjournment, any order which the Children's Court could have made under subsection (1).

(7) The Children's Court may, in making any order under subsection (1), impose such conditions or give such directions as the Children's Court may deem fit for the purpose of ensuring the safety and well-being of the child in respect of whom such order is made, and such conditions or directions may include the following -

- (a) that the parent or guardian of the child accompanied by the child shall attend interactive workshops held at designated places;
- (b) if the child is placed at a place of safety, a social worker shall accompany the parent or guardian for the first visit to see the child and thereafter the parent or guardian shall visit the child on a regular basis as determined by the Children's Court; or
- (c) if the child is in an educational institution, that the parent or guardian shall consult with the child's teacher and principal of the institute once a month.

(8) Any parent or guardian who fails to comply with any of the conditions imposed or directions given under subsection (7) commits an offence and is liable on conviction to a fine not exceeding twenty five thousand Emalangeni or to imprisonment for a period not exceeding two years or to both.

(9) An order under subsection (1) shall not be made without giving the child, parent or guardian of the child an opportunity to attend the proceedings and to be heard.

(10) Notwithstanding subsection (9), an order under subsection (1) may be made if the Children's Court is satisfied on information given by a social worker that the parent or guardian of the child, having been required to attend, has failed to do so, or is not available or cannot be found within a reasonable time.

(11) If the Children's Court is not satisfied that a child brought before it under this section is in need of care and protection, the Children's Court shall order the child to be returned to the care and custody of his parent or guardian with close monitoring by a social worker.

(12) The Children's Court may, on the application of -

- (a) a social worker;
- (b) the person in charge of a place of safety;
- (c) the parent or guardian of a child;
- (d) the child; or
- (e) any person who has information,

amend, vary or rescind any order made under this section if the Children's Court is satisfied that it is in the best interests of the child to do so; or upon proof that the circumstances under which the order was made have since changed after the making of the order.

## PART V

### CHILD IN NEED OF REHABILITATION AND URGENT PROTECTION

#### *Child in need of rehabilitation.*

38. A child is in need of rehabilitation if there is reasonable cause to believe that the child -

- (a) is being induced to perform any sexual act, or is in any physical or social environment which may lead to the performance of such act;
- (b) lives in or frequents any brothel or place of assignation;
- (c) is habitually in the company or under the control of brothel-keepers or procurers or persons employed or directly interested in the business carried on in brothels or in connection with prostitution; or
- (d) is a victim of sexual violence or labour exploitation or is denied access to education; or
- (e) is a habitual substance abuser.

#### *Removal of a child in need of rehabilitation to a place of safety.*

39. (1) Any social worker, police officer or chief who is satisfied on reasonable grounds that a child is in need of rehabilitation may order the child to be removed to a place of safety and the child shall be temporarily kept in such place of safety.

(2) Any child who is temporarily kept under subsection (1) shall be brought before the Children's Court within 48 hours exclusive of the time necessary for the journey from the place where the child was so removed to the Children's Court.

(3) If it is not possible to bring a child before the Children's Court within the time specified in subsection (2), the child shall be kept in a place of safety for a period not exceeding seven days within which the child shall be brought before the Children's Court.



(4) If the Children's Court is satisfied that the child brought before it is in need of rehabilitation, the Children's Court may order the child to be kept in a place of safety until -

- (a) an inquiry into the circumstances of the child's case has been completed; and
- (b) a report of the inquiry has been submitted to the Children's Court by the social worker.

(5) If the Children's Court is not satisfied that a child brought before it is in need of rehabilitation, the Children's Court shall order the child to be returned to the care of the parent or guardian.

***Orders upon completion of an inquiry.***

40. (1) An inquiry referred to under section 39 (4) shall be made by a social worker.

(2) A social worker shall complete the inquiry and submit a report to the Children's Court within a period not exceeding one month from the date of admission of a child to a place of safety under section 39 (1).

(3) If after considering the report submitted under subsection (2), the Children's Court is satisfied that any child brought before it is a child in need of rehabilitation, the Children's Court may, subject to the other provisions in this section -

- (a) order the child to be kept in a place of safety for a period not exceeding three years from the date of the admission of the child into a place of safety under section 39 (1) and the order shall be an authority for his admission into a place of safety;
- (b) make an order placing the child for such period not exceeding three years from the date of the order in the care of the person whether a relative or not who is willing and whom the Children's Court considers to be a fit and proper person to undertake care of such child;
- (c) make an order requiring the parent or guardian of a child to enter into a binding agreement, with or without sureties, as the Children's Court may determine, for such period not exceeding three years from the date of the order subject to such conditions as the Children's Court thinks fit for the proper care and guardianship of the child; or
- (d) make an order placing the child under the supervision of a social worker, subject to such conditions as the Children's Court thinks fit and for such period not exceeding three years from the date of the order.

(4) An order made under subsection (3) (a) or (d) may have the effect of extending the period of such placement or supervision, as the case may be, until the child attains the age of eighteen years.

(5) The Children's Court may, on its own or on an application by or on behalf of the child, parent, guardian, social worker or person in charge of a place of safety, reduce the period of placement upon evidence of material change in the circumstances that gave rise to the order of placement.

(6) The Children's Court shall, when making an order under subsection (3) (a) or (d), order the parent or guardian of a child to enter into a binding agreement for the duration of the order with such conditions which may include -

- (a) in the case of the provisions of subsection (3) (a), regular visits to the place of safety where the child is kept; and
- (b) in the case of the provisions of subsection (3) (d), ensuring that the child remains indoors within stipulated times.

(7) Any person who is ordered to enter into a binding agreement under subsection (3) or (7), as the case may be and fails to comply with any of the conditions for the agreement, commits an offence and is liable on conviction to a fine of not less than ten thousand Emalangeni or to imprisonment for a period of not less than six months or both.

(8) A child who is kept in a place of safety under subsection (3) (a) shall, on the expiration of the period of placement whether by-

- (a) lapse of time; or
- (b) reason of any reduction made pursuant to subsection (6),

be placed under the supervision of a social worker or other person appointed by the Director of Social Welfare for such purpose.

(8) The period of supervision for the purpose of subsection (8) shall be determined by the Children's Court after hearing the recommendations of the social worker and consulting with the child, parent or guardian but the period of such supervision shall not in any case exceed one year from the date of expiration of the period of placement of the child.

(9) The Children's Court may on the application of the child, parent or guardian exempt the child from the application of subsection (8) if satisfied that the case warrants such exemption.

***Child in need of urgent protection.***

41. (1) A child is in need of urgent protection if there is reasonable cause to believe that -

- (a) that child is being threatened or intimidated for purposes of prostitution or for purposes of having sexual intercourse with another or for any immoral purpose;
- (b) the child is being forced to marry;
- (c) the child is pregnant and suicidal or rejected by the family due to this condition;
- (d) the child is subjected to hazardous conditions of labour;
- (e) the child is forced to undergo cultural or spiritual rituals;
- (f) the child is compelled to leave school; or
- (g) the child is confined or detained by another person in contravention of this Act.

(2) Any person or the affected child who is in need of urgent protection may, on his own make an application to a social worker, chief or police officer for admission into a place of safety.

(3) A social worker at the place of safety shall satisfy himself that the child brought under subsection (1) is in need of urgent protection, and if the circumstances so warrant, admit the child.

(4) If the person in charge of the place of safety receives any child under subsection (3), that child shall be attended to by a social worker within forty-eight hours of admission and the social worker shall make an assessment and produce a full report of the circumstances.

(5) A child admitted under subsection (3) shall reside in the place of safety for as long as the social worker is satisfied that the child is in need of urgent protection.

(6) The social worker-

- (a) who receives a child under subsection (3); or
- (b) to whom the child is brought under subsection (4),

shall immediately inform the Children's Court of such admission with a full report of the circumstances and shall, in the like manner, inform the Children's Court of the child's departure.

## PART VI ADMINISTRATION OF PROPERTY OF CHILDREN BY OFFICE OF THE MASTER OF THE HIGH COURT

### ***Reporting of estate to the office of the Master of the High Court.***

42. Where a parent is survived by minor children, the surviving parent, guardian, closest relative, or any member of the community shall report the estate to the office of the Master of the High Court within two months after the death of the parent.

### ***Seeking permission of the office of the Master of the High Court for alienation, disposal off or sale of children's property.***

43. (1) A surviving parent, guardian, closest relative or any member of the community shall seek permission of the office of the Master of the High Court prior to mortgaging, alienating, disposing off or selling children's property.

(2) A surviving parent, guardian or closest relative who fails to comply with the provisions of this section, commits an offence and is liable on conviction to a fine not exceeding fifteen thousand Emalangeni or to imprisonment for a term not exceeding five years or both.

(3) Reimburse the victim to the value of the property that was disposed off through a sale or otherwise.

### ***Duties of the office of the Master of the High Court.***

44. Without limiting any other functions of the office of the Master of the High Court, for the proper and efficient administration of this Act, the office of the Master of the High Court shall -

- (a) in administering a child's share of parental property, ensure that the best interests of the child are met;
- (b) where the assets of the estate are being alienated, disposed off or sold, ensure that permission has been granted and the children are not left destitute or homeless;
- (c) have power to administer and confiscate property belonging to children and to delegate such powers to any person or institution;

- (d) where the office of the Master of the High Court discovers that the property belonging to children has been negligently used by the successful heir or any other person, request the concerned person to pay that property failing which the Office of the Master of the High Court shall make an application to court for such a person to pay that property or for a writ of execution to be issued by the court;
- (e) where parents married in community of property have deserted, neglected or abandoned children, hear evidence to verify the contribution of the surviving spouse towards maintenance of such children;
- (f) where the surviving spouse is found not to have made any contribution under paragraph (e) -
  - (i) give to such spouse a child's share only;
  - (ii) exercise discretion to award any amount of money depending on the circumstances of the case; or
  - (iii) divide the half share of the abandoning spouse between his children.
- (g) have power to invest the money brought to the office with any financial institution.

***Duties of a chief in the administration of the property of children.***

45. A chief before whom an heir is presented shall -

- (a) make sure that the names of minor children of the deceased appear in all the documents; and
- (b) liaise with the office of the Master of the High Court.

***Duty of employer in relation to property belonging to children.***

46. (1) It shall be the duty of any employer, after the death of his employee who has minor children, to send all the employees benefits to the office of the Master of the High Court who will administer and invest such property where necessary.

(2) An employer who fails to comply with the provisions of this section, commits an offence and is liable on conviction to a fine not exceeding twenty thousand Emalangeni.

***Duties of financial institutions.***

47. (1) No financial institution shall open and operate any account in respect of an orphaned child without the prior consent of the Master of the High Court.

(2) Any financial institution which contravenes the provisions of this section commits an offence and is liable on conviction to a fine not exceeding ten thousand Emalangeni.

**PART VII**  
**OFFENCES IN RELATION TO HEALTH AND**  
**WELFARE OF CHILDREN**

***Ill-treatment, neglect, abandonment or exposure of children to abuse.***

48. (1) Any person who, being a person having the care of a child -

- (a) abuses, neglects, abandons or exposes the child in a manner likely to cause the child physical, psychological or emotional injury or causes or permits the child to be so abused, neglected, abandoned or exposed commits an offence and is liable on conviction for the offence under to a community based sanction or to imprisonment for a term of not less than five years;

(2) The Children's Court -

- (a) may, in addition to any punishment specified in subsection (1) (a), order the person convicted of an offence under that subsection to enter into a binding agreement with sureties to be of good behaviour for such period as the Court deems fit; and
- (b) may include in the binding agreement under paragraph (a) such conditions as the Court deems fit.

(3) If a person who is ordered to execute a binding agreement to be of good behaviour under subsection (2) fails to comply with any of the conditions of such bond, he shall be liable to a further term of imprisonment not exceeding five years.

(4) A parent or guardian or other person legally obliged to maintain a child shall be deemed to have neglected the child in a manner likely to cause the child physical, psychological or emotional injury if, being able to so provide from his own resources, he fails to provide adequate food, clothing, medical treatment, lodging, care, guidance and protection to the child.

***Children not to be used for begging.***

49. Any person who causes or procures any child or, being a person having the care of a child, allows that child to be on any street, premises or place for the purposes of -

- (a) begging, receiving alms, whether or not there is any pretence of singing, playing, performing or offering anything for sale; or
- (b) carrying out illegal hawking, lotteries, gambling or other illegal activities detrimental to the health, welfare and educational advancement of the child,

commits an offence and is liable on conviction to a fine not exceeding ten thousand Emalangeni or to imprisonment for a term not exceeding two years or both.

***Leaving a child without supervision and care.***

50. Any person who, being a parent or guardian or a person for the time being having the care of a child, leaves that child -

- (a) without making provision for the supervision and care of the child;
- (b) for a period which is unreasonable having regard to all the circumstances; or
- (c) under conditions which are unreasonable having regard to all the circumstances, commits an offence and is liable on conviction to a community based sanction or to a fine not exceeding five thousand Emalangeni or to imprisonment for a term not exceeding two years or both.

**PART VIII**  
**CONDITIONS FOR TAKING A CHILD INTO CARE**

***Conditions for taking a child into care.***

51. (1) If a person takes a child into his care or guardianship -

- (a) that person; and
- (b) the person in whose care the child was at the time of such taking,

shall, not later than one week thereafter, notify the chief of the area where the child is or a social worker of such taking.

(2) On receiving any notification under subsection (1), the social worker shall make such inquiry as he thinks fit as to -

- (a) the circumstances and the reasons for the taking; and
- (b) the suitability for that purpose of the person who has taken the child into his care or guardianship.

(3) If, after the inquiry referred to under subsection (2), the social worker deems it expedient to do so in the best interest of the child, he may either -

- (a) order that the child be returned to the care of his parent or guardian or the person in whose care, the child was at the time of taking; or
- (b) permit the taking of the child on such terms and conditions as the social worker may require.

(4) If the taking of a child by any person has been permitted under subsection (3) (b) subject to any term or condition and default is made in complying with such term or condition, the social worker may by warrant under his hand order that the child -

- (a) be taken out of the care or guardianship of such person; or
- (b) be placed in a place of safety or under the guardianship of a relative or other fit and proper person on such terms and conditions as the social worker may require until the child attains the age of eighteen years or for a shorter period.

(5) For the purposes of this section, a "person" includes informal, formal and traditional structures -

- (a) not maintained by government; or
- (b) not formally established for purposes of care.

(6) A chief who is notified under section 51(1) shall notify or cause to be notified a social worker of such taking.

(7) A social worker shall, on receiving any notification under this section, record the particulars of such notification in a register in such form as may be prescribed.

(8) Any person who fails to comply with subsection (1) commits an offence and is liable on conviction to a community based sanction or a fine not exceeding ten thousand Emalangeni or to imprisonment for a term not exceeding five years or both.

***Application.***

52. (1) The provisions of this Part shall not apply to the taking of a child -

- (a) into the care or guardianship of any person -
  - (i) in accordance with an order of court; or
  - (ii) by any social worker or police officer acting under this Act;
- (b) who is in a place of safety or an orphanage, institution or centre -
  - (i) maintained by government; or
  - (ii) approved by the Minister;
- (c) as a boarder at an educational institution; and
- (d) who is regularly attending an educational institution into the care of a friend or relative of the parent or guardian with the consent of the parent or guardian.

(2) For the purposes of this Part, a "guardian" of a child means -

- (a) a person lawfully appointed by a will or any other legal document of a similar nature or by the order of a court to be the guardian of the child;
- (b) a person who has lawfully adopted the child; or
- (c) a relative who has been formally elected and left with up-bringing of orphaned children and any other children left by parents for various reasons.

***Subsequent obligations.***

53. (1) If the taking of a child has been notified to and permitted by a social worker under section 51, the person who has taken the child shall, if at any subsequent time -

- (a) he intends to return the child to the care, custody or control of the parent or guardian of the child or any other person from whom the child was taken; or
- (b) without his knowledge or consent, the child has left his care, custody or control,

report in person to the social worker and shall, whenever practicable, bring or cause to be brought before the social worker the child and the parent or guardian of the child or any other person from whom the child was taken.

(2) On receiving a report under subsection (1), the social worker shall make a note of the report and shall if -

- (a) the child and the parent or guardian of the child or any other person from whom the child was taken are present at the time such report is received, return the child to the parent or guardian or such person, as the case may be; or

- (b) the parent or guardian of the child or any other person from whom the child was taken is not present at the time such report is received -
  - (i) take the child into temporary care until the child can be returned to the parent or guardian or such person; and
  - (ii) immediately send written information to the last known place of residence of the parent or guardian or such person.

***Presentation of child before social worker.***

54. (1) If a social worker or any other designated person such as chiefs has reason to believe that there is, within the area of his jurisdiction, a child in respect of whose taking no notification has been made pursuant to section 51, he may, by written notice or summons under his hand addressed to the person who has or is believed to have the care or guardianship of the child, require that person to appear and to present the child before him at the time and place specified in the written notice or summons for the purposes of an inquiry under subsection (4).

(2) If a person to whom a written notice or summons has been served under subsection (1) fails to present a child at the time and place specified in the written notice, the social worker or any other designated person charged with similar responsibility may apply to a magistrate for a search warrant to search for the child and to produce the child before the social worker.

(3) Any child named or described in such warrant may be temporarily -

- (a) placed in a place of safety; or
- (b) placed in the care of a relative or other fit and proper person on such terms and conditions as the social worker may require, until the social worker has completed his inquiry under this Part.

(4) A social worker shall make such inquiry as he thinks fit as to -

- (a) the circumstances and the reasons for the taking of the child referred to in subsection (1); and
- (b) the suitability of the person who has taken the child into his care or guardianship.

(5) If, after the inquiry mentioned under subsection (4), the social worker deems it expedient in the best interests of the child, he may -

- (a) order that the child be returned to the care of the parent or guardian or the person in whose care the child was at the time of such taking; or
- (b) permit the taking of the child on such terms and conditions as the social worker may specify.

(6) If the taking of a child by any person has been permitted under subsection (5) (b) subject to any term or condition and default is made in complying with such term or condition, the social worker may by warrant under his hand order that the child -

- (a) be taken out of the care or guardianship of such person; and



- (b) be placed in a place of safety or in the care of a relative or other fit and proper person on such terms and conditions as the social worker may specify until the child attains the age of eighteen years or for any shorter period.

## PART IX FOSTERAGE AND ADOPTION

### *Adoption*

55. A child is adopted if the child has been placed in the permanent care of a person in terms of a court order that has the effects contemplated in Section

### *Child who may be adopted*

56. (1) Any child may be adopted if –

- (a) the adoption is in the best interest of the child
- (b) the child is adoptable; and
- (c) the provisions of this Part are complied with

(2) An adoption social worker shall conduct an assessment to determine whether a child is adoptable.

(3) A child is adoptable if -

- (a) the child is an orphan and has no guardian or caregiver who is willing to adopt the child;
- (b) the whereabouts of the child's parent or guardian cannot be Established;
- (c) The child has been abandoned;
- (d) The child's parent or guardian has abused or deliberately neglected the child, or has allowed the child to be abused or deliberately neglected; or
- (e) The child is need of a permanent alternative placement.

### *Person who can foster or adopt.*

57. (1) A child may be adopted by

- (a) a widower, widow, divorced or unmarried person
- (b) a married person who's spouse is the parent of the child
- (c) the biological father of a child born out of wedlock
- (d) the foster parent of the child; or
- (e) jointly by a husband and wife

(2) A prospective adoptive parent shall be -

- a) Fit and proper to be entrusted with parental responsibilities and rights in respect of the child
- b) Willing and able to undertake, exercise and maintain those responsibilities and rights
- c) Twenty five years older than the child to be adopted; and
- d) Properly assessed by an adoption social worker for compliance with paragraphs (a) and (b) and by his country's competent authority in the case of foreign nationals

***Establishment of foster care placement and adoption committee.***

58. (1) The Minister shall establish, under the Department of Social Welfare, regional committees for foster care placement and adoption.

(2) The foster care placement and adoption committee shall consists of -

- (a) the Regional Administrator or his representative who shall be the Chairperson;
- (b) social worker from that Region who shall be the secretary;
- (c) the Attorney General or his representative;
- (d) a representative of Non-governmental Organisations;
- (e) two other people from the community with interest in the welfare of children selected by the Director of Social Welfare; and
- (f) a representative of the Child Protection and Domestic Violence Unit of the police.

(3) The foster care placement and adoption committee shall screen applications of potential foster and adoptive parents and monitor the situation of children under foster care or adoption.

(4) Members of the foster care placement and adoption committee shall meet as and when there are applications of potential foster and adoptive parents to screen.

(5) An application to foster or adopt a child shall be made to the Director of Social Welfare or the designated social worker at district level who shall forward it to the relevant Foster Care Placement and Adoption Committee.

***Establishment of a Register on Prospective Adoptive Parents and Adoptable Children.***

59. (1) The Director of Social Welfare shall keep and maintain a register to be called the Register on Prospective Adoptive Parents and Adoptable children for the purpose of keeping a record of -

- (a) adoptable children;
- (b) proper prospective adoptive parents.

(2) The name and other identifying information of a child may be entered into the register if the child is adoptable as contemplated in Section 56.

(3) The name or other identifying information of a child shall be removed from the register if the child has been adopted.

(4) A person may be registered in the prescribed manner as a prospective adoptive parent if Section 57 has been complied with.

(5) Registration of a person as a prospective adoptive parent

(a) is valid for a period of three years

(b) may be renewed as prescribed

(c) ceases

(i) on written notice of withdrawal being given to the Director of Social Welfare

(ii) on the death of the registered person

(iii) on cancellation by the Director of Social Welfare if the registered person is no longer

(aa) a fit and proper person to be entrusted with full parental responsibilities and rights in respect of a child; and

(bb) willing and able to undertake, exercise and maintain those responsibilities and rights

(iv) if the registered person is convicted of an offence involving violence

(6) Only the Director of Social Welfare and officials in the Department designated by the Director shall have access to the register described in this Section.

***Parental rights and responsibilities of foster parent.***

60. A foster parent in whose care a child is placed shall have the same rights and responsibilities in respect of the child's care and guardianship as the parent of the child while the child remains in his care.

***Duties of the Department of Social Welfare under this Part.***

61. (1) The Department of Social Welfare shall facilitate assessment of the potential foster and adoptive parents and the conditions surrounding the child to be fostered or adopted and shall prepare a report to that effect.

(2) In the case of adoption, after the assessment referred to under subsection (1), the Department of Social Welfare through the designated social worker shall present a report in respect of the child to the High Court.

***Application for adoption.***

62. (1) An application for an adoption order may be made jointly by a husband and wife.

(2) Where an application for an adoption order is made jointly by a husband and a wife, there shall be a written proof to that effect.

(3) An adoption order may be granted to an individual person provided he meets the conditions set under section 57.

(4) Where application for an adoption order is made in respect of a child who has attained the age of ten years and is open for adoption, the consent of the child shall be sought and if the child is below ten years, his opinion shall be taken into consideration.

(5) An adoption order can be terminated by the High Court if the adoption is proved not to be in the best interests of the child.

(6) No payment shall be given to the person who gives away his child for adoption.

***Consent of parents or guardians.***

63. (1) An adoption order shall only be made with the consent of the parent or guardian of the child.

(2) The High Court may dispense with the consent of any parent or guardian of the child if satisfied that the parent or guardian has neglected or persistently ill-treated the child, or the person cannot be found or is incapable of giving consent or that the consent is unreasonably withheld.

(3) Any consent under this section may be given without the knowledge of the identity of the applicant for the order and where the consent is subsequently withdrawn only because the identity of the applicant was not known, the consent shall be considered to have been unreasonably withheld.

(4) Any parent or guardian of a child who has given consent for the adoption order shall not be entitled to remove the child from the care and guardianship of the applicant except with the permission of the High Court and in recognition of the best interests of the child.

(5) The High Court may require the consent of any person for an adoption order if it considers that the person has any rights or obligations in respect of a child such as under an agreement, a court order or under Swazi law and custom.

(6) Where an application for adoption is made in respect of a child who is born out of wedlock, the natural father of the child, if known and available, shall be consulted.

(7) Where an application for adoption is made in respect of a child who was abandoned and his parents or guardian could not be traced, the parents or guardian shall have no power to claim back the child from the adoptive parents.

***Knowledge of adoption by child.***

64. (1) An adoptive parent shall, under the guidance of a social worker, inform the adopted child of the fact that the child is adopted and the child's parentage but this disclosure shall only be made if it is in the best interests of the child and if the child is of an understanding age.

(2) No person other than the adoptive parent shall disclose an adoption to the adopted child.

(3) Subject to subsection (1), the adopted child shall, where possible, have access to photos, letters or any form of artifacts that might help the child understand his roots better.

(4) If the adopted child has any siblings, the child should be informed of any siblings and be helped to maintain a link with the siblings, either through visits, letters or other communication channels.

(3) Any person who fails to comply with the provisions of this section, commits an offence and is liable on conviction to a fine not exceeding hundred thousand Emalangeni or to imprisonment for a term not exceeding two years or both.

***Inter-country adoption.***

65. (1) A person who is not a citizen of Swaziland may adopt a Swazi child, if he -

- (a) has stayed in Swaziland for at least one year;
- (b) has fostered a child for at least one year under the supervision of a social worker;
- (c) does not have a criminal record;
- (d) has a report concerning his suitability to adopt a child from his country's social welfare office or other competent national authority; and
- (e) has satisfied the High Court that his country of origin will respect and recognize the adoption order and will grant resident status to the child.

(2) For the purposes of an application under this section, the social worker referred to under subsection (1) (b), shall be required to submit a report to assist the High Court in considering the application, and the High Court may, in addition, require some other person to make a report in respect of the application.

(3) The restrictions and conditions under sections 67 and 68 shall apply in respect of an application under this section.

(4) The High Court shall make an interim adoption order for a period not less than two years on condition that supervision of the child be done by social workers of the country where the adoptive parents reside and postpone the determination of the application.

(5) Where a foreign child has been adopted by a Swazi who is residing in Swaziland, that person shall report the matter to the Department of Social Welfare which shall provide the High Court with such information relevant to the adoption.

(6) Where a foreign child has been adopted by a Swazi who is residing in Swaziland, that child shall be afforded all citizenship rights in Swaziland.

(7) Where a person who is not a citizen of Swaziland has adopted a Swazi child while residing in Swaziland, such a person shall on departure report to the Ministry of Foreign Affairs which shall arrange that the supervision of the child be done by the social workers of the country to which the adoptive parents are departing.

(8) For the purposes of subsection (5), the High Court shall order the Department of Social Welfare to report regularly on the welfare status of the concerned child.

***Procedure in adoption proceedings.***

66. (1) When the High Court hears adoption applications, the High Court shall -

- (a) proceed in camera unless open proceedings will be in the best interests of the child;
- (b) admit documentary evidence relating to the consent required for the order;

- (c) require a social worker to represent the interests of the child in the proceedings relating to an adoption order or an interim order;
- (d) require a social worker to prepare a social enquiry report to assist the court to determine whether the adoption order is in the best interests of the child or not; and
- (e) request for any other information that the High Court may need.

***Conditions for adoption order.***

67. (1) When considering an application for the adoption of a child the court shall take into account all relevant factors, including -

- (a) the religious and cultural background of -
  - (i) the child;
  - (ii) the child's parent; and
  - (ii) the prospective adoptive parent;
- (b) a report contemplated in section 66 (1) (d);
- (c) A report contemplated in section 65 (1) (d)

(2) Before the High Court makes an adoption order, the High Court shall be satisfied that -

- (a) the consent required under this Part for an adoption order has been obtained and that the parent or guardian of the child understands that the effect of the adoption order will mean permanent deprivation of parental rights;
- (b) the adoption is in the best interests of the child and that the wishes of the child have been considered if the child is capable of forming an opinion;
- (c) if the child is under ten years of age, the child's opinion has been sought and considered;
- (d) if the child is at least ten years of age, the child's consent to the adoption has been obtained unless it is impossible for the child to grant such consent; and
- (e) the arrangement for the adoption of the child are in accordance with the prescribed requirements
- (f) the social welfare competent authority of the country concerned has agreed to the adoption of the child
- (g) the applicant has not received or agreed to receive any payment and that no person has made or agreed to make any payment or given or agreed to give any reward to the applicant for the adoption except where the High Court has ordered otherwise.

(3) The High Court may impose conditions when granting an adoption order and may require the applicant to enter a binding agreement and make such provisions in respect of the child as the High Court considers necessary.

(4) The adoption order shall include the following particulars if known -

- (a) date, place and country of birth of the child;
- (b) name, gender and surname of the child before and after the adoption;
- (c) name, surname, age, address, citizenship and occupation of the adoptive parent(s); and
- (d) date of the adoption order,

unless the High Court directs otherwise.

***Restriction on making adoption orders.***

68. An adoption order shall not be made unless the applicant or, in the case of a joint application, one of the applicants -

- (a) is twenty-five years or older than the child; or
- (b) is a relative of the child and is twenty-one years of age.

***Effect of adoption on parental rights.***

69. (1) Where an adoption order is made -

- (a) the rights, duties, obligations and liabilities including those under customary law of the parents of the child or of any other person connected with the child of any nature whatsoever shall cease; and
- (b) the adoptive parent of the child shall assume the parental rights, duties, obligations and liabilities of the child with respect to care, guardianship and education as if the child were born to the adoptive parent.

(2) Where an adoption order is made jointly to a husband and wife, they shall assume the parental responsibilities jointly and the child shall relate to them as parents as if born naturally to them as husband and wife.

(3) Where an adoption order is made to an individual person, he shall assume the parental responsibilities and the child shall relate to him as a parent as if born naturally to him.

(4) The adopted child shall be a member of the clan, lineage or other group, and as such will give the child all rights to the family rituals in accordance with Swazi law and custom.

***Devolution of property on adoption.***

70. (1) Where an adoptive parent dies intestate, his property shall devolve in all respects as if the adopted child is the natural child of the adoptive parent.

(2) An adopted child shall not inherit from the natural parents on intestacy.

(3) If it appears to the High Court on a claim made that the disposition of the property devolving on an intestacy has been exercised unfairly against the adopted child, the High Court may order such provisions as the High Court deems equitable to be made to the adopted child out of the property devolving on intestacy in accordance with the law.

***Testamentary disposition.***

71. (1) In a testamentary disposition of property, whether or not in writing made after the date of an adoption order -

- (a) any reference whether expressed or implied to the child of the adoptive parent shall unless the contrary intention appears, be construed as a reference to the adopted child;
- (b) where a disposition made by the adoptive parent prior to adoption order makes no provision for the adopted child, the adopted child may apply to the High Court to vary the disposition to provide for the adopted child from the estate of the adoptive parent;
- (c) any reference to a child of the adopted child's natural parents in a will shall not be construed as including a reference to the adopted child unless the contrary intention appears;
- (d) any reference to a person related to the adoptive parent shall unless the contrary intention appears be construed as a reference to a person as if he were the relative of the adopted child.

***Register of adopted children.***

72. (1) The Director of Social Welfare shall maintain a register of adopted children, whether adopted inside or outside Swaziland, in which shall be recorded particulars of the adoption orders or interim orders as the High Court may direct to be made under this Part.

(2) Every adoption order or interim order made by the High Court shall be served on the Director of Social Welfare by the Registrar of the High Court within seven days of the making of the order.

***Access to information in the adoption register***

73. (1) The information in the adoption register may not be disclosed to any person except -

- a) To an adopted child after the child has attained the age of 18
- b) For any official purposes subject to conditions determined by the Director of Social Welfare
- c) By an order of court if the court finds that such disclosure is in the best interests of the adopted child.

***Issue of adoption compliance certificate***

74. When the High Court has approved the adoption of a child in terms of Section 67 the Director of Social Welfare may issue an adoption compliance certificate.

**PART X****SALE, HARBOURING AND ABDUCTION OF CHILDREN*****Unlawful transfer of possession, custody or control of child.***

75. (1) Any person who takes part in any transaction the object or one of the objects of which is to transfer or confer, wholly or partly, temporarily or permanently, the possession, custody or



control of a child for any valuable consideration, commits an offence and is liable conviction to imprisonment for a term of not less than twenty years.

(2) Any person who without lawful authority or excuse harbours or has in his possession, custody or control a child with respect to whom the temporary or permanent possession, custody or control has been transferred or conferred for valuable consideration by any person within or outside Swaziland, commits an offence and is liable conviction to imprisonment for a term of not less than twenty years.

(3) For the purposes of subsection (2), if any person harbours or has in his possession, custody or control a child without lawful authority or excuse, the child shall, until the contrary is proved, be presumed to be a child with respect to whom the temporary or permanent possession, custody or control has been transferred or conferred for valuable consideration.

***Security required by a social worker.***

76. (1) If a social worker has reasonable cause to believe that a child -

(a) has been brought into Swaziland either -

(i) after having been transferred for valuable consideration; or

(ii) by fraud, misrepresentation or any false pretence;

(b) has been transferred to the custody or control of any person for valuable consideration either within or outside Swaziland; or

(c) is being detained against his will by some person other than his parent or guardian,

the social worker shall immediately cause the arrest of the person(s) suspected and assist the police in investigating the matter.

(2) The social worker shall place such a child into a place of safety.

***Taking a child without appropriate consent.***

77. (1) Any person, parent or guardian who -

(a) does not have the lawful custody of a child; and

(b) takes a child, without appropriate consent, whether within or outside Swaziland,

commits an offence and is liable on conviction to imprisonment for a term of not less than five years.

(2) A person has lawful custody of a child under this section if he has been conferred custody of the child by virtue of any written law or by an order of the Children's Court or any other Court.

(3) It shall be a defence under this section if a person takes or sends a child away without the consent of the person having lawful custody of the child if on reasonable cause -

(a) the person -

- (i) does it in the belief that the other person consented, or would have consented, if he was aware of all the relevant circumstances; or
- (ii) has taken all reasonable steps to communicate with the other person but has been unable to communicate with him;
- (b) the person has reasonable grounds to believe that the child has been abused, neglected, abandoned or exposed in a manner likely to cause a child physical, psychological or emotional injury; or
- (c) the other person has unreasonably refused to consent although he was aware of all the relevant circumstances.

### ***Recovery order.***

78. (1) If it appears to the Children's Court that there is reason to believe that a child had been taken or sent away without the consent of the person who has lawful custody of the child as described in section 74, the Children's Court may make a recovery order.

(2) A recovery order may be made by the Children's Court on application being made by or on behalf of any person who has the lawful custody of the child.

(3) For the purposes of this section, a "recovery order" may -

- (a) direct any person who is in a position to do so to produce the child on request to any authorised person;
- (b) authorise the removal of the child by any authorised person;
- (c) require any person who has information as to the child's whereabouts to disclose that information to the authorised person;
- (d) authorise any police officer to enter into any premises specified in the order and search for the child.

(4) Any person who intentionally obstructs an authorised person from exercising the powers under subsection (3) commits an offence and is liable conviction to imprisonment for a term not exceeding fifteen years.

## **PART XI**

### **CHILDREN IN CONFLICT WITH THE LAW, AGE OF CRIMINAL RESPONSIBILITY AND AGE DETERMINATION**

#### ***Age of criminal responsibility and prosecution requirements.***

79. (1) No child below the age of ten years shall be prosecuted for a criminal offence.

(2) No prosecution for a criminal offence may be instituted against a child between the ages of ten and fourteen until the inquiry magistrate is satisfied that the child possesses the capacity to appreciate the difference between right and wrong and has the ability to act in accordance with that appreciation.

(3) An inquiry to establish whether a child appreciates the difference between right and wrong and is able to act in accordance with that appreciation shall be conducted by an inquiry magistrate.

(4) It shall be presumed that a child between the ages of ten and fourteen lacks the capacity to appreciate the difference between right and wrong, and cannot act in accordance with a full appreciation, unless the Crown proves beyond a reasonable doubt that such child, as a matter of fact has that appreciation and is able to act in accordance with that appreciation.

(5) Evidence of the intellectual, emotional, psychological and social development of a child is relevant to any enquiry into whether such child possesses the capacity to appreciate the difference between right and wrong and has the ability to act in accordance with that appreciation.

(6) The evidence referred to under subsection (5) shall be supported by a report from a person with expertise in child development or child psychology, who shall testify before an inquiry magistrate in person as to the content and findings of the report.

(7) The evidence referred to in subsection (5) may be challenged by any person present at the inquiry and any evidence in rebuttal may be adduced.

***Purposes of assessment of age.***

80. (1) The purposes of assessment of age are to -

- (a) establish the probable age of the child;
- (b) establish the prospects of the child being able to be diverted by a social worker;
- (c) establish the prospects for diversion by a prosecutor or inquiry magistrate;
- (d) provide information to support recommendations to the prosecutor and the inquiry magistrate regarding release of the child into the care of a parent or guardian or placement in a place of safety;
- (e) in the case of children below the minimum age of prosecution, to establish what measures, if any, need to be taken.

(2) Assessment is effected by a social worker and may take place at a magistrate's court, the offices of the Department of Social Welfare, a private house, a police station or any other suitable place identified by the social worker concerned.

(3) No person other than the following is entitled to attend assessment of a child as referred to under this section -

- (a) the child in respect of whom the assessment is conducted;
- (b) the child's parent or guardian;
- (c) the prosecutor in whose district the assessment is being conducted;
- (d) a legal representative;
- (e) the police officer responsible for arresting the child;
- (f) a medical officer; and
- (g) any person whose presence is necessary or desirable for the completion of the assessment process.

***Duties of police officer in relation to age assessment.***

81. (1) Subject to subsection (2), if a police officer is uncertain about the exact age of the person suspected of having committed an offence, but has reason to believe that this age of that person would render that person subject to protections under this Act, he shall take such person to a social worker for assessment into the age within the periods prescribed under or, if a social worker is not readily available, to a medical officer.

(2) Where a police officer has reasonable grounds to believe that a child is below the minimum age of prosecution as described under section 79, he shall not arrest the child.

***Age assessment by social worker.***

82. (1) The social worker referred to under section 81 shall receive, obtain or request any evidence relevant to assessment into the age of a child or person.

(2) Upon receipt of information referred to under subsection (1), the social worker shall make an assessment in respect of the age of the person brought before him and shall for this purpose, consider the evidence received in the following order of cogency -

- (a) a valid birth certificate, identity document or passport;
- (b) any other form of registration of birth, identity or age acknowledged by the office of the office of the Registrar General;
- (c) statements from a parent, guardian, or person likely to have knowledge of the age of the child or a statement made by the child or person who alleges that he is a child;
- (d) an estimation of age made by a medical practitioner;
- (e) a previous determination of age by a magistrate under this Act;
- (f) secondary documentary evidence, such as a hospital birth record, baptismal certificate, school registration forms, school reports, and other evidence of a similar nature if relevant to establishing a probable age.

(3) The social worker shall make an assessment as to the probable age of the child or person concerned.

(4) Where the social worker, after making the assessment, concludes that a child or person referred to him by a police officer in terms of section 81 is over the age of eighteen years or is below the minimum age of prosecution as referred to under section 79, such child or person is not subject to the provisions of this Section.

(5) The conclusions of the social worker under subsection (4) shall not remain valid after evidence to the contrary before an inquiry magistrate.

(6) Where the social worker concludes that a child is, by virtue of his age, subject to the provisions of this Act, he shall proceed with the assessment of the child, and the age assessment can form the basis of -

- (a) the decisions of the social worker referred to under section 89; and
- (b) the recommendations of the social worker referred to under section 90.

(7) Where the social worker is uncertain as to the probable age of the child or person, or where the age of a child or person is in dispute, the social worker shall cause the child or person to be taken to a medical officer for assessment of age unless the child or person has already been taken to the medical officer by the police under section 81, in which case the provisions of section 83 apply.

***Age estimation by medical officer.***

83. (1) Any police officer or social worker may refer a child or person to a medical officer for an estimation of the age of the child or person.

(2) Where a medical officer concludes that a child or person referred to him for estimation of age is -

- (a) over the age of eighteen years, that person is deemed to be an adult and is not subject to the provisions of this Act, or
- (b) below the minimum age of prosecution as referred to under section 79, that child shall be referred back to the social worker for further attention in terms of section 89; or
- (c) over the minimum age of prosecution as referred to under section 79 and under the age of eighteen years, that child shall be referred back to the social worker concerned, together with the record of the estimation of age for further procedures under this Act.

(3) Where a medical officer concludes that he is unable to make accurate assessment of the person's age and it is not clear as to whether that person is subject to the provisions of this Act, he shall refer such person back to the social worker concerned for the purposes of determination of age by an inquiry magistrate.

***Age determination to be effected at preliminary inquiry.***

84. (1) The social worker to whom a child has been referred by a medical officer under section 83 (3), shall cause that child or person to appear before an inquiry magistrate for purposes of the determination of the age of that child or person and shall place such inquiry magistrate in possession of a completed age assessment together with relevant documentation referred to under section 86 (1)

(2) The inquiry magistrate shall, on the available evidence and with due regard to the provisions of section 82 (2), make a determination as to the age of a child or person which shall be entered into the record as the age of the child or person, and shall be considered to be the correct age until such time as any contrary evidence is placed before the court in which the inquiry magistrate presides or any other court.

(3) For the purposes of the determination referred to under subsection (2), the inquiry magistrate may require any documentation, evidence or statements relevant to age determination from any person, body or institution to be placed before him.

(4) If an inquiry magistrate determines that a person is over the age of eighteen years, he shall close the preliminary inquiry and direct that the matter be transferred to a court other than the Children's Court for criminal proceedings.

(5) Where an inquiry magistrate makes a determination under subsection (2), he shall cause a record of the determination to be forwarded to the office of the Registrar General for the purposes of issuing relevant identification documents.

(6) Where necessary, an inquiry magistrate may cause a subpoena to be served on any person to produce the documentation, evidence or statements referred to under subsection (3).

***Age assessment and determination by officer presiding in criminal court.***

85. (1) Where a person appearing in a criminal court other than a preliminary inquiry or the Children's Court alleges that he is below the age of eighteen years at any stage in a criminal trial before sentence, or where it appears to such court that, that person may be below the age of eighteen years, the officer presiding in that court may conduct the inquiry as to the age of that person in accordance with the provisions of section 84 (2) and (3).

(2) If the age of the person referred to under subsection (1) is found to be below eighteen years and the trial has not yet commenced, the presiding officer concerned shall transfer the matter to an inquiry magistrate for further proceedings under this Act.

(3) If the age of the person referred to under subsection (1) is found to be below the age of eighteen years and the trial has commenced, the proceedings shall continue to be conducted before the presiding officer concerned, but the remainder of the proceedings shall be conducted under the provisions of this Act.

(4) The presiding officer concluding a trial under subsection (3) may, after conviction, deal with the matter in a manner similar to which the Children's Court would do.

***Parent or guardian to attend assessment.***

86. (1) Any parent or guardian who has been issued with a written notice or a summons to appear at an assessment of a child, shall attend such an assessment unless exempted from the obligation to do so under subsection (3).

(2) If a person referred to under subsection (1) has not been notified to attend the assessment, the social worker concerned may at any time before such assessment direct a police officer to issue a written notice to such person to appear at an assessment.

(3) A person who has been notified under subsection (1) or (2) may apply to the social worker concerned for exemption from the obligation to attend the assessment in question, and if such social worker exempts such person, he shall do so in writing.

(4) A person who has been notified under subsection (1) or (2) and who has not been exempted from the obligation to attend the assessment under subsection (3) and who fails to attend the assessment in question, commits an offence and is liable on conviction to a community based sanction.

***Duties of a social worker in relation to social assessment.***

87. (1) A social worker shall assess all children -

(a) who have been arrested and who remain in detention in police custody within 48 hours of such arrest subject to the provisions of section 97 (a);

(b) who have been arrested and released from detention in police custody under section 104, within 48 hours of arrest;

- (c) in respect of whom an alternative method of securing attendance at assessment has been effected under section 94, within seventy-two hours of such an alternative having been employed.
- (2) The social worker shall make every effort to locate a parent or a guardian for the purposes of concluding the assessment process of the child unless, all reasonable efforts to locate such person or persons have failed, then the social worker may conclude the assessment in the absence of such person or persons.
- (3) The social worker shall explain to the child in language that the child understands -
- (a) the purposes of the assessment; and
  - (b) that the child has the right to -
    - (i) contradict or challenge any information against the child;
    - (ii) remain silent;
    - (iii) have the parent or guardian contacted;
    - (iv) have a person referred to under paragraph (iii) or a legal representative present during the noting by a police officer or a magistrate of a confession, admission, pointing out or during an identification parade;
    - (v) choose and to be represented by a legal practitioner at the child's own cost; and
    - (vi) be provided with legal representation by the State or court.
- (4) The social worker shall interview the child, the child's parents or guardian in order to effect the necessary assessment.
- (5) The social worker may contact or consult with any other person who has any information relevant to the assessment of the child.
- (6) The social worker shall obtain evidence relevant to the age assessment referred to under section 82.
- (7) Unless the child is the child below the minimum age of prosecution as referred to under section 79, the social worker shall make a report with the following recommendations -
- (a) the prospects of diversion;
  - (b) the possible release of the child into the care of a parent or guardian; or
  - (d) the placement, where applicable, of a child in a place of safety.
- (8) Transfer or conversion of a matter to the Children's Court shall be considered by the social worker.
- (9) If the social worker recommends that the matter be transferred to the Children's Court the report shall reflect his recommendation and reasons as well as recommendations as to the temporary placement of the child pending the opening of the Children's Court inquiry.

(10) The report mentioned in subsection (7) shall be submitted to the prosecutor for the opening of the preliminary inquiry.

***Powers of social worker to obtain relevant evidence or secure attendance of relevant persons.***

88. A social worker may, by issuing a notice, require the arresting officer or any other police officer to -

- (a) bring a child forthwith from police custody for assessment;
- (b) obtain documentation relevant to proof of a child's age from a specified place or a specified person;
- (c) notify a specific parent or guardian to appear at an assessment.

***Powers of social worker in relation to children below the minimum age of prosecution.***

89. (1) After assessment under section 80 (1) (a) and (d) of a child below the minimum age of prosecution, the social worker concerned may -

- (a) refer the child or the family of the child for counselling or therapeutic intervention;
- (b) arrange the provision of support services to the child or family of the child;
- (c) arrange a conference, which shall be attended by the child, parents or an appropriate adult, and which may be attended by any other person likely to be able to provide information material for the purposes of the conference; or
- (d) decide to take no action.

(2) The purpose of the conference convened by the social worker under subsection (1) (c) is to assist such social worker to -

- (a) establish fully the circumstances surrounding the allegations against the child;
- (b) formulate a written plan appropriate to the child and relevant to the circumstances; or
- (c) make an order in terms of this section.

(3) The written plan under subsection (2) (b) shall -

- (a) specify the objectives to be achieved for the child concerned and the period within which those objectives should be achieved;
- (b) contain details of the service and assistance to be provided for the child and for any parent or guardian;
- (c) specify the persons or organisations who will provide such services and assistance;
- (d) state the responsibilities of the child and of such child's parent or guardian;
- (e) state personal objectives for the child and of such child's parent or guardian; and
- (f) contain such other matters relating to the education, employment, recreation and welfare of the child as are relevant.



(4) The social worker shall record the outcome of the assessment and the decision made or given under subsection (1), as well as the reasons for such decision or order.

***Powers of social worker in respect of children above the minimum age of prosecution alleged to have committed offences referred to in the Schedule.***

90. (1) After an assessment under section 80 (1) of a child above the minimum age of prosecution as referred to under section 79, the social worker concerned may, where the child is alleged to have committed an offence referred to in the Schedule -

- (a) refer the child to the Children's Court for appropriate action;
- (b) take no further action; or
- (c) if the child acknowledges responsibility for the alleged offence, refer the child to a diversion option referred to under section 128 (2) or (3), where there are no factors mitigating against such decision.

(2) A decision taken by a social worker under subsection (1) may be effected in his sole discretion.

(3) The social worker concerned shall record any decision taken under subsection (1), as well as the reasons for such decision.

(4) If the social worker does not make a decision under subsection (1), he may recommend that the matter be referred to the prosecutor for the opening of the preliminary inquiry in which case the social worker shall make an age assessment and produce an assessment report.

***Powers of social worker in respect of children above the age of prosecution alleged to have committed offences not referred to in the Schedule.***

91. (1) After an assessment under section 80 (1) (a), (c), (d) and (e) of a child above the age of minimum prosecution as referred to under section 79, the welfare officer concerned shall, where the child is alleged to have committed an offence not referred to in the Schedule, make an age assessment and an assessment report, which together with supporting information, shall be submitted to the prosecutor for the opening of the preliminary inquiry.

(2) If it appears to the social worker that the child concerned does not intend to accept responsibility for the alleged offence, that fact shall be indicated in the assessment report referred to under subsection (1).

(3) After an assessment referred to under subsection (1), the welfare officer may recommend -

- (a) the diversion of the child to a specified process, programme or appropriate alternative order mentioned under section 128;
- (b) that no further action be taken in respect of the alleged offence;
- (c) that the matter be transferred to the Children's Court for appropriate action;
- (d) that the matter not be diverted and be referred to the prosecutor ;
- (e) that the child be released to a parent or guardian, or on his own recognisance;

- (f) an appropriate placement, including placement in the care of a fit and proper person; or
- (g) detention in a secure care facility or correctional facility with due regard to the circumstances referred to under section 115.

## PART XII

### POLICE POWERS AND DUTIES

#### *Meaning and purpose of arrest.*

92. (1) An arrest, for purposes of this Act, may be made by a police officer with or without a warrant unless the child to be arrested submits to custody.

(2) The effect of an arrest, for the purposes of this Act, is that the child arrested is in lawful custody until lawfully discharged or released from such custody.

(3) The purpose of arrest under this Act, is to bring the child before a preliminary inquiry or for assessment under section 91.

(4) An arrest shall be made with due regard to the dignity and well-being of the child.

(5) Subject to subsection (6), if it is clear that the child cannot be arrested without the use of minimum force, the police officer arresting the child may use such force as may be reasonably necessary and proportional in the circumstances, to overcome any resistance.

(6) Where the use of minimum force is placed in dispute in civil matters, the onus of proving that the minimum force was used rests on the person so alleging.

(7) The police officer arresting or attempting to arrest a child under this section is not justified in using deadly force that is intended or is likely to cause death or serious bodily harm to such child, except if he on reasonable grounds believes-

- (a) that the force is immediately necessary for the purposes of protecting him, any person lawfully assisting him or any other person from eminent death or serious bodily harm;
- (b) that there is a substantial risk that the suspect will cause eminent death or serious bodily harm if the arrest is delayed; or
- (c) that the offence for which the arrest is sought is in progress and is of a forcible and serious nature and involves the use of life-threatening violence or a strong likelihood that it will cause serious bodily harm.

#### *Powers of arrest and arrest by police officer without warrant.*

93. (1) A police officer may, subject to subsections (2) and (3), without warrant arrest any child -

- (a) who commits or attempts to commit any offence in his presence;
- (b) whom he reasonably suspects of having committed an offence, including the offence of escaping from lawful custody;
- (c) who willfully obstructs him in the execution of his duty;

- (d) who is reasonably suspected of having failed to observe any condition imposed in the passing of sentence or in postponing or suspending the operation of any sentence under this Act.

(2) Any police officer may arrest any child referred to under subsection (1) whose age is above the minimum age of prosecution referred to under section 79 but below the age of eighteen years for the purposes of bringing that child for assessment by a social worker as referred to under section 87.

(3) In deciding whether to effect an arrest, a police officer is obliged to consider whether an alternative method of securing the appearance of the child at assessment, as referred to under section 94, can be used, or whether an informal caution referred to under section 101 (1) can be used.

***Alternatives to arrest.***

94. (1) Alternatives to arrest shall include the following-

- (a) requesting the child in language that the child understands to accompany the police officer to the place where assessment can be effected;
- (b) written notification to the child and, if available, the parents, guardian or family of that child to appear for assessment at a place and on a date and at a time specified in the written notice;
- (c) granting of a recognisance by a police officer at the place of arrest, to be noted in the pocket book of the police officer concerned, informing the child to appear at the assessment at a specified date, time and place and, the police officer shall as soon as is reasonably possible inform a social worker of the granting of such recognisance;
- (d) accompanying the child to his home, where a written notice referred to under paragraph (b) can be given to the child and parents, guardian or family;
- (e) opening a docket for the purposes of consideration by the Director of Public Prosecutions as to whether the matter should be set down for the holding of a preliminary inquiry or whether the child should be charged.

(4) Subject to the provisions of subsection (1), a child may be summoned to appear at assessment at a place on a date and a time specified in the summons upon application by a prosecutor to the clerk of the Children's Court.

(5) Where an alternative to arrest as referred to under subsection (1) has been employed, a child shall be required to appear for assessment within 72 hours of such alternative being employed, or in the case of the issuing of a summons, within 72 hours of the summons being served on the child.

***Arrest by private person without warrant.***

95. (1) Any private person may without warrant arrest any child whom he reasonably believes to be above the minimum age of prosecution as referred to under section 79, and below the age of eighteen years -

- (a) who commits or attempts to commit in his presence or whom he reasonably suspects of having committed an offence;

(b) whom he reasonably believes to have committed any offence and to be escaping from and being freshly pursued by a person whom such private person reasonably believes to have authority to arrest that person for that offence;

(c) whom he is by any law authorised to arrest without warrant in respect of any offence specified in that law.

(2) Minimum force, where necessary, shall be used in effecting an arrest under this section.

(3) The provisions of section 92 (5) and (6) relating to the use of force and deadly force, with the changes required by the context, apply to this section.

(4) Any private person who has effected an arrest as referred to in this section shall hand the child over to the chief, police or social worker as soon as possible.

***Issue of warrant of arrest.***

96. (1) An inquiry magistrate or presiding officer in the Children's Court may issue a warrant for the arrest of any child presumed to be below the age of eighteen years and above the minimum age of prosecution as referred to under section 79 upon the written application of the Director of Public Prosecutions or a police officer which -

(a) sets out the offence alleged to have been committed;

(b) alleges that such offence was committed within the area of jurisdiction of such a magistrate or where such offence was not committed within such area of jurisdiction, which alleges that the child in respect of whom the application is made, is known or is on reasonable grounds suspected to be within such area of jurisdiction; and

(c) states that from information taken upon oath, there is a reasonable suspicion that the child in respect of whom the warrant is applied has committed the alleged offence.

(2) A warrant of arrest issued under this section shall direct that the person described in that warrant be arrested by a police officer in respect of the offence set out in the warrant and that he shall be brought before a social worker for assessment as referred to under section 87.

(3) A warrant of arrest may be issued on any day and shall remain in force until it is cancelled by the person who issued it or, if such person is not available, by any person with like authority, or until it is executed.

(4) A warrant of arrest may be suspended by an inquiry magistrate or presiding officer in a Children's Court, and the officer required to execute such warrant, may, instead of arresting a child, employ one of the alternatives to arrest as referred to under section 94.

***Duties of police officer upon arrest with or without warrant.***

97. (1) Where an arrest of a child above the minimum age of prosecution has taken place, the police officer shall -

(a) if the child is in detention in police custody, bring such child to a social worker in whose area the arrest of the child has taken place promptly for assessment, but not later than 48 hours after arrest and, if by the expiry of this period a social worker cannot practically be traced, the police officer shall request the prosecutor to set the matter down for the holding of a preliminary inquiry as soon as possible;

- (b) inform the child in a language that the child understands of the allegation against him; and
- (c) inform the child in language that the child understands of the following rights-
  - (i) the right to remain silent;
  - (ii) the right to have the child's parent, guardian, chief or any appropriate adult contacted;
  - (iii) the right to have a person referred to under subparagraph (ii) or a legal representative present during the noting of a confession, admission, pointing out or identification parade;
  - (iv) the right to choose and to be represented by a legal representative at his own cost; and
  - (v) the right to be provided legal representation by the State or court.

(2) Where an alternative to arrest as referred to under section 94 has been used, the police officer shall explain the rights set out in paragraph (c) of subsection (1) to the child.

(3) Where an arrest has been effected, the arresting officer shall provide an inquiry magistrate with a written report within 48 hours, giving reasons why alternatives to arrest as referred to under section 94 could not be employed.

***Duty of police officer to inform social worker.***

98. (1) The police officer shall inform the social worker in whose area the arrest of a person under the age of eighteen years has taken place, of such arrest within 12 hours.

(2) If an alternative method of securing the attendance of the child at assessment as referred to under section 94 has been used, the social worker concerned shall inform the police officer in whose area the assessment will take place as soon as possible and not later than 72 hours after the procedures referred to under section 94 have been effected.

***Duty of police officer to notify parents, guardian or family member.***

99. (1) Where a child has been arrested, the police officer who has arrested the child, shall notify the child's parents, guardian or a family member of the arrest, and give the relevant person or persons a written notice requiring such person to attend an assessment at a specified time and place.

(2) If one of the persons referred to under subsection (1) is not available, or cannot be traced, the police officer shall request the child to identify another appropriate adult, and if such adult is identified, the police officer shall request that person to attend the assessment at a specified time and place.

(3) Where an alternative method to arrest as referred to under section 94 has been effected, the person employing such alternative shall, as soon as possible thereafter, notify the child's parent, guardian or a member of the family of the use of the procedure referred to under section 94, and give the relevant person notice requiring the person to attend the assessment at a specific time, place and date.

(4) If one of the persons referred to under subsection (3) is not available, or cannot be traced, the person employing an alternative method to arrest shall request the child to identify another appropriate adult, and if such adult is identified, the police officer shall request that person to attend the assessment at a specific time and place.

***Duties of police upon request.***

100. An arresting officer or another police officer may be required by a social worker, as a matter of urgency, to -

- (a) notify a specific person of the appearance of a child under the age of eighteen years at the assessment;
- (b) give the relevant person a written notice to attend the assessment at a specified time and place;
- (c) obtain documents relevant to proof of age from a specified address or place; or
- (d) transport a specified person or persons to the place where assessment is to be effected.

***Cautioning by police.***

101. (1) A police officer may apply an informal caution instead of arresting a child.

(2) A formal caution, where recommended by a social worker, prosecutor or an inquiry magistrate, may be administered by a police officer to a child in the presence of the parent or guardian and victim of the child's unlawful conduct.

(3) A formal caution shall be administered in private, whether in a police station or elsewhere, in the presence of a social worker, if available, and the persons mentioned in subsection (2).

(4) The police officer referred to in subsection (2) shall cause a record of the caution to be kept at the applicable police station and shall forward a record to the Commissioner of Police who shall cause a register of cautions to be kept.

(5) The record of a formal cautions referred to in subsection (4) shall be expunged after a period of two years from the date on which a caution was administered.

(6) The register referred to under subsection (4) may be made available to -

- (a) any member of the police;
- (b) any social worker;
- (c) any inquiry magistrate;
- (d) Director of Public Prosecutions; and
- (e) any person for bona fide research purposes with the permission of the Commissioner of Police.

***Pre-trial procedures and presence of parent or guardian.***

102. (1) No confession, admission or pointing out by a child may be admitted as evidence in the Children's Court where such confession, admission or pointing out was made to a police officer

or an inquiry magistrate unless a legal representative, parent or guardian of such child was present at the time of such procedure.

(2) No evidence obtained at an identification parade may be admitted as evidence in the Children's Court unless a legal representative, parent or guardian was present at the time of such procedure.

(3) Fingerprinting of children should be regarded as a measure which should not be resorted to before the finalisation of a preliminary inquiry but, the fingerprints of a child may be taken during the period after arrest and before appearance of the child before the preliminary inquiry if -

- (a) it is essential for the investigation of the case;
- (b) it is required for the purposes of establishing the age of the person in question; or
- (c) it is necessary to establish the prior convictions of a child for the purposes of making a decision on diversion, release from detention in police custody or placement in a particular place of safety.

***Detention in police custody before appearance at assessment.***

103. (1) Detention of a child in police custody, whether in a police cell, police vehicle, lock-up or other place shall be used as a measure of last resort and for the shortest possible period of time.

(2) The station commander of each police station shall cause a separate cell to be kept, and details regarding the detention in police cells of all persons under the age of eighteen years shall be recorded in the register.

(3) The register referred to under subsection (2) may be examined by a parent, guardian, legal representative, prosecutor, magistrate, social worker, health worker or any other person authorised by the station commander to examine the register.

(4) Whilst in detention in police custody, a child shall -

- (a) be held in conditions and treated in a manner that takes account of his age;
- (b) be held separately from adults and boys shall be held separately from girls;
- (c) be held, as far as possible, in conditions which will minimise the risk of harm to that child, including the risk of harm from other children;
- (d) have the right-
  - (i) to adequate food;
  - (ii) to medical treatment when required;
  - (iii) of access to reasonable visits by parents, guardians, legal representatives, social workers, health workers and religious counsellors;
  - (iv) of access to reading material;
  - (v) to adequate exercise; and

(vi) of access to adequate clothing, including sufficient blankets and bedding.

(5) No child may be held in detention in police custody for longer than 48 hours prior to appearing before an inquiry magistrate.

(6) A child may only be remanded to detention in police custody for a period of 48 hours and for one further period of a maximum of 48 hours where no alternative action can be taken.

(7) No police officer may admit, or allow a child to remain, in detention in police custody after the expiry of the periods of time set in subsections (5) and (6), and any police officer admitting or allowing such child to remain in police custody longer than the said periods of time, commits an offence and on conviction, personally liable for damages incurred.

(8) Where a child in police custody makes a complaint regarding injury sustained by that child during arrest or whilst in detention, the police officer to whom such complaint is made, shall report the complaint to the station commander who shall, within a reasonable time cause the child to be taken to a medical officer for examination and treatment and attach the report of the medical officer to the police docket relating to the child concerned.

(9) A police officer or station commander who fails to comply with the provisions of subsection (8) commits an offence and is on conviction civilly liable for the injuries incurred after being made aware of the complaint.

(10) A police officer of a sex different from that of the detained child shall not have any physical contact with such child while in detention except in the presence of a police officer of the same sex as that of the child or where a police officer of the same sex is not available.

(11) A police officer who contravenes the provisions of subsection (10) commits an offence and is liable on conviction to a fine of not less than two thousand emalangeni or to 6 months imprisonment or both.

***Powers of police to release a child from detention before preliminary inquiry.***

104. (1) In respect of a child accused of any offence, consideration should be given to the release of such child from detention in police custody pending a preliminary inquiry.

(2) A child shall, unless there are substantial reasons not to do so, be released from detention in police custody by a police officer on own recognisances, or into the care of a parent or guardian on one or more conditions as set out under subsection (4).

(3) Where a child is alleged to have committed a serious offence, a child may be released from police custody by a police officer, in consultation with the Director of Public Prosecutions on one or more conditions as set out under subsection (4).

(4) Conditions of release of a child for the purposes of this section include the following -

- (a) the obligation to appear at a specified time and place for assessment not later than 48 hours after the arrest;
- (b) the obligation to report periodically to a specified person or place;
- (c) the prohibition not to interfere with witnesses, to tamper with evidence or to associate with a person, persons or group of specified people; and



(d) the obligation that the child has to return to his home or to a specified address.

(5) Where a child has not been released from detention in police custody prior to the holding of a preliminary inquiry, the arresting officer shall provide the relevant inquiry magistrate with a written report giving reasons why such child could not be released from detention in police custody.

(6) The Commissioner of Police shall provide -

- (a) transport costs or transport assistance in respect of a child who is released from police custody on own recognisances; and
- (b) recovery of transport costs from a child to whom such costs had been provided if it appears that such child or his family is able to pay for such costs.

***Child not charged until matter entered on roll of Children's Court.***

105. For the purposes of proceedings under this Act, a child is deemed not to be charged until, after the finalisation of the preliminary inquiry, the prosecutor enters the matter on the roll of the Children's Court under the provisions of this Act and formally puts the charges to the child.

### PART XIII PRELIMINARY INQUIRY

***Nature and purposes of preliminary inquiry.***

106. (1) For the purposes of this Act and any other Act, the proceedings of a preliminary inquiry shall be regarded as the proceedings of the Children's Court.

(2) The place where a child will appear for purposes of the holding of the preliminary inquiry, shall be determined and be presided over by the inquiry magistrate.

(3) The purposes of a preliminary inquiry are to enable the inquiry magistrate to -

- (a) ascertain whether an assessment of a child has been effected by a social worker, and if not, whether compelling reasons exist as to why an assessment can be dispensed with;
- (b) order that an assessment be effected, if it has not yet been done;
- (c) establish whether the matter can be diverted before charges are instituted in the Children's Court or any other court under the provisions of this Act;
- (d) refer the matter to a prosecutor for charges to be instituted in the Children's Court where the child does not admit responsibility for the alleged offence or where diversion of the matter is not possible;
- (e) transfer the matter to the Children's Court;
- (f) assess whether there is sufficient evidence to warrant a prosecution; and
- (g) determine release or placement of the child pending -
- (i) the finalisation of the preliminary inquiry;

- (ii) referral to the Children's Court; or
- (iii) transfer to the Children's Court.

***Procedure in preliminary inquiry.***

107. (1) A preliminary inquiry shall be held -

- (a) if a child has been arrested as referred to under section 96, within 48 hours of such arrest; and
- (b) if an alternative to arrest as referred to under section 98 has been effected, within 72 hours of such alternative having been employed.

(2) At the commencement of the preliminary inquiry the prosecutor shall ensure that the inquiry magistrate is in possession of -

- (a) the age assessment report, save where assessment has not been effected; and
- (b) any further supporting documentation that the prosecutor deems relevant to the preliminary inquiry or that is required under this Act.

(3) At the commencement of the preliminary inquiry, the inquiry magistrate shall inform the child in the language that the child understands of the following rights -

- (a) the right to challenge evidence and the right to adduce evidence;
- (b) the right to remain silent;
- (c) the right to have the child's parents or guardian present at the preliminary inquiry;
- (d) the right to choose and to be represented by a legal practitioner at his own cost; and
- (e) the right to legal assistance by a lawyer appointed by the State or the Children's Court.

(4) No persons other than the following are entitled to attend the preliminary inquiry-

- (a) the child and the parents or guardian;
- (b) a prosecutor;
- (c) a social worker;
- (d) the arresting officer or other police officer;
- (e) the child's legal representative; and
- (f) any other person served with a subpoena, requested or permitted to attend the preliminary inquiry as referred to under section 109 (1) (a) or (b).

(5) The preliminary inquiry may not be held in the absence of the child concerned.

(6) The preliminary inquiry may be held in a room, office, chamber or closed court but may not be held in an open court.

(7) The proceedings shall be conducted in an informal manner, and the inquiry magistrate is responsible for conducting the proceedings, asking the necessary questions, interviewing any person or persons attending the inquiry and eliciting any information that is required.

(8) Evidence of a previous diversion or previous charge proved may be elicited or adduced at the preliminary inquiry by any person.

(9) The inquiry magistrate shall keep a record of the proceedings of the preliminary inquiry or cause such a record to be kept.

(10) A decision of the inquiry magistrate presiding at the preliminary inquiry is not subject to appeal, save for a decision to remand a child in custody referred to under section 115.

***Separation and joinder of preliminary inquiry.***

108. (1) If the child in respect of whom the holding of a preliminary inquiry is contemplated, is co-accused of an alleged offence with an adult, the case of the adult concerned may on the directive of the Director of Public Prosecutions be separated from that of the child and will not be subject to the provisions of this Act.

(2) If the child in respect of whom the holding of a preliminary inquiry is contemplated, is co-accused with one or more other children, a joint preliminary inquiry as provided in Section 87 of this Act may be held in respect of all children concerned but, the inquiry proceedings may be separated at any time where this is in the best interests of any of the children.

***General powers and duties of the inquiry magistrate.***

109. (1) The inquiry magistrate may -

- (a) cause a subpoena to be served on any person whose presence is necessary for the finalisation of the preliminary inquiry;
- (b) request or permit the attendance of any person, who, in his opinion can contribute to the proceedings of the preliminary inquiry;
- (c) request the production of any further documentation or may elicit any further information to supplement that referred to under section 107 (2), which is relevant or necessary to the proceedings;
- (d) make a determination of age referred to under section 84;
- (e) after consideration of the information contained in the assessment report, elicit any information from the persons attending the inquiry to supplement or clarify the information contained in the assessment report, and which is necessary in order to enable him to make the decision referred to under section 110 (4); and
- (f) take such steps as he deems necessary to establish the truth of any statement or submission that may be in dispute.

(2) Where a social assessment has not been effected, the inquiry magistrate shall instruct the prosecutor to refer the child to a social worker in order for an assessment to be effected but, the inquiry magistrate may decide that assessment may be dispensed with if compelling reasons for doing so exist, and if it is in the best interests of the child.

(3) An inquiry magistrate shall apprise himself of diversion programmes available as well as their aims and content.

***Decisions of inquiry magistrate and factors to be considered.***

110. (1) In regard to all matters brought before the preliminary inquiry, the inquiry magistrate shall, before referring the matter to a prosecutor for the institution of charges in the Children's Court under subsection (4) (b), satisfy himself that diversion of the matter is not possible.

(2) In order to establish whether or not diversion is possible, the inquiry magistrate shall have regard to -

- (a) the assessment report, unless the assessment of the child has been dispensed with under section 109 (2);
- (b) the views of any person present at the preliminary inquiry;
- (c) any further information provided by any person present at the preliminary inquiry; and
- (d) any further information requested by him in the course of conducting the preliminary inquiry.

(3) In taking a decision under subsection (4), the inquiry magistrate shall take account of the principle that the child has the right to participate in all decisions affecting him but, where a child does not acknowledge the responsibility of the offence, the child shall not be required to answer any question which may infringe upon his rights to be presumed innocent and to remain silent.

(4) After consideration of the social assessment report, if the assessment has not been dispensed with under section 109 (2), and submissions by the prosecutor, the child or any other party to the inquiry, the inquiry magistrate may-

- (a) divert the matter in accordance with the standards and requirements set out under section 126 and section 127 and in terms of any of the options set out under section 128; or
- (b) refer the matter to a prosecutor for charges to be instituted in the Children's Court or any other court acting under the provisions of this Act.

(5) After an inquiry magistrate has made a decision to divert the matter in terms of subsection (4) (a), and if formal programmes for diversion are not available, or are not appropriate to the circumstances of a child, his family or the alleged offence, the inquiry magistrate shall, as far as is possible, develop a diversion strategy which meets the standard and requirements of diversion set out under sections 126 and 127 and which is appropriate to the circumstances of a particular child, his family, community of origin and the alleged offence.

(6) The inquiry magistrate shall -

- (a) if he has taken a decision that the matter should be referred to the Children's Court in terms of subsection (4) (b), record written reasons for such decision; and
- (b) receive and consider the reports regarding arrest of the child and detention in police custody provided by the arresting police officer under sections 97 (3) and 104 (5) respectively, and if, in the opinion of the inquiry magistrate, an arrest or detention in a police cell, as the case may be, was necessary, he shall forward a copy of the record referred to in those sections to the parent, guardian or legal representative of the child.

***Sufficiency of evidence in a preliminary inquiry.***

111. (1) An inquiry magistrate who intends to refer the matter to a prosecutor for charges to be instituted in the Children's Court or other court in terms of section 110 (4) (b), shall satisfy himself that there is sufficient evidence to sustain a prosecution, and for this purpose he may request the prosecutor, the investigating officer or any other relevant person to provide an oral report concerning the sufficiency of such evidence.

(2) If the inquiry magistrate has substantial and compelling reasons to believe that there is insufficient evidence to support the institution of charges against the child, he shall close the preliminary inquiry and -

(a) order that the child, if in detention, be released; or

(b) the child be released with an order for appropriate intervention by a social worker.

(3) If at any stage of the preliminary inquiry it appears that the child concerned does not intend to accept responsibility for the alleged offence as referred to under 127 (1) (a), the inquiry magistrate shall, subject to the provisions of subsection (1) regarding sufficiency of evidence, refer the matter to the prosecutor for charges to be instituted in the Children's Court or any other court acting in terms of the provisions of this Act.

***Inquiry magistrate's duty where child previously released or alternatives to arrest used.***

112. Where a child has been previously released from detention, or where an alternative to arrest under section 94 has been used, and the matter is to be transferred to a prosecutor for charges to be instituted in the Children's Court or any other court in terms of section 110 (4) (b), the inquiry magistrate -

(a) shall warn the child in language that the child understands to appear on a specified date at a specified place and at the specified time at such Children's Court inquiry; and

(b) may extend or confirm any conditions of release that were in operation by virtue of the provisions of section 104 (3) prior to the child's appearance at the preliminary inquiry.

***Inquiry magistrate's duty to inquire into possible release of child from detention.***

113. (1) Where a child who appears at a preliminary inquiry has been arrested, and has not been released previously from detention under section 104, the inquiry magistrate, when remanding the matter under section 114 (1) or (2); or referring the matter to the Children's Court or other court for charges to be instituted in terms of section 110 (4) (b), shall establish whether the child can be released from detention pending-

(a) finalisation of the preliminary inquiry; or

(b) the institution of charges in the Children's Court or any other court.

(2) The inquiry magistrate shall, in making the determination referred to in subsection (1), have regard to the recommendation of a social worker in respect of release from detention contained in the social assessment report, as well as any further evidence which has been placed before him by the child or any other person.

(3) Release of a child into the care of a parent or guardian on one or more of the conditions set out in subsection (5) shall be considered as a measure of first resort.

(4) A child may be released on his own recognisance with or without conditions as set out in subsection (5).

(5) Conditions of release of a child for the purposes of this section include -

- (a) the obligation to appear before the Children's Court or any other court acting in terms of the provisions of this Act at a specified place on a specified date and at a specified time;
- (b) the obligation to report periodically to a specified person or place;
- (c) the prohibition not to interfere with witnesses, to tamper with evidence or to associate with a person, persons, or group of specified people; and
- (d) if the preliminary inquiry has been remanded under section 114, the obligation to appear at further proceedings of the preliminary inquiry at a specified place on a specified date and at a specified time.

(6) Where a decision is made at the preliminary inquiry to divert a child under the provisions of section 110 (4) (a), the child shall be released from custody.

***Remanding of preliminary inquiry.***

114. (1) The inquiry magistrate may remand a preliminary inquiry for a period of 48 hours, if it is necessary for the purposes of-

- (a) securing the attendance of a person necessary for the finalisation of the inquiry;
- (b) obtaining information necessary for the finalisation of the inquiry;
- (c) establishing the attitude of the victim to diversion;
- (d) furthering the development of a diversion option; or
- (e) finding alternatives to pre-trial residential detention.

(2) The preliminary inquiry may be remanded for a further period of 48 hours, after which the matter may be referred to a prosecutor for charges to be instituted in the Children's Court or any other court acting in terms of the provisions of this Act.

(3) Where a preliminary inquiry is remanded for purposes of the noting of a confession, admission, pointing out or the holding of an identity parade, the inquiry magistrate shall inform the child of his right to have a parent, guardian or legal representative present during such proceedings.

(4) Where a child cannot be released into the care of a parent or guardian, such child may, subject to section 113 (2), be remanded to a place of safety or a secure care facility, or if a place of safety or secure care facility is not available, and subject to the provisions of section 103 (7), to a police cell pending finalization of the preliminary inquiry.

(5) Where the matter has not been referred to the Children's Court or any other court as referred to in subsection (2), the preliminary inquiry shall be closed and -

- (a) the child be released from custody; or
- (b) the child be released and an alternative intervention by a social worker be applied.

***Circumstances under which a child may be remanded in detention after finalisation of preliminary inquiry.***

115. (1) Subject to the remainder of the provisions of this section, a child who is accused of having committed an offence may, after finalisation of the preliminary inquiry, be detained in a place of detention, secure care facility or correctional institution pending plea and trial in the Children's Court or any other court acting in terms of the provisions of this Act, but -

- (a) the inquiry magistrate shall consider the granting of bail to ensure that the deprivation of liberty of such child is a measure of last resort; and
- (b) such child may not be detained in a police cell or lock-up.

(2) Where an inquiry magistrate has established that a child cannot be released from detention after the finalisation of the preliminary inquiry because -

- (a) it is not in the interests of justice;
- (b) a remand in detention is required in order to locate the child's parent or guardian;
- (c) there are compelling reasons to believe that the child will abscond or will fail to attend a trial;
- (d) of the seriousness of the offence;
- (e) of the likelihood that the child will interfere with the witnesses; or
- (f) of the likelihood that the child will be exposed to threats or danger by any person,

the child may be remanded to a place of safety, secure care facility or prison pending the hearing of the matter before the Children's Court or any other court acting in terms of the provisions of this Act, subject to the provisions of subsections (3), (4), (5) and (6).

(3) In making a determination as to whether the placement of the child should be in a place of safety or a secure care facility as referred to in subsection (2), the inquiry magistrate shall have regard to the recommendations of a social worker as contained in such officer's assessment report.

(4) Where a child is above the age of fourteen but has not attained the age of eighteen years of age, and charged with murder, unlawful sexual act, indecent assault involving the infliction of grievous bodily harm, robbery with aggravated circumstances, or theft of stock, theft of motor vehicle, drug trafficking, counterfeit goods, counterfeit currency, laundering of money, offences relating to sale of liquor and gambling, if it is alleged that the value of the dependence-producing substance in question is more than E50, 000 or any offence relating to the dealing in or smuggling of ammunition, firearms, explosives or armaments, and release or referral to a secure care facility is not possible because-

- (a) there is no such facility within a reasonable distance from the court in which the child is appearing;

- (b) there is such a facility within a reasonable distance from the court, but written or oral evidence has been provided by a social worker that there is no vacancy at the time of making the decision; or
- (c) the inquiry magistrate is satisfied, on evidence placed before him, that there is a substantial risk that the child may cause harm to other children in a place of safety or secure care facility,

the child may be remanded to a prison, and such remand to a prison shall only be possible after finalisation of the preliminary inquiry, and the matter has been referred to the Children's Court or any other court for charges to be instituted.

(5) In making an order that the child be remanded to prison as referred to in subsection (2), the inquiry magistrate shall enter the reasons for such remand on the record of the proceedings.

(6) Where a child is remanded to a place of safety, secure care facility or prison in terms of subsection (2) -

- (a) the child shall appear every 14 days before the Children's Court or any other court acting in terms of the provisions of this Act, which court shall -
  - (i) inquire whether detention in a place of safety, secure care facility or prison remains necessary;
  - (ii) if ordering further detention of the child, enter the reason for such further detention on the record of the proceedings; and
  - (iii) consider the reduction of any amount of bail that has been granted in respect of such child;
- (b) the officer presiding in the Children's Court shall be satisfied that the child is being treated in a manner and kept in conditions that take account of the child's well-being; and
- (c) the plea and trial in the Children's Court or any other court acting in terms of the provisions of this Acts hall be finalised as speedily as possible.

***Failure of child above the minimum age of prosecution to attend assessment or preliminary inquiry.***

116. (1) If a child above the minimum age of prosecution as referred to under section 79 fails to appear at an assessment or breaches any conditions of release from detention in police custody, the social worker in whose district the assessment was to have taken place, may request the inquiry magistrate to issue a warrant of arrest.

(2) If a child fails to appear at the preliminary inquiry, the prosecutor concerned may request the inquiry magistrate to issue a warrant of arrest.

(3) If a child appears at an assessment or at the preliminary inquiry, as the case may be, after the execution of the warrant of arrest referred to in subsections (1) and (2), the matter shall, in the case of an assessment, forthwith be set down for the holding of the preliminary inquiry or, in the case of appearance at the preliminary inquiry, be proceeded with.

(4) Where the preliminary inquiry referred to under subsection (3) takes place, the inquiry magistrate shall inquire into the reasons for the child's failure to appear at the assessment or at the preliminary inquiry.



(5) Where the inquiry magistrate finds that the failure of the child to appear at an assessment or at the preliminary inquiry was due to fault on the part of the child, he may take that fact into account when making a decision under section 110 (4).

***Failure to comply with diversion conditions.***

117. (1) Where a child has been diverted by a social worker or prosecutor and fails to comply with a condition of diversion, or with any other order, or fails to attend a programme, the social worker or the prosecutor concerned may request the inquiry magistrate to issue a warrant of arrest or written notice to appear in respect of such child.

(2) If a child appears after the execution of a warrant of arrest or as (1) result of the issue of a written notice to appear as referred to under subsection (1), the matter shall be set down for holding of a preliminary inquiry where the inquiry magistrate shall inquire as to the circumstances surrounding the failure of the child to comply with the conditions of a diversion option.

(3) Where a child has been diverted by an inquiry magistrate as referred to in section 110 (4) (a) and fails to comply with the conditions of diversion, or with any other order, or fails to attend a specified programme, the inquiry magistrate concerned may issue a warrant of arrest or written notice to appear in respect of such child.

(4) When a child appears before an inquiry magistrate after a warrant of arrest or written notice to appear has been issued in terms of subsection (3) and the child, at the time of such appearance is still below the age of eighteen years, the inquiry magistrate shall inquire as to the circumstances surrounding the failure of the child to comply with the conditions of the diversion option.

(5) The inquiry magistrate may, at the preliminary inquiry referred to under subsections (2) and (4), decide to -

- (a) divert the matter;
- (b) divert the matter to the same programme with altered conditions;
- (c) apply any other diversion option as described under section 128;
- (d) refer the matter to the prosecutor for charges to be instituted in the Children's Court or in any other court acting under the provisions of this Act; or
- (e) make an appropriate order which will assist the child and his family to comply with the diversion initially applied.

(6) The execution of a warrant of arrest referred to in this Part may be suspended by the inquiry magistrate, and the officer required to execute such warrant, may, instead of arresting a child, employ one of the alternatives to arrest as referred to under section 94.

(7) When a person who has been arrested on a warrant issued pursuant (1) to subsections (1) and (3) is no longer below the age of eighteen years at the time of appearance, that person should appear before the inquiry magistrate, who shall inquire as to the circumstances surrounding the failure of the person to comply with the conditions of the diversion option.

(8) In circumstances referred to under subsection (7), the inquiry magistrate may take any of the steps referred to in subsection (5) (a),(b),(c), or (e) or refer the matter to a court other than the Children's Court for prosecution on the original set of facts.

***Procedure upon referral of matter to be instituted.***

118. (1) Upon finalisation of the preliminary inquiry, if diversion has not taken place, and if the inquiry magistrate has found that there is sufficient evidence to sustain a prosecution of a child as referred to under section 111, the inquiry magistrate shall -

- (a) refer the matter to the prosecutor for charges to be instituted in the Children's Court or any other court acting under the provisions of this Act as referred to under section 105;
- (b) warn any parent or guardian of such child to attend the proceedings referred to under paragraph (a) at a specified place and on a specified date and time; and
- (c) ensure the provision of legal representation for such child in terms of the provisions of section 147.

(2) Where the child concerned is not in detention after finalisation of the preliminary inquiry, the inquiry magistrate may -

- (a) alter or extend any condition imposed under section 108 or section 113;
- (b) alter or extend any order made under section 113 (3) and shall warn any parent or guardian in whose care the child has been released to appear in the Children's Court or any other court acting under the provisions of this Act at a specified place and on a specified date and time; and
- (c) warn the child, his parent or guardian to appear in the Children's Court or any other court acting under the provisions of this Act at a specified place and on a specified date and time.

(2) An inquiry magistrate shall recuse him and may not preside in the Children's Court in relation to that matter if such magistrate has, during the course of such preliminary inquiry, heard any information prejudicial to the impartial determination of the matter.

***Application for release from detention.***

119. (1) Nothing contained in this Act shall be construed as precluding a child who is in detention in respect of an offence from applying for release from detention at any stage prior to the passing of the sentence in respect of that offence.

(2) A court, in hearing an application referred to under subsection (1), shall have regard to the circumstances referred to section 115 (3).

(3) An appeal against the decision of a court hearing an application referred to under subsection (1) may be lodged to the High court.

## PART XIV

### RESTORATIVE JUSTICE AND DIVERSION

***Restorative justice.***

120. The purposes of restorative justice in terms of this Act are to -

- (a) provide an opportunity to the person or persons or community affected by the harm caused to express their views regarding the impact of such harm;

- (b) encourage restitution of a specified object or symbolic restitution;
- (c) promote reconciliation between the child and the person or community affected by the harm caused; and
- (d) empower communities to address children at risk of offending without resorting to the criminal justice.

***Establishment of Umphakatsi Child Justice Committee.***

121. (1) There shall be established a committee that shall be known as the Umphakatsi Child Justice Committee in each chiefdom.

(2) The Umphakatsi Child Justice Committee shall be responsible for handling all restorative justice processes at the umphakatsi level.

(3) The Umphakatsi Child Justice Committee shall comprise of the chief and six other members elected by the community in consultation with the chief.

(4) The chief shall be the chairperson of the Umphakatsi Child Justice Committee.

(5) Four members of the Umphakatsi Child Justice Committee shall form a quorum at any meeting of the Umphakatsi Child Justice Committee.

(6) Subject to this Act, the Umphakatsi Child Justice Committee shall determine its own procedure.

(7) The Umphakatsi Child Justice Committee shall meet as and when it is necessary or there is a case to be dealt with.

(8) For purposes of this Part, the Department of Social Welfare shall, with the necessary modifications, carry out the functions of Umphakatsi Child Justice Committee in urban areas and shall for that purpose appoint suitable persons to constitute a Committee.

***Restorative justice processes.***

122. The restorative justice processes include -

- (a) family group conference;
- (b) victim - offender mediation; and
- (c) any other restorative justice processes.

***Family Group Conference.***

123. (1) A family group conference shall be convened by the Chairperson of the Umphakatsi Child Justice Committee in consultation with the families of the children concerned.

(2) The Chairperson of the Umphakatsi Child Justice Committee who convenes a family group conference shall notify all persons who are entitled to attend the conference of the date, the time and the place at which the conference is to be held.

(3) No notice is required to be given pursuant to subsection (1) to any person whose whereabouts cannot, after reasonable enquiries, be ascertained.

(4) A notice required under subsection (2) shall be given at a reasonable time before the conference is to be held.

(5) The following persons are entitled to attend a family group conference -

- (a) the children in respect of whom the conference is held;
- (b) the parents or guardians;
- (c) members of the families of the children concerned;
- (d) a social worker, where the conference has been convened on the basis of a report from a social worker;
- (e) legal representative of the children concerned;
- (f) any relevant body or organisation which the concerned families may recommend as appropriate to attend the conference; and
- (g) any person, body or organisation whose attendance at the conference is recommended by the Chairperson of the Umphakatsi Child Justice Committee working in consultation with the concerned families.

(8) The Chairperson of the Umphakatsi Child Justice Committee who convenes a family group conference shall take all reasonable steps to ensure that all information and advice required by the conference to carry out its functions are made available to the conference.

(9) Where it is appropriate and with the permission of the conference, any person may attend a family group conference for the purpose of conveying to that conference any information or advice required by that conference to carry out its functions.

(10) A family group conference shall regulate its own procedure in such manner as it thinks fit.

(11) The Chairperson of the Umphakatsi Child Justice Committee shall provide such administrative services as may be necessary to enable a family group conference to discharge its functions.

(12) The functions of the family group conference are the following -

- (a) to consider in relation to the child(ren) in respect of whom the conference was convened such matters relating to the care and protection of those child(ren) as the conference thinks fit;
- (b) where the conference considers that the child(ren) in respect of whom the conference was convened is in need of care or protection, to make such decisions or recommendations and to formulate plans as the conference considers necessary in the best interests of that/those child(ren).
- (c) to review from time to time the decisions and recommendations made and the plans formulated by that conference and their implementation.

(13) The Chairperson of the Umphakatsi Child Justice Committee who convenes a family group conference shall cause to be made a written record of the details of the decisions and recommendations made and the plans formulated by the conference pursuant to this section.

(14) The Chairperson of the Umphakatsi Child Justice Committee who has convened a family group conference shall communicate the decisions, recommendations and the plans made by the family group conference to every person that will be directly involved in the implementation of decision, recommendation or plan and seek their agreement.

(15) Where the Chairperson of the Umphakatsi Child Justice Committee is unable to secure an agreement to a decision, recommendation or plan referred to under subsection (13), the Chairperson of the Umphakatsi Child Justice Committee may, for the purpose of enabling the conference to reconsider that decision, recommendation or plan, reconvene that conference.

(16) A family group conference reconvened under subsection (14) may confirm, rescind or modify its previous decision, recommendation or plan.

(17) Any decision, recommendation or plan confirmed or modified under subsection (15), and any new decision, recommendation or plan made or formulated under that subsection, shall be deemed to have been made in the previous conference.

(18) The Chairperson of the Umphakatsi Child Justice Committee who convenes a family group conference shall ensure that copies of the proceedings of the conference, where the proceedings were recorded, are given to all persons present at the conference.

(19) Information, statement or admission made or disclosed in the course of a family conference shall not be admissible in any court.

(20) No person shall publish any report of the proceedings of a family group conference.

(21) Nothing under subsection (19) applies to the publication of statistical information relating to family conferences or bona fide research relating to family group conferences.

***Victim - offender mediation.***

124. (1) Victim-offender mediation shall be convened by the Chairperson of the Umphakatsi Child Justice Committee in consultation with the victim and offender.

(2) The victim and the offender shall meet in a safe and structured setting with the assistance of a trained mediator or the Chairperson of the Umphakatsi Child Justice Committee.

(3) The functions of the victim-offender mediation are to -

- (a) to enable the victim and offender to talk about the crime, express their feelings and concerns;
- (b) to participate directly in developing options for trying to make things right; and
- (c) to afford the offender an opportunity to make apologies, provide information and develop reparative plans and gain insight for personal growth.

(4) The Chairperson of the Umphakatsi Child Justice Committee who convened a victim-offender mediation shall cause to be made a written record of the details of the decisions and recommendations made and the plans formulated in the victim-offender mediation.

(5) The Chairperson of the Umphakatsi Child Justice Committee who has convened a victim-offender mediation shall communicate the decisions, recommendations and the plans made by the victim-offender mediation to every person that will be directly involved in the implementation of decisions, recommendation or plan and seek their agreement.

***Referral to restorative justice process.***

125. (1) Referral to restorative justice process may be made by -

- (a) child or his parent, guardian or any appropriate adult;
- (b) chief;
- (d) police;
- (e) social worker
- (f) prosecutor; and
- (g) Children's Court.

(2) Where the case is referred to restorative justice process by the Children's Court, the police or social worker, and the victim and offender do not agree on the decision to be made at such a forum, the case shall go back to the Children's Court, the police or social worker for further action.

***Diversion.***

126. (1) The purposes of diversion in terms of this Act are to -

- (a) encourage the child to be accountable for the harm caused by him;
- (b) promote an individualised response to the harm caused which is appropriate to the child's circumstances and proportionate to the circumstances surrounding the harm caused;
- (c) promote the reintegration of the child into the family and community;
- (d) prevent stigmatisation of a child which may occur through contact with the criminal justice system.

(2) Where possible and appropriate, diversion shall include restorative justice elements which aim at healing relationships, including the relationships of the victim (s) and offender(s).

(3) In making a decision whether to or not to divert a child, consideration shall be given to whether this would be in the best interest of the child.

(4) No child may be unfairly discriminated against on the basis of race, gender, sex, disability, ethnic or social origin, colour, religion, conscience, belief, culture, language, birth or socio-economic status in the selection of a diversion programme, process or option and all children shall have equal access to diversion options.

(5) Corporal punishment and public humiliation shall not be elements of diversion.

(6) A child under the age of thirteen years shall not be required or permitted to perform community service or other work as an element of diversion.

(7) Diversion programmes shall -

- (a) promote the dignity and well-being of the child, and the development of the sense of self-worth and ability of the child to contribute to society;
  - (b) not be exploitative, harmful or hazardous to a child's physical or mental health;
  - (c) be appropriate to the age and maturity of the child;
  - (d) not interfere with a child's schooling;
  - (e) where possible and appropriate, impart useful skills;
  - (f) where possible and appropriate, include an element which seeks to ensure that the child understands the impact of his behaviour on others, including the victims of the offence, and may include compensation or restitution; and
  - (g) where possible and appropriate, be presented in a location reasonably accessible to children, and children who do not have the means to afford transport in order to attend a selected diversion programme, should be provided with the means to do so.
- (8) No child shall be required to pay for admission to a diversion programme.

***Circumstances to be considered for diversion.***

127. (1) A child suspected of having committed an offence may only be referred for diversion by a social worker, prosecutor, an inquiry magistrate or an officer presiding in a Children's Court as referred to in this Act, if -

- (a) such child acknowledges responsibility for the alleged offence and consents to diversion;
- (b) there are reasons to believe that there is sufficient evidence for the matter to proceed to trial;
- (c) there is no risk of infringement of the child's procedural rights; and
- (d) the child has a fixed address.

(2) Where circumstances as referred to in subsection (1) exist, diversion shall be considered as a matter of first resort.

***Diversion options.***

128. (1) A social worker, prosecutor, inquiry magistrate or officer presiding in the Children's Court, in selecting a diversion under this section, shall ensure that -

- (a) due regard is given to a child's maturity, cultural, religious and linguistic context, the child's community of origin and the child's age;
- (b) the option recommended or selected is proportionate to the circumstances of the child, the nature of the offence and the interests of the society; and
- (c) due regard is had to the various levels of diversion options.

(2) Diversion options that may be applied in respect of a child in the first instance are not limited to but may include -

- (a) an oral or written apology to a specified person or persons or institution;
- (b) referral to a police officer above the rank of inspector for purposes of the administration of a police caution without conditions;
- (c) referral to a senior police officer for the purposes of the administration of a police caution with conditions;
- (d) placement under a supervision and guidance order for a period not exceeding three months or as determined by the circumstances of the case;
- (e) placement under a reporting order for a period not exceeding three months;
- (f) issuing of a compulsory school attendance for a period not exceeding three months;
- (g) issuing of a family time order for a period not exceeding three months;
- (h) issuing of a positive peer association order in respect of a specified person or persons or specified place for a period not exceeding three months;
- (i) issuing of a good behaviour order with conditions;
- (j) issuing of an order prohibiting the child from visiting, frequenting or appearing at a specified place;
- (k) compulsory attendance at a specified centre or place for a specified vocational or educational purpose and for a period not exceeding five hours each week, for a maximum of eight weeks;
- (l) symbolic restitution in respect of a specified object to a person, persons, group or institutions; and
- (m) restitution of a specified object to a specified victim or victims of the alleged offence where the object concerned can be returned or restored.

(3) Diversion options that may be applied in respect of a child in the second instance are not limited to but may include -

- (a) placement under a supervision and guidance order for a period longer than three months but not exceeding six months;
- (b) placement under reporting order for a period longer than three months but not exceeding six months;
- (c) issuing of compulsory school attendance order for a period longer than three months but not exceeding six months;
- (d) issuing of a family time order for a period longer than three months but not exceeding six months;
- (e) issuing of a positive peer association order in respect of a specified person or persons or a specified place for a period longer than three months but not exceeding six months;



- (f) compulsory attendance at a specified centre or place for a specified vocational or educational purpose for a period not exceeding five hours each week, for a maximum of twelve weeks;
- (g) 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 social worker when effecting the assessment for a maximum period of twenty- five hours, and to be completed within a maximum period of three months;
- (h) restitution of the specified object to a specified victim or victims of the alleged offence where the object concerned can be returned or restored or payment of compensation to a maximum of E5000. 00 to a specified person, persons, group or institution where the child or his family is able to afford this;
- (i) referral to appear at the victim-offender mediation, a family group conference or other restorative justice process at a specified time, on a specified date and at a specified place; and
- (j) one or more of the options set out in paragraphs (a) to (i) of this subsection or in paragraphs (a), (i) or (l) of subsection (2) used in combination, with due regard to the age of the child concerned, the circumstances of the child and his family, and the nature of the offence.

(4) Diversion options that may be applied in respect of a child in the third instance are not limited to but may include -

- (a) placement under a supervision and guidance order for a period longer than six months but not exceeding one year in duration;
- (b) compulsory attendance at a specified centre or a place for a specified vocational or educational purpose for a period of not more than twenty hours each week for a maximum of six months;
- (c) performance without remuneration of some service for the benefit of the community under the supervision and control of an organisation or institution, or specified person or group identified by a social worker when effecting the assessment for a period exceeding twenty-five hours but not exceeding hundred hours to be completed within a maximum period of six months;
- (d) referral to appear at the victim-offender mediation, a family group conference or other restorative justice process at a specified time, on a specified date and a specified place;
- (e) restitution of a specified object to a victim or victims of the alleged offence where the object concerned can be returned or restored or payment of compensation to a maximum of E10,000,00 to a specified person, persons, group or institution where the child or his family is able to afford this;
- (f) referral to a programme with a residential element, where the duration of the programme does not exceed three months, and no portion of the residence requirement exceeds twenty-one consecutive nights with a maximum of thirty-five nights; and
- (g) one or more of the above options used in combination, or combined with one or more of the orders referred to in paragraphs (b), (c), (d), or (e) of subsection (3) or in paragraph (a) of subsection (2).

(5) Diversion options that may be applied in respect of a child over the (1) age of fourteen years in the fourth instance, which shall be imposed only by an inquiry magistrate or other officer presiding in proceedings in terms of the provisions of this Act if he has reason to believe that the Children's Court, in relation to the circumstances of the child and the offence, would impose a term of imprisonment exceeding six months or a reform school sentence, are not limited to but may include -

- (a) referral to a programme with a residential element, where the duration of the programme does not exceed six months, and no portion of the residence requirement exceeds twenty-one consecutive nights with a maximum of sixty nights during the operation of the programme;
- (b) performance without remuneration of some services for the benefit of the community under the supervision and control of an organisation or institution, or a specified person or group identified by the social worker effecting the assessment for a maximum period of 250 hours, to be completed within a maximum period of twelve months;
- (c) where a child is over the age of compulsory school attendance, and is no longer attending formal schooling, compulsory attendance at a specified centre or place for a specified vocational or educational purpose for a maximum period of not more than 35 hours per week, to be completed within a maximum period of six months; and
- (d) any of the options referred to in paragraphs (a), (d), (e) and (g) of subsection (4) in combination with any of the options referred to in this subsection.

(6) A victim-offender mediation, family group conference or other restorative justice process referred to in subsections (3) (i) and (4) (d) may apply any option referred to under subsections (2), (3) or (4) to a child referred to such mediation, conference or process, or reach another resolution appropriate to the child, his family and to local circumstances, provided that such mediation, conference or process may not, in the case of another resolution, contravene any applicable principle under this Act.

***Referral and powers of prosecution in respect of children above the minimum age of prosecution with respect to diversion.***

129. (1) Subject to the provisions of section 90 (1) and (2), where a social worker, in relation to a child above the minimum age of prosecution, has recommended that-

- (a) such child be diverted to a specified process, programme or appropriate alternative order mentioned under section 91 (3) (a);
- (b) the matter involving such child be transferred to the Children's Court in terms of section 91 (3) (c);
- (c) no further action be taken in terms of section 91 (3) (b); or
- (d) the matter involving such child should not be diverted,

the matter shall be submitted to a prosecutor.

(2) Upon consideration of the recommendations of the social worker as referred to in subsection (1) (a), (b) and (c) the prosecutor may -

- (a) concur with the recommendation of the social worker and divert the matter, arrange for the transfer of the matter to the Children's Court, or decline to charge the child concerned; or

- (b) disagree and state reasons why he disagrees with the recommendation of the social worker, and arrange for the opening of a preliminary inquiry.

(3) Upon consideration of the recommendations of the social worker as referred to in subsection (1) (d) the prosecutor may -

- (a) disagree with the recommendations of the social worker and divert the matter, arrange for the transfer of the matter to the Children's Court inquiry as referred to under subsection (2) (a), or decline to charge the child concerned; or
- (b) concur with the recommendation of the social worker, and arrange for the opening of a preliminary inquiry.

(4) Where a prosecutor takes one of the steps outlined in subsection (2) (a) or (3) (a), no charges against the child shall be instituted in accordance with section 105, but where a child fails to comply with a condition of diversion, the provisions of section 117 shall apply.

(5) Where an assessment has not been effected, the prosecutor to whose notice the case involving a child under the age of eighteen years has been brought, shall arrange that assessment be effected, or, if this is not possible, arrange for the opening a preliminary inquiry.

## PART XV

### BAIL AND DETENTION PENDING TRIAL

#### ***Bail.***

130. (1) Where a child appears before the Children's Court charged with an offence, the presiding officer shall inquire into the case and unless there is a serious danger to the child, release the child on bail -

- (a) on a court bond on his own recognisance; or
- (b) with sureties, preferably, the child's parents, guardian, family member or responsible person on a court bond.

(2) If bail is not granted, the Children's Court shall record the reasons for refusal and inform the child of his right of appeal or review to the High Court.

#### ***Remand.***

131. (1) Where a child is not released on bail, the Children's Court may make an order remanding or committing him in a remand home.

(2) If there is no remand home within a reasonable distance from the Children's Court, the Children's Court shall make an order as to the detention of the child in a place of safe custody as it deems fit.

(3) For the purposes of this section, a place of safe custody shall be a place which the Children's Court considers suitable to ensure that the child shall be brought to the Children's Court when required and shall not associate with any adult detainee.

(4) Remand in custody shall be for the shortest period possible and shall not exceed three months.

(5) No child shall be remanded in custody with an adult.

(6) A child who escapes from a remand home or other place of safe custody in which he is detained may be arrested with or without a warrant and returned to that place.

(7) Pending the establishment of a remand home, the Minister may declare by notice in the Gazette any establishment as a remand home.

(8) Notwithstanding anything to the contrary herein contained, the Children's Court shall consider alternatives to remand such as close supervision or placement with a fit and proper person determined by the Children's Court on the recommendation of a social worker.

## PART XVI CHILDREN'S COURT

### *Jurisdiction of Children's Court.*

132. (1) Every Magistrate Court shall be a Children's Court within its area of jurisdiction and shall have jurisdiction to hear and determine cases of children in need of care and charges against children in conflict with the law.

(2) A magistrate presiding in proceedings in a Children's Court shall be designated by the Chief Justice and the Children's Court shall, as far as possible, be staffed by specially trained personnel.

(3) The court room, where practicable, should be located and designed in a way which is conducive to the dignity and protection of children and the proceedings shall be informal, child-friendly and allow the active participation of all persons who need to be involved in the proceedings.

### *Proceedings under this Act by court other than Children's Court.*

133. (1) A court, other than a Children's Court, has jurisdiction to try the case of an accused child where such child is charged with murder or unlawful sexual act, or where he is charged with any other offence and -

- (a) the likely sentence will exceed the jurisdiction of the Children's Court;
- b) there are multiple charges in respect of the child concerned and any other court other than the Children's Court has jurisdiction in respect of one or more of those charges;  
or
- (c) a decision has been made under section 139 that there will be a joinder of trials.

(2) Where the Director of Public Prosecution is satisfied that the circumstances referred to under subsection (1) (a) or (b) exist in respect of the matter involving a particular child, he may, prior to the commencement of the trial, refer the matter to the appropriate court for plea and trial.

(3) A Subordinate Court and a Children's Court have concurrent jurisdiction in respect of matters in which a child is charged together with an adult and a successful application for joinder of the trials has been made under section 139.

(4) The court hearing the matter under this section shall conduct the proceedings in accordance with the provisions of this Act and with due regard to the best interests of the child.

(5) If the Children's Court has proved a charge against a child and the Children's Court is of the view that exceptional circumstances exist which indicate that the appropriate sentence may exceed the sentencing jurisdiction of the Children's Court, the Children's Court may refer the matter to the the High Court for sentencing, and cause a copy of the record of the proceedings to be made available to the Children's Court.

***Assistance to the children who appear in court.***

134. (1) At the commencement of the proceedings in the Children's Court, the presiding officer shall inform a child appearing before such court in a language that the child understands of the following rights -

- (a) the right to challenge testimony of witnesses;
- (b) the right to remain silent;
- (c) the right to have the child's parents or guardian present at the proceedings;
- (d) the right to choose and to be represented by a legal representative at his own cost; and
- (e) the right to be represented by a legal representative chosen by the Court or provided by the State.

(2) A child who is under the age of eighteen years shall be assisted by his parent or guardian at criminal proceedings, and this requirement may be dispensed with where -

- (a) all efforts to locate such person have been exhausted and any further delay would be prejudicial to the best interests of the child; or
- (b) the child is charged with an offence under the Schedule and the sentence referred to under section 153 (a) (i), (ii) or (iii), (b), (c) or (k) is likely to be imposed.

***Parent or guardian to attend proceedings.***

135. (1) A parent or guardian of a child who has been warned by an inquiry magistrate to attend proceedings involving such child under section 118 (1) (b), shall attend such proceedings unless exempted from the obligation to do so under subsection (3).

(2) If a person referred to under subsection (1) has not been warned to attend the relevant proceedings, the court before which the proceedings are pending may at any time during the proceedings direct any person to warn a person referred to under subsection (1) to attend such proceedings.

(3) A person who has been warned in terms of subsection (1) or (2), may apply to the officer presiding in the court in which the child is to appear for exemption from the obligation to attend the proceedings in question, and if such presiding officer exempts such person, he shall do so in writing.

(4) A person who has been warned under subsection (1) or (2) and who has not been exempted from the obligation to attend the relevant proceedings under subsection (3), and a person who is present at proceedings and who is warned by the court to remain in attendance, shall remain in attendance at the relevant proceedings, whether in that court or any other court, unless excused by the court before which such proceedings are pending.

(5) A person who has been warned in terms of subsection (1) or (2) and who fails to attend the proceedings in question or who fails to remain in attendance at such proceedings in accordance with the provisions of subsection (4), commits an offence and is liable on conviction to a fine not exceeding twenty thousand Emalangeni or to imprisonment for a term not exceeding one year.

***Charge sheet and withdrawal of charge.***

136. (1) The allegations contained in any charge sheet shall be formulated in a language that the child can read or understand.

(2) A legal representative, parent or guardian of a child offender shall be provided with a copy of a charge sheet at the beginning of the proceedings.

(3) Nothing contained in this Act shall be construed as precluding the prosecuting authority from exercising the discretion to withdraw a charge at any stage of the proceedings.

***Conduct of proceedings in Children's Court.***

137. (1) The officer presiding in the Children's Court may, if it would be in the best interests of the child, actively participate in eliciting evidence from any person involved in the proceedings.

(2) All proceedings conducted in the Children's Court shall be held in camera and the privacy of the child concerned and other child witnesses, subject to the provisions of section 144, shall be protected at all times.

(3) The proceedings of the Children's Court shall, with regard to the child's procedural rights, be conducted in an informal manner to encourage the maximum participation of the child, his parent or guardian and other child witnesses.

(4) Where the presence of a parent, guardian or any other person who is not an officer of the Children's Court is likely to discourage the maximum participation of the child, the Children's Court shall order that person to recuse himself from the proceedings.

(5) The children shall be permitted to speak in their own language with the assistance, where necessary, of an interpreter and the presiding officer shall ensure that they are addressed in a language that they understand.

(6) In the case of a child with speech or hearing impairment, the Children's Court shall order that a person with expertise in sign language be engaged to assist the child and the court.

(7) The presiding officer shall ensure that the conduct of all proceedings and the conduct of all court personnel are conducive to the protection of all the children participating in the proceedings.

(8) In cases involving children in conflict with the law, no handcuffs, leg-irons or other restraints may be used when a child appears in the Children's Court, unless an imminent danger exists that the safety of any person may be endangered if such restraints are not used.

(9) A child held in a lock-up, cell or at the court on suspicion of having committed an offence or who is being transported to court shall be kept separately from adults and be treated in a manner and kept in conditions which take account of his age.

(10) A female child offender shall be kept separately from any male child offender and shall be under the care of an adult woman.

(11) The proceedings of the Children's Court may, at the discretion of the presiding officer, be held in a place other than a court.

(12) The presiding officer shall protect a child offender and other child witnesses from hostile or intimidating cross-examination where such cross-examination is regarded by the presiding officer as being prejudicial to the well-being of the child or the fairness of the proceedings.

***Evidence in cases involving child offenders.***

138. (1) Evidence of admissions, confessions and pointing out made under coercive circumstances or in the absence of a child's parent, guardian or legal representative is inadmissible in proceedings in the Children's Court or any other court acting under the provisions of this Act.

(2) No evidence of an admission or confession made by a child during an assessment or during the course of a preliminary inquiry is admissible at proceedings in the Children's Court.

***Separation and joinder of trials involving children and adults.***

139. (1) If a child appearing in a Children's Court is co-accused with an adult, the case of the adult concerned shall be separated from that of the child and is not subject to the provisions of this Act unless any person involved in the proceedings, including the child, his parent, such child's legal representative and the prosecutor, before the commencement of the trial, may make an application to the court in which the adult is due to appear for a joinder of the trials concerned.

(2) A person making an application for joinder of trials to the court in which the adult concerned is to appear shall give notice to all parties concerned.

(3) The rules of the court to which an application as referred to in subsection (1) is made, relating to applications, time periods for applications and opposition of applications, apply to the provisions of this section.

(4) If a person making an application under this section has shown, on a balance of probabilities, that a miscarriage of justice or prejudice to the victim or victims of the alleged offence would otherwise occur, the court to which the application is directed, may order a joinder of the trials of the child and adult concerned, provided that the best interests of the child are duly considered.

(5) If the court makes a finding under subsection (4), the matter before the Children's Court shall be transferred to the court in which the adult is to appear.

(6) The court to which the matter has been transferred to under subsection (5), shall act in accordance with the provisions of this Act in relation to the proceedings involving the child concerned.

***Separation and joinder of trials involving children only.***

140. (1) A prosecutor may join the trial of a child offender with that of any other accused child in the same proceedings at any time before evidence has been led in respect of the charge in question.

(2) Where two or more children are charged jointly, whether with the same offence or different offences, the Children's Court may at any time during the trial, upon the application of the prosecutor or by or on behalf of any of the children, direct that the trial of any one or more of the children shall be held separately from the trial of the other children, and the Children's Court may abstain from giving judgement in respect of any such children.



*Adjournment of proceedings.*

141. (1) The Children's Court or any other court acting under the provisions of this Act shall finalise all trials of accused children as speedily as possible and shall ensure that remands are limited in number and in periods between remands.

(2) A court other than Children's Court acting under the provisions of this Act shall ensure that trials of accused children receive priority on the roll of such court.

(3) Where the child has been remanded in custody, the presiding officer shall ensure that the requirements set out under section 115 (6) regarding remands to places of safety or prison are complied with.

(4) Where a child has been remanded to custody pending trial in the Children's Court or any other court acting under the provisions of this Act, the plea and trial of such child shall be finalised within a period not exceeding three months, after which period the child shall be released from detention.

*Powers of officer presiding in Children's Court.*

142. (1) If, at any time before conviction, or after conviction and before sentence, the child accepts responsibility for an offence and the Children's Court in which the child appears is of the opinion that the matter should be diverted, the court may refer the child to any diversion option referred to under section 115, and, any finding of guilt shall be considered not to have been made.

(2) If, at any time before conviction, or after conviction and before sentence, the Children's Court is of the opinion that substantial grounds exist that an alternative dispute resolution mechanism may be appropriate to the resolution of the matter before the court, the Court may stop the proceedings and order that the matter be referred to a victim-offender mediation, a family group conference or other restorative dispute resolution or make any other order as it may deem necessary to resolve the matter.

(3) If the matter is referred to victim-offender mediation, family group conference or other restorative dispute resolution process, the written recommendations emanating from such mediation, conference or process shall be re-submitted to the Children's Court within 14 days if the child is not in custody upon which such Court may -

- (a) confirm the recommendations by making such recommendations an order of the Court;
- (b) substitute or amend the recommendations and make an appropriate order; and
- (c) reject the recommendations and proceed with the trial.

(4) If the child is in custody the written recommendations emanating from such mediation, conference or process shall be re-submitted to the Children's Court within five days after referral of the matter.

(5) Where the Children's Court acts under the provisions of subsection (4) (a) or (b), any finding of guilt made in relation to the matter before the Children's Court shall be considered not to have been made.



***Failure to attend court proceedings.***

143. (1) If a child fails to appear at any proceedings in the Children's Court or any other court acting in terms of the provisions of this Act, the prosecutor may request the presiding officer in such proceedings to issue a warrant of arrest in respect of such child.

(2) If the presiding officer, upon the appearance of a child in the Children's Court or any other court acting under the provisions of this Act, after the execution of a warrant of arrest, finds that the failure of the child to appear at the proceedings concerned was due to fault on the part of the child, he may take that factor into account when making a decision as to how the matter should proceed.

***Privacy and confidentiality.***

144. (1) Where a child appears before the Children's Court or any other Court acting under the provisions of this Act, no person other than the persons referred to under sections 80 (3) and 107 (4) may be present unless such person's presence is necessary in connection with such proceedings or is authorised by the Court on good cause shown.

(2) No person, institution or organisation may publish in any manner whatsoever, any information which reveals or may reveal the identity of a child under the age of eighteen years appearing at an assessment, a preliminary inquiry or before the Children's Court or any other court acting in terms of the provisions of this Act, or of a witness under the age of eighteen years appearing at any proceedings referred to in this Act.

(3) Subject to the provisions of subsection (4), no prohibition or direction under this section may prevent -

- (a) any person, institution or organisation from gaining access to information pertaining to a child or children governed by this Act if such access would be in the interests, safety or welfare of any such child or of children in general;
- (b) the publication, in the form of a bona fide law report, of-
  - (i) information for the purpose of reporting any question of law relating to the proceedings in question; or
  - (ii) any decision or ruling given by any court on such question, and
- (c) the publication, in the form of any report of a bona fide professional or technical nature, of research results and statistical data pertaining to a child or children governed by this Act if such publication would be in the interests, safety or welfare of any such child or of children in general.

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

(5) Nothing under this section prevents publication of information or making of reports that expose the identity and names of persons, institutions and organisations that are involved in the commission or aiding and abetting the commission of offences involving children.

(6) Any person who publishes any information in contravention of this section or contrary

to any direction or authority under this section or who in any manner reveals the identity of a child or of a witness in contravention of a direction under this section, commits an offence and is liable on conviction to a fine not exceeding twenty thousand Emalangeni or to imprisonment term not exceeding two years.

***Evidence through intermediaries.***

145. (1) Whenever proceedings involving children are pending before any court and it appears to such court that it would expose any witness under the age of eighteen years to undue mental stress or suffering if he testifies at such proceedings, the court may, subject to subsection (5), appoint a competent person as an intermediary in order to enable such witness to give evidence through an intermediary.

(2) Except for examination by the court, examination, cross-examination or re-examination of any witness in respect of whom a court has appointed an intermediary under subsection (1), shall take place in any manner other than through that intermediary.

(3) The appointed intermediary may, unless the court directs otherwise, convey the general purport of any question to the relevant witness.

(4) If a court appoints an intermediary under subsection (1), the court may direct that the relevant witness may give his evidence at any place -

- (a) which is formally arranged to set that witness at ease;
- (b) which is so situated that any person whose presence may upset that witness, is outside the sight and hearing of that witness; and
- (c) which enables the court and any person whose presence is necessary at the relevant proceedings to see and hear, either directly or through the medium of any electronic or other devices, that intermediary as well as that witness during his testimony.

(5) The Minister of Justice may by notice in the Gazette determine the persons or the category or class of persons who are competent to be appointed as intermediaries.

(6) An intermediary who is not in the full-time employment of the State shall be paid such travelling and subsistence and other allowances in respect of the services rendered by him as the Minister of Finance, may determine.

(7) No oath, affirmation or admonition which has been administered through an intermediary shall be invalid and no evidence which has been presented through an intermediary shall be inadmissible solely on account of the fact that such intermediary was not competent to be appointed as an intermediary under subsection (5), at the time when such oath, affirmation or admonition was administered or such evidence was presented.

(8) If at any proceedings it appears to a court that an oath, affirmation or admonition was administered or that evidence has been presented through an intermediary who was appointed in good faith but, at the time of such appointment, was not qualified to be appointed as an intermediary under subsection (5), the court shall make a finding as to the validity of that oath, affirmation or admonition or the admissibility of that evidence, as the case may be, with due regard to-

- (a) the reason why the intermediary concerned was not qualified to be appointed as an intermediary, and the likelihood that the reason concerned will affect the reliability of the evidence so presented adversely;

- (b) the mental stress or suffering which the witness, in respect of whom that intermediary was appointed, will be subjected to if that evidence is to be presented anew, whether by the witness in person or through another intermediary; and
- (c) the likelihood that real and substantial justice will be impaired if that evidence is admitted.

(9) Nothing under this section prevents the prosecution from presenting anew any evidence which was presented through an intermediary referred to under subsection (7).

(10) The provisions of subsection (7) shall also be applicable in respect of all cases where an intermediary referred to in that subsection has been appointed, and in respect of which, at the time of the commencement of that subsection, the trial court or the court considering an appeal or review, has not delivered judgement.

## PART XVII

### LEGAL REPRESENTATION

#### *Principles relating to legal representation.*

146. (1) A child has a right to legal representation in any legal proceedings.

(2) A legal representative appearing on behalf a child under this Act shall -

- (a) allow the child to give independent instruction on the manner in which the case is to be conducted;
- (b) clearly explain the child's rights and responsibilities in relation to any proceedings under this Act and which the child is involved to him in language which he can understand;
- (c) encourage informed decision-making by explaining possible options and the consequences of decisions;
- (d) promote diversion where appropriate whilst ensuring that the child is not unduly influenced to acknowledge guilt;
- (e) ensure that all time periods or delays throughout the case are kept to the minimum and that remands are limited in number and period of time between each remand;
- (f) ensure that the child is able to communicate in his language, and in cases where the legal representative does not speak the same language as the child, ensure that an interpreter is used who should also be apprised of these principles; and
- (g) become acquainted with the local options for diversion and alternative sentencing.

#### *Appointment of a legal representative.*

147. (1) A child may have legal representation at any stage of proceedings under this Act.

(2) A child shall be advised by a police officer, a social worker, the inquiry magistrate and the officer presiding in the Children's Court that he has the right to legal representation.

(3) The child, his parent or guardian may appoint a legal representative of their choice and they are responsible for the payment of such services.

(4) Where a child exercises his right to have a legal representative appointed at the State expense, a social worker, police officer or prosecutor or officer presiding in the Children's Court shall request for a court appointed attorney to represent the child pro bono.

(5) After the finalisation of the preliminary inquiry, if a legal representative has not yet been appointed and the child, his parent or guardian has indicated that they do not intend to select a legal representative of their own choice as referred to under subsection (3), such child shall be represented by a court appointed attorney pro bono if-

(a) the child is remanded in detention;

(b) charges are to be instituted in the Children's Court or any other court acting under the provisions of this Act in respect of any offence.

(6) The inquiry magistrate shall cause a child referred to under subsection (5) to be made aware on the same day that the preliminary inquiry is finalised of the appointment of a legal representative.

(7) The inquiry magistrate shall -

(a) furnish the child concerned with the name and contact details of such legal representative; and

(b) make an appointment for the child to consult with such legal representative as soon as possible.

(8) Where a child is in detention as referred to under subsection (5) (a), the legal representative appointed in terms of that subsection shall, within seven days of receiving instructions to represent such child, consult with the child at the place where he is being held, provided that such place is within a reasonable distance from the court in which the child is appearing.

#### ***Waiver of legal representation in some circumstances.***

148. (1) A child requiring legal representation under the provisions of section 147 (5) (a) and (b) may not waive the legal representation, except where the child is charged with an offence listed in the Schedule and such child is not in detention.

(2) Where a child mentioned under section 147 (5) (a) and (b) declines to give instructions to his appointed legal representative, this factor shall be brought to the attention of the inquiry magistrate or the officer presiding in the Children's Court, as the case may be, whereupon the court shall question the child to ascertain the reasons for the child's declining to give instructions to the legal representative and note such reasons on the record of the proceedings.

(3) If, after questioning the child under subsection (2), the Children's Court is of the opinion that such application will be appropriate, the child may be given the opportunity to make a fresh application for a court appointed attorney to represent the child pro bono.

(4) If the questioning under subsection (2) reveals that the child does not wish to have the assistance of any legal representative, the court shall instruct a legal representative appointed by the court to attend all future hearings, address the court on the merits of the case and note an appeal or review if, at the conclusion of the trial, an appeal or review is considered by the legal representative to be necessary.

**PART XVIII**  
**SENTENCING**

***Power to impose sentence after a charge is proved.***

149. A Children's Court or any other court acting under the provisions of this Act may, after proving a charge against a child, impose a sentence in accordance with the provisions of this Part.

***Pre-sentence report.***

150. (1) A Children's Court, or any other court imposing a sentence under the provisions of this Act, shall require the preparation and placement of a pre-sentence report, whether written or verbal by a social worker, before court prior to the imposition of sentence or the court may dispense with the pre-sentence report where the proof of charge is of an offence listed in the Schedule or where requiring such a report would cause undue delay in the finalisation of the case, and which delay would be prejudicial to the best interests of the child.

(2) The Children's Court or any other court sentencing a person under the age of eighteen years shall not impose a sentence with a residential element, unless a pre-sentence report has been placed before such court.

(3) The Children's Court or any other court acting under the provisions of this Act which imposes any sentence involving detention in any residential facility, shall certify on the warrant of detention that such pre-sentence report has been placed before the court prior to the imposition of the sentence.

(4) Where the certification referred to under subsection (3) does not appear on the warrant of detention issued under the provisions of this Act, the persons admitting such child to the residential facility in question shall remit the matter back to the court.

(5) No person may admit a child under the age of eighteen years to any facility under this Act unless the warrant of detention contains the certification referred to under subsection (3), and a person who admits a child without the necessary certification commits an offence and is liable on conviction to a fine not exceeding five thousand Emalangeni or to imprisonment term not exceeding two years.

***Evidence of previous diversion and other evidence relevant to sentence.***

151. (1) Evidence that a child has been previously diverted, and has attended a programme or completed community service or other diversion option may be adduced after conviction and before the imposition of sentence, provided that such evidence of previous diversion may not be considered in aggravation of the sentence.

(2) The evidence of the previous diversion referred to under subsection (1) may be considered relevant to the selection of a particular programme, community service option or other sentence option referred to under sections 153, 154, 155 or 156.

(3) The Children's Court or any other court imposing a sentence under the provisions of this Act may consider written or oral evidence from the victim or victims of the offence about the impact of the offence as evidence relevant to the sentence.

(4) The Children's Court or any other court imposing a sentence under the provisions of this Act may consider any other written or oral evidence relevant to sentence.

(5) The Children's Court shall request the child concerned and his parents or guardian to address the court on sentence, and, where a pre-sentence report has been submitted, shall allow the child and his parents or guardian an opportunity to place in dispute any finding or recommendation made in such report.

(6) The prosecution may, after conviction, prove any previous convictions against the child, and the court shall establish whether the child admits or denies any such previous convictions, however that the prosecution may lead evidence to prove any convictions denied by the child.

(5) For the purposes of subsection (6), a document relating to the finger prints of a child which emanates from the Police is admissible as preliminary proof of the facts contained therein.

*Nature of sentences.*

152. A presiding officer imposing a sentence under this Act may impose any one of the options referred to under section 128 (2), (3), (4) or (5), or any of the sanctions referred to in sections 153, 154, 155 or 156.

*Sentences not involving residential element.*

153. (1) A sentence not involving a residential element which is available as a sentence for the purposes of this Act includes -

- (a) (i) restitution of a specified object to a specified victim or victims of the alleged offence where the object concerned can be returned or restored, or payment of compensation to a specified person, persons, group or institution in an amount which the child or his family is able to afford;
- (ii) in a matter where there is no identifiable person or persons whom compensation or reparation could be paid or provided to in terms of paragraph (i), payment of a sum of money or restitution of specified goods to a community organisation, charity or welfare organisation concerned with activities which benefit children, identified by the child who is to be sentenced; or
- (iii) any form of symbolic restitution;
- (b) an oral or written apology to a specified person or institution;
- (c) a correctional reprimand;
- (d) placement under a good behaviour order for a period not exceeding six months;
- (e) placement under a family time order for a period not exceeding six months;
- (f) placement under a compulsory school attendance order for a period not exceeding six months;
- (g) placement under a positive peer association order for a period not exceeding six months;
- (h) that the child and members of his family attend guidance or counselling with a specified provider of such services, for a period not exceeding 12 months ;
- (i) placement under the care and control of an appropriate adult specified by the court;

- (j) placement under a supervision and guidance order for a period not exceeding 12 months;
- (k) compulsory attendance at a specified centre or place for a specified programme for a specified vocational or educational purpose for a period not exceeding 20 hours each week, for a maximum of six months except that where a child is over the age of compulsory school attendance and is no longer attending formal schooling, compulsory attendance at a specified centre or place for a specified educational or vocational purpose for a maximum period of not more than 35 hours per week to be completed within a maximum period of 12 months may be imposed;
- (l) performance without remuneration of some service for the benefit of the community under the supervision or control of an organisation or an institution, or a specified person or group identified by the presiding officer, or by the social worker of the district in which the Children's Court is situated for a maximum period of 250 hours and to be completed within 12 months except that this sentence may not be -
  - (a) imposed upon a child under the age of thirteen years; or
  - (b) harmful to a child's health or development and may not prejudice school attendance.

***Postponement or suspension of sentence.***

154. (1) The passing of any sentence may be postponed, with or without one or more of the conditions referred to under subsection (2) for a period not exceeding three years.

(2) The conditions of postponement referred to under subsection (1) may include -

- (a) restitution, compensation or symbolic restitution;
- (b) an apology;
- (c) the obligation not to re-offend;
- (d) being of good behaviour;
- (e) school attendance for a specified period;
- (f) attendance at a victim-offender mediation, a family group conference or other restorative dispute resolution process;
- (g) the attendance of guidance or counselling with a specified provider of such services for a specified period by the child and members of his family;
- (h) submitting to supervision and guidance for a specified period; or
- (i) any other condition appropriate to the circumstances of the child and in keeping with the principles of this Act, which promotes the children's reintegration into society.

(3) The whole or any part of a sentence referred to under section 153 may be suspended, without conditions, or with one or more of the conditions referred to under subsection (4).

(4) The conditions of suspension referred to under subsection (3) include -



- (a) the obligation not to re-offend;
- (b) restitution, compensation or symbolic restitution; and
- (c) any other measure, including a sanction referred to under section 153 if such sanction has not been imposed as the sentence to be suspended, which is appropriate to the circumstances of the child and in keeping with the principles of this Act, and which promotes the children's reintegration into society.

(5) Where a Children's Court has postponed the passing of sentence under subsection (1) for a specified period and the Children's Court is, after expiry of the period, satisfied that any conditions imposed have been fulfilled, the Children's Court may decline to impose a sentence and may discharge the child except that the conviction may be recorded as a previous conviction or the presiding officer may act in accordance with the provisions of section 142 (1).

***Sentences with restorative justice element.***

155. (1) A sentence involving a restorative justice element which is available as a sentence for the purposes of this Act includes-

- (a) referral of the child concerned to appear at a victim-offender mediation;
- (b) family group conference; or
- (c) other restorative justice process,

at a specified time on a specified date and at a specified place.

(2) The decisions or agreements reached at the process referred to under subsection (1) and instituted under this section shall be referred back to the Children's Court or any other court acting under the provisions of this Act-

- (a) within 14 days if the child concerned is in detention; or
- (b) within 21 days if the child concerned is not in detention

to be taken into account in the consideration of an appropriate sentence.

(3) Where the presiding officer in the Children's Court or any other court passing sentence under this Act does not agree with the terms of the decision or agreement reached at the process referred to under subsection (1) and imposes a sentence which differs in a material respect from that agreed to or decided upon, he shall note the reasons for deviating from the agreement or decision on the record of the proceedings.

(4) Where an agreement or a decision is not reached at a process referred to under subsection (1), the matter shall be referred back to the presiding officer in the Children's Court or other court acting under the provisions of this Act for imposition of a sentence.

***Sentences involving imprisonment.***

156. (1) Imprisonment for a maximum period of three years may be imposed as a sentence for the purposes of this Act except that this sentence may not be imposed on a child below the age of 16 years.

- (2) The whole or any part of a sentence referred to under subsection (1)



may be postponed or suspended with or without conditions as referred to under section 154 (2), on condition that the child performs a service for the benefit of the community or on condition that the child attend a specified centre for a specified purpose as referred to under section 153 (k).

***Sentences involving residential element.***

157. (1) No sentence involving a residential element may be imposed upon a child unless the presiding officer is satisfied that-

- (a) the seriousness of the offence justifies such a sentence;
- (b) the protection of the community justifies such a sentence;
- (c) the severity of the impact of the offence upon the victim was of such magnitude that such a sentence is justified; and
- (d) the child has previously failed to respond to non-residential alternatives.

(2) The presiding officer imposing any sentence involving a residential element on a child shall note the reasons for handing down such sentence on the record of the proceedings and communicate such reasons to the child in language that he can understand.

(3) A sentence involving a residential element which is available as sentence for the purposes of this Act includes -

- (a) referral to a programme with a periodic residential requirement where the duration of the programme does not exceed 12 months, and no portion of the residence requirement exceeds 21 nights, with a maximum of 60 nights for the duration of the programme; and
- (b) referral to a facility, and subject to the conditions set out under section 159.

***Contribution order.***

158. (1) Where an order has been made by the Children's Court placing a child in the custody of some other person or sending a child to an approved school, the Children's Court may -

- (a) order the parent or guardian of the child to make contributions towards the maintenance of the child;
- (b) order a child who has attained the age of 16 years and is engaged in remunerative work to make contributions towards his maintenance; or
- (c) from time to time vary or revoke an order made under paragraph (a) or (b).

(2) A contribution order may be made on the application of the person in whose custody the child is placed or who is named in the approved school order.

(3) A contribution order shall remain in force as long as the committal order or approved school order is in force.

(4) A person on whom a contribution order is made shall, if he changes his address, forthwith give notice thereof to the person who was, immediately before the change, entitled to receive the contributions.

(5) A person who fails to give notice under subsection (4) commits an offence and is liable on conviction to a fine of not less than one thousand Emalangeni.

***Referral to residential facility.***

159. (1) Where a sentence referred to under section 157 is a referral to an approved school, such sentence may be imposed for a period not less than six months and, subject to subsection (2), a period not exceeding two years.

(2) A sentence to an approved school for longer than two years may be imposed where the child is a child below the age of 16 years who would otherwise have been sentenced to imprisonment, and where the offence is so serious as to warrant such sentence.

(3) A child referred to under subsection (2) who, at the time of the sentence is below the 16 years, may not be permitted to reside in an approved school beyond the age of 18 years.

(4) A child referred to under subsection (1) who is 16 years or older at the time of sentence, may be permitted to reside in an approved school until expiry of his sentence.

(5) A sentence to an approved school may not be extended by administrative action and any application for the extension of the duration of the sentence should be considered by the court which imposed the original sentence.

(6) Where a sentence referred to under section 157 is a sentence to imprisonment, such sentence may not be imposed unless-

(a) the child is 16 years of age or above; and

(b) substantial and compelling reasons exist for imposing a sentence of imprisonment because a charge against the child has been proved which is both serious and violent or because the child has previously failed to respond to alternative sentences, including residential sentences other than imprisonment.

(7) No sentence of imprisonment may be imposed on a child in respect of an offence listed in the Schedule.

(8) Where a sentence referred to under section 157 is a sentence of imprisonment, the whole or any part of that sentence may be suspended on one of the conditions referred to under section 157 (2), on condition that the child perform service for the benefit of the community as referred to under section 153 (i), or on condition that the child attend a specified centre for a specified purpose referred to under section 153 (k), or on condition that the child is sent to prison as referred to under section 156.

(9) No sentence of imprisonment may be imposed on a child under the provisions of this Act for a period exceeding 15 years on any charge, and where a child is sentenced to periods of imprisonment on more than one charge and the sentences cumulatively amount to more than 15 years the sentences shall be served concurrently.

(10) Subject to subsection (11), where a child fails to comply with any condition imposed in relation to any other sentence, such child may be brought before the Children's Court for re-imposition of an appropriate sentence, which may include a sentence of imprisonment.

(11) Any period of time that a child has spent in prison while awaiting trial shall be deducted by the presiding officer from any period of imprisonment imposed as a sentence.

***Monetary penalties.***

160. No monetary penalty payable to the State may be imposed as a sentence by Children's Court or any other court acting under the provisions of this Act, except that if a penalty involving a fine and imprisonment in the alternative as prescribed for an offence, the presiding officer may impose a sentence referred to under section 153 (a) (i), (ii) or (iii), but not the alternative of imprisonment.

***Prohibition of certain forms of punishment.***

161. (1) No sentence of life imprisonment or death may be imposed on a child or any person who was 18 years or below at the time the offence was committed.

(2) No sentence of corporal punishment or any form of punishment that is cruel, inhumane or degrading may be imposed on a child.

(3) A child who has been sentenced to attend an approved school may not be detained in prison whilst awaiting designation of the place where the sentence will be served.

## PART XIX PROBATION

***Probation order.***

162. (1) If the Children's Court before which a charge against a child is Proved, is of the opinion that having regard to the circumstances, including the nature of the offence and the character of the child, it is appropriate to do so, the Children's Court may make a probation order.

(2) The Children's Court, before making the probation order under subsection (1), shall explain to the child in a language that the child understands -

- (a) the effect of the order; and
- (b) that if he -
  - (i) fails to comply with the probation order; or
  - (ii) commits another offence,

he shall be liable to be dealt with for the original offence as well as for the other offence.

(3) A probation order shall have effect for such period not more than two years from the date of the order as may be specified in the probation order.

4) For the purposes of securing the good conduct and supervision of the probationer or preventing a repetition by him of the same offence or the commission of other offences, a probation order shall -

- (a) require the probationer to comply during that period to the supervision of a probation officer;
- (b) specify that the probationer is not to commit any offence during the term of probation order; and

(c) contain such other requirements, as the Children's Court having regard to the circumstances of the case considers necessary including any one or more of the following -

- (i) that the probationer shall reside at the probation hostel, at the home of his parent or guardian or relative or at some other place;
- (ii) that the probationer shall attend an educational institution to be recommended by a social worker;
- (iii) that the probationer shall remain indoors at his place of residence, be it at the probation hostel or at a home, during hours to be specified.

(5) Without prejudice to the powers of the Children's Court to make orders, the payment of sums by way of damages for injury or compensation for loss shall not be included amongst the requirements of a probation order.

(6) The Children's Court, before making a probation order containing requirements as to residence -

- (a) shall consider the home environment of the child; and
- (b) if the order requires a child to reside in a probation hostel, shall specify in the order the period for which he is so required to reside, but that period shall not extend beyond 12 months from the date of the order.

(7) The Children's Court which makes a probation order shall -

- (a) immediately give a copy of the order -
  - (i) to the probationer;
  - (ii) to the social worker or another person under whose supervision the probationer is placed; and
  - (iii) to the person in charge of the probation hostel or other place in which the probationer is required by the order to reside; and
- (b) send to a Children's Court for the district or area named in the order in which the probationer is required to reside during the probation period a copy of the order together with such documents and information relating to the case as it considers likely to be of assistance to the court.

(8) The Children's Court in making a probation order may, if it thinks it is expedient for the reformation of the probationer, place the probationer in the charge of any person who consents to accept the probationer, on that person's giving security for the good behaviour of the probationer.

***Failure to comply with probation order.***

163. (1) If at any time during the probation period it appears to the Children's Court that a probationer has failed to comply with any of the requirements of the probation order, the Children's Court may issue -

- (a) a summons requiring the probationer to appear at the place and time specified in the summons; or

(b) a warrant of his arrest.

(2) A warrant under subsection (1) shall not be issued except on information in writing and on oath submitted by the probation officer.

(3) A summons or warrant issued under this section shall direct the probationer to appear or be brought before the Children's Court.

(4) A probationer when arrested under subsection (1) may, if not brought immediately before the Children's Court under subsection (3) -

(a) be placed under detention; or

(b) be released on bail, with or without sureties,

until such time as he can be brought before the Children's Court.

(5) If it is proved to the satisfaction of the Children's Court that a probationer has failed to comply with any of the requirements of the probation order under section 162 (4)(a) or (c) the Children's Court may, without prejudice to the continuance of the probation order deal with the probationer for the offence in respect in which the probation order was made in any manner in which the Children's Court could deal with him if the Children's Court had just found him guilty of that offence.

#### ***Effects of probation.***

164. (1) The finding of guilt for an offence for which an order was made under this Part placing the child in conflict with the law on probation shall be deemed not to be a proved charge for any purpose other than for the purposes of -

(a) the proceedings in which the order was made; and

(b) any subsequent proceedings which may be taken against a child under this Part.

(2) The provisions of subsection (1) shall not affect the right of any such child -

(a) to appeal against the finding of guilt; or

(b) to rely on a finding of guilt in bar of any subsequent proceedings for the same offence.

#### ***Variation of probation order.***

165. (1) If the Children's Court is satisfied that a probationer proposes to change or has changed his residence from the district or area named in the probation order to another district or area, the Children's Court may, and if an application is made by a social worker, shall, by order vary the probation order by substituting for the district or area named therein the district or area where the probationer proposes to reside or is residing.

(2) If the probation order contains requirements which, in the opinion of the Children's Court cannot be complied with unless the probationer continues to reside in the district or area named in the order, the Children's Court shall not vary the order except in accordance with subsection (4).

(3) If a probation order is varied under subsection (1), the Children's Court shall send to the Children's Court for the new district or area named in the order a copy of the order together with such documents and information relating to the case as it considers likely to be of assistance to that Children's Court.

(4) Without prejudice to subsections (1) and (3) the Children's Court may on the application made by a social worker or by the probationer vary the probation order by -

- (a) revoking any of the requirements in the probation order; or
- (b) inserting in the probation order, either in addition to or in substitution for any such requirement, any requirement which could be included in the order if the order were then being made by the Children's Court in accordance with section 162.

(5) The Children's Court shall not vary a probation order under subsection (4) by -

- (a) reducing the probation order; or
- (b) extending that period such that the probation period becomes more than two years.

***Variation of probation order.***

166. (1) The Children's Court by which a probation order was made may, on an application made by a social worker, the parent or guardian of the probationer or the probationer, discharge the probation order.

(2) The Children's Court shall not deal with an application under subsection (1) without summoning the probationer unless the application is made by a social worker.

(3) If -

- (a) the Children's Court discharges a probation order under subsection (1); or
- (c) a probationer dealt with under section 163 for the offence for which he was placed on probation, the probation order shall cease to have effect.

***Children's court to give copies of varying or discharging order to social worker.***

167. On the making of an order varying or discharging a probation order under section 165 or 166 respectively -

- (a) the Children's Court shall forthwith give sufficient copies of the varying or discharging order to a social worker;
- (b) the social worker shall give a copy of the varying or discharging order to -
  - (i) the probationer; or
- (c) the person in charge of the probation hostel or place in which the probationer is or was required by the order to reside.

**PART XX**  
**APPEAL AND REVIEW**

***Appeal by child against whom a charge has been proved.***

168. Any child against whom a charge has been proved by the Children's Court or any other court acting under the provisions of this Act has the right to appeal to an upper court.

*Automatic review in certain cases.*

169. (1) Any sentence which involves a residential element imposed on a child under section 157 or 159 and any sentence involving imprisonment imposed on a child under section 155, shall be subjected in the ordinary course to review by an upper court.

(2) Any sentence involving a residential element imposed under the provisions of this Act which is wholly or partially suspended, is subject to review under subsection (1).

(3) The review procedure referred to under subsections (1) or (2) shall be deferred where a child has appealed against a proven charge or sentence and has not abandoned the appeal, and shall cease to apply with reference to such an accused when judgement is given.

(4) Each sentence on a separate charge shall be regarded as a separate sentence for the purposes of rendering a sentence subject to the provisions of this section.

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

(6) A judicial officer conducting a review under this section has the power to -

- (a) confirm, alter or quash the proven charge;
- (b) in the event of several proven charges being quashed, where the charge was proved on one of two or more alternative charges, confirm, alter or quash the other alternative charges or one or other of the alternative charges;
- (c) confirm, alter or set aside the sentence or any other order of the lower court;
- (d) set aside or correct the proceedings of the lower court;
- (e) generally give such judgement or impose such sentence or make such order as the lower court ought to have given, imposed or made on any matter which was before it at the trial of the case in question; or
- (f) increase the sentence imposed by the lower court or impose any form of sentence.

(2) A judicial officer exercising powers under this section may receive any evidence or cause a subpoena to be served on any person to appear for the purposes of giving evidence.

***Review in other instances.***

170. (1) Nothing contained in this Act shall be construed as depriving the High Court of its inherent right to review irregularities in proceedings of lower courts.

(2) If, in any case of a child in conflict with the law in which the Children's Court or any other court acting under the provisions of this Act has imposed a sentence which is not subject to automatic review in the ordinary course, it is brought to the notice of the judge of the High Court that the proceedings in which the sentence was imposed were not conducted in accordance with justice, such court or judge has the same powers as if the matter has been laid before that court or the judge concerned under section 169.

***Review of proceedings after proving a charge but before sentence.***

171. (1) If the presiding officer after a charge has been proven but before sentence is of the opinion that the proceedings have not been conducted in accordance with justice, he may, without sentencing the accused, record reasons for this opinion and transmit them, together with the record of the proceedings, to the registrar of the High Court, who shall cause the matter to be set down before a judge in chambers for review.

(2) The review referred to under subsection (1) shall be conducted in the same way as an automatic review under section 169.

***Suspension of execution of sentence.***

172. (1) The execution of any sentence may not be suspended by the noting of an appeal against a proven charge or sentence or pending review unless the court which imposed the sentence releases the child concerned on conditions referred to under section 113 (3), (4) and (5) or, in the case of a sentence not involving a residential element, suspends the operation of the sentence pending the finalisation of the appeal or review.

(2) Where the execution of a sentence has been suspended in terms of subsection (1), it may be a further condition, where appropriate, that the child against whom a charge has been proven shall report at a specified place and time upon service, in the manner prescribed by the rules of court, of a written order upon him in order that effect may be given to any sentence in respect of the proceedings in question.

## PART XXI CHILDREN AT RISK OF OFFENDING

***Children at risk of offending.***

173. (1) If the parent or guardian of a child requests the Children's Court orally or in writing to detain a child in an approved school, probation hostel or centre on the grounds that the parent or guardian is unable to exercise proper control over the child, the Children's Court -

- (a) shall immediately inquire into the circumstances of the parent(s) or guardian(s) request;
- (b) shall direct a social worker to submit a social assesment report to the Children's Court for the court to determine whether an order under subsection (2) may be made in respect of the child; and
- (c) after hearing the child may order the child to be temporarily detained in an approved school, probation hostel or centre if it deems it necessary to do so.

(2) If after considering the report referred to in paragraph (1)(b) and the comments of the child thereon, the Children's Court is satisfied that -

- (a) it is expedient so to deal with the child; and



- (b) the parent or guardian understands the results which will follow from and consents to the making of the order,

the Children's Court may, on the recommendation of the social worker, order that the child -

- (i) be sent to an approved school, probation hostel or centre, as may be appropriate; or
- (ii) be placed for such period not exceeding three years under the supervision of a social worker or some other person appointed for the purpose by the Children's Court,

and any such order may require the child to reside for a period not exceeding 12 months in a probation hostel, approved school or other appropriate institution.

***Supervision by social worker or other person.***

174. (1) If a Children's Court makes an order under section 173(2) (ii) placing a child under the supervision of a social worker or some other person, that officer or other person -

- (a) shall, while the order remains in force, visit, guide and counsel the child; and
- (b) may, if it appears necessary to do so, at any time while the order remains in force, bring the child before the Children's Court.

(2) The Children's Court before whom a child is brought under subsection (1) (b) may, if it deems it expedient to do so, amend the order made under section 173 and

- (a) send the child, subject to the consent of the child's parent or guardian, to an approved school, place of safety or centre, whichever is appropriate; or
- (b) place the child in the care of a fit and proper person, whether a relative or not, who is willing to undertake the care of the child, for the unexpired period of the order.

**PART XXII  
INSTITUTIONS**

***Places of safety for children in need of welfare.***

175. (1) The Minister may by notice in the gazette, designate, establish or appoint any place, institution or centre to be a place of safety for the care and protection of children.

(2) The Minister shall determine conditions and requirements to be met by all places of safety and shall not register any place of safety unless and until it has met those conditions and requirements.

(3) The Department of Social Welfare shall -

- (a) maintain a directory of all registered places of safety; and
- (b) be responsible for monitoring and supervision of the places of safety.

(4) The Director of Social Welfare shall advise the Minister on the designation, establishment or appointment of any place, institution or centre to be a place of safety for the care and protection of children.

(5) The Minister shall have powers to appoint commission of enquiry on any place of safety should need arise.

(6) The Minister shall have the power to revoke a designation or appointment made under subsection (1) if the person who runs a place of safety does not comply with the provisions of subsection (2).

***Escape or removal of child from place of safety.***

176. (1) A child who escapes or is removed from a place of safety without lawful authority -

- (a) may be apprehended by a social worker, police officer and shall be brought to the place of safety; and
- (b) shall be kept for such period which is equal to the remaining term of his stay under the order originally made by the Children's Court.

(2) The social worker, or police officer who apprehended the child shall investigate the case so as to find out why the child escaped.

***Removing or helping a child to escape from place of safety.***

177. A person who -

- (a) removes a child from a place of safety without lawful authority;
- (b) assists or induces, directly or indirectly, a child to escape from a place of safety; or
- (c) harbours or conceals a child who has so escaped, or prevents him from returning to the place of safety,

commits an offence and is liable on conviction to a fine not less than ten thousand Emalangeni or to imprisonment for a term not exceeding five years or to both.

***Places of detention or custody for children in conflict with the law.***

178. (1) The Minister may, by notice in the Gazette, designate, establish or appoint such places of detention as may be required for purposes of this Act.

(2) The Minister shall determine conditions and requirements to be met by all places of detention or custody for children in conflict with the law and shall not register any institution unless and until it has met those conditions and requirements.

(3) The Department of Social Welfare shall -

- (a) maintain a directory of all places of detention and custody for children in conflict with the law; and
- (b) be responsible for monitoring and supervision of places referred to under paragraph (a).

(4) The Director of Social Welfare shall advise the Minister on the designation, establishment or appointment of any place, institution or centre to be a place of detention or custody for the care and protection of children in conflict with the law.

(5) The Minister shall have powers to appoint commission (s) of inquiry on any place of detention or custody should need arise.

(6) The Minister shall have the power to revoke a designation or appointment made under subsection (1) if the person, institution or organisation which runs a place of detention or custody does not comply with the provisions of subsection (2).

***Remanding children to places of detention or custody.***

179. (1) A child shall ordinarily be remanded in custody in a place of detention designated, established or appointed under this Act and situated in the same area as the Children's Court by which the child is remanded.

2) The order or judgement in pursuance of which a child is committed to custody in a place of detention shall be -

- (a) delivered with the child to the person who is in charge of the place of detention; and
- (b) an authority for his detention in the place of detention in accordance with the terms of the order or judgement.

(3) A child while being detained and while being conveyed to and from the place of detention shall be deemed to be in lawful custody.

(4) The Minister -

- (a) shall cause places of detention or custody to be inspected; and
- (b) may make regulations -
  - (i) as to the classification, treatment, employment and control of children detained in such places of detention or custody; and
  - (ii) to provide for the appointment of fit and proper persons to visit periodically children detained in such places of detention.

***Escape or removal from place of detention or custody.***

180. (1) A child who escapes or is removed from a place of detention or custody without lawful authority -

- (a) may be arrested without a warrant by a social worker or a police officer and be brought back to the place of detention; and
- (b) shall be kept in a place of detention or custody for the remaining term of his term of detention under the order ordinarily issued by the Children's Court.

(2) The social worker or police officer who apprehended the child shall investigate the case so as to find out why the child escaped.

***Removing or helping child to escape from place of detention or custody.***

181. Any person who -

- (a) removes a child from a place of detention or custody without lawful authority;

- (b) assists or induces, directly or indirectly, a child to escape from a place of detention or custody; or
- (c) harbours or conceals a child who has so escaped, or prevents him from returning to the place of detention or custody,

commits an offence and is liable on conviction to a fine of not less than ten thousand emalangeni or to imprisonment for a term not exceeding five years or to both.

***Probation Hostel.***

182. (1) The Minister may, by notice in the Gazette, designate, establish or appoint such probation hostels as may be required for the purposes of this Act.

(2) The Minister shall make regulations for the management and inspection of probation hostels.

***Child under thirteen years not to be sent to probation hostel.***

183. A child under the age of thirteen years shall not be sent to a probation hostel.

***Child who escapes or is removed from probation hostel.***

184. A child who escapes or is removed from a probation hostel without lawful authority -

- (a) may be arrested without a warrant by any social worker or police officer; and
- (b) be brought back to the hostel or before the Children's Court,

and the Children's Court may deal with him for the offence for which he was sent to the probation hostel in the same manner in which the Children's Court could deal with him if it had just proven a charge against him.

***Removing or helping child to escape from probation hostel.***

185. Any person who -

- (a) removes a child from a probation hostel without lawful authority;
- (b) assists or induces, directly or indirectly, a child to escape from a probation hostel; or
- (c) harbours or conceals a child who has so escaped, or prevents him from returning to the probation hostel,

commits an offence and is liable on conviction to a fine of not less than ten thousand emalangeni or to imprisonment for a term not exceeding five years or to both.

***Approved school.***

186. (1) The Minister may, by notice in the Gazette designate, establish or appoint such approved schools as may be required for the education, training and detention of children to be sent there in pursuance of this Act.

(2) The Minister may classify such approved schools -

- (a) according to the ages of the persons for whom they are intended; and
- (b) in such other ways as he may think fit so as to ensure that a child sent to an approved school is sent to a school appropriate for his case.

***Child under thirteen years not to be sent to an approved school.***

187. A child under thirteen years shall not be sent to an approved school.

***When child can be sent to approved school.***

188. (1) If -

- (a) a child is found guilty of an offence;
- (b) the welfare report submitted to the Children's Court shows that -
  - (i) the parent or guardian of the child can no longer exercise or is incapable of exercising any proper control over him; and
  - (ii) the child is in need of institutional rehabilitation; and
- (c) it appears to the Children's Court that although the offence committed is not serious in nature but it is expedient that the child be subjected to detention for such term and under instruction and discipline as appears most conducive for his reformation,

the Children's Court shall, on the recommendation of a social worker, send the child to an approved school.

(2) If the Children's Court orders a child to be sent to an approved school, the order shall be an authority for his placement in that approved school for a period of three years from the date of the order.

(3) Notwithstanding subsection (2), the management of an approved school to which a child is sent may, in their discretion -

- (a) shorten the period of detention for reasons which appear to them to be sufficient;
- (b) permit any such child to be released for such period and upon such conditions as they may deem fit to impose;
- (c) report to the Department of Social Welfare on the action taken; or
- (d) where the Department of Social Welfare is not in agreement with the action taken, the matter shall be referred to the Children's Court for determination.

(4) A child shall not be permitted to be released under subsection (3) (b) during the first twelve months of the period of detention without the written consent of the Minister.

***Delivery of approved school order to the person in charge of approved school.***

189. (1) The Children's Court which makes an approved school order shall cause the order to be delivered to the person who is in charge of the approved school.

(2) The Children's Court which makes an approved school order shall cause all such information in the possession of the Court with respect to a child as is in the opinion of the Children's Court should be known by the person who is in charge of the approved school, to be transmitted to the person who is in charge of the approved school.

(3) If a child has been ordered to be sent to an approved school, any person who knowingly harbours or conceals him after the time has come for him to go to the approved school, commits an offence and is liable on conviction to a fine not less than ten thousand emalangeni or to imprisonment for a term not exceeding five years or to both.

(4) If a person authorised to take a child to an approved school is, when the time has come for him to go to the approved school, unable to -

- (a) find the child; or
- (b) obtain possession of the child,

the Children's Court may, if satisfied by information on oath or affirmation that there is reasonable grounds for believing that some person named in the information can produce the child, issue a summons requiring the person so named to attend at the court on such day as may be specified in the summons and produce the child.

(5) If the person referred to under subsection (4) fails to comply with the requisition under that subsection without reasonable excuse he shall, in addition to any other liability to which he may be subject to under this Act, on conviction be liable to a fine not exceeding ten thousand Emalangeni.

***Further placement in approved school.***

190. If the person who is in charge of an approved school is satisfied that a child -

- (a) whose period of placement in the approved school is about to expire needs further care or training; and
- (b) cannot be placed in suitable employment without such further care and training,

he may, if the management of the approved school consent, place him for a further period not exceeding six months but any such period shall not extend beyond the date the child attains the age of eighteen years.

***After care of child released from approved school.***

191. If a child is sent to an approved school, the Children's Court making the order shall, at the same time, make an order that after the expiration of the period of his placement he shall, for a period not exceeding one year, be under the supervision of -

- (a) a social worker; or
- (2) such other person as the Children's Court may appoint.

***Escape from approved school or failure to return to approved school after expiry of leave.***

192. (1) Any child who -

- (a) escapes from the approved school in which he is placed, or from any hospital, home or place in which he is receiving medical attention;
- (b) being absent from the approved school on temporary leave of absence or with permission -
  - (i) runs away from the person in whose charge he is; or
  - (ii) fails to return to the approved school upon the expiration of his leave, or upon the revocation of such permission; or
- (c) being absent from the approved school under supervision, fails to return to the approved school upon being recalled,

may be arrested without a warrant and be brought before the Children's Court where the child is found or the approved school is situated.

(2) If a child brought before a Children's Court under subsection (1) is under the age of fourteen years, the Children's Court shall order the child to be brought back to the approved school or to be sent to another approved school for -

- (a) a period which is equal to the period during which he was unlawfully at large; or
- (b) the remainder of his period of placement; and
- (c) such period not exceeding six months as the Children's Court may direct, in addition to the periods mentioned in paragraphs (a) and (b).

(3) If a child brought before the Children's Court under subsection (1) has attained the age of fourteen years, the Children's Court may order the child to be brought back to the approved school or to be sent to another approved school for -

- (a) a period equal to the period during which he/she was unlawfully at large; or
- (b) the remainder of the period of his placement; and
- (c) such further period not exceeding six months as the Court may direct.

***Supervision of approved school.***

193. Every approved school shall be under the supervision of the Director of Social Welfare.

***Removing or helping child to escape from approved school.***

194. Any person who -

- (a) removes a child from an approved school without lawful authority;
- (b) assists or induces, directly or indirectly, a child to escape from an approved school;  
or
- (c) harbours or conceals a child who has so escaped, or prevents him from returning to the approved school,

commits an offence and is liable on conviction to a fine not less than ten thousand emalangeni or to imprisonment for a term not exceeding five years or to both.

***Other facilities for children in conflict with the law.***

195. (1) The Minister may, by notice in the Gazette, establish or appoint other facilities as may be required for temporary accommodation or day-training without institutionalising children in conflict with the law pursuant to this Act.

(2) A child placed in a facility referred to under subsection (1), shall be under the supervision of a social worker.

(3) The Director of Social Welfare may grant leave of absence to any child who is in temporary accommodation at the facility referred to under subsection (1), for such periods and on such conditions as he may prescribe.

(4) Where it is deemed appropriate, the Director of Social Welfare may transfer a child to any other suitable facility.

(5) A child who is placed at a specific facility and who absconds shall be arrested with or without a warrant and be brought before a Children's Court in the area in which he is found.

(6) The Children's Court shall enquire into the absconding and make an appropriate decision basing itself on the best interests of the child.

***Standards for monitoring and supervision of children's institutions established under this Act.***

196. (1) The Department of Social Welfare shall facilitate the setting of standards for monitoring and the supervision of all children's institutions established under this Act.

(2) There shall be established under the Department of Social Welfare a body to monitor and supervise all institutions providing care and protection to children under this Act.

**PART XXIII  
PARENTAGE, CUSTODY AND GUARDIANSHIP**

***Parentage.***

197. (1) The following persons may apply to a Children's Court for an order to confirm the parentage of a child -

- (a) the child;
- (b) the parent of a child;
- (c) the guardian of a child;
- (d) a social worker; or
- (e) any other interested person as the Children's Court may deem fit.

(2) The application for parentage may be made -

- (a) before the child is born;



- (b) within three years after the death of the father or mother of a child; or
- (c) before a child is eighteen years of age or after the child has attained that age with special leave of Children's Court.

***Evidence of parentage.***

198. The following shall be considered by a Children's Court as evidence of parentage -

- (a) the name of the parent entered in the register of births;
- (b) performance of customary ceremony by the father of the child;
- (c) refusal by the parent to submit to medical test;
- (d) public knowledge of parentage; and
- (e) any other matter that the Children's Court may consider relevant.

***Medical test.***

199. The Children's Court may order the alleged parent to submit to a medical test and the Children's Court shall, on the basis of the evidence before it, make such order as it considers appropriate.

***Custody and access.***

200. (1) A parent, family member or any other person may apply to a Children's Court for custody of a child.

(2) A parent, family member or any other person may apply to a Children's Court for periodic access to the child.

(3) The Children's Court shall consider the best interests of the child and the importance of the child being with his mother when making an order for custody or access.

(4) Subject to subsection (3), a Children's Court shall also consider -

- (a) the age of the child;
- (b) that it is preferable for a child to be with his parents except if his rights are persistently being abused by his parents;
- (c) the views of the child;
- (d) that it is desirable to keep siblings together;
- (e) the need for the continuity in the care and control of the child; and
- (f) any other matter that the Children's Court may consider relevant.

***Non - custodial parent to have access to child.***

201. A non-custodial parent in respect of whom an application is made to the Children's Court for an order of parentage or custody under this Part shall have access to the child who is the subject of the parentage or custody order.

***Offence.***

202. Any person who unlawfully removes a child from a person who has lawful custody of a child commits an offence and is liable on conviction to a fine not exceeding ten thousand emalangeni or to imprisonment for a term not exceeding five years or to both.

***Appointment of guardian.***

203. (1) For the purposes of this section "guardian" means a person appointed to assume parental responsibility over the child by -

- (a) will made by a parent of the child;
- (b) an order of the Children's Court;
- (c) by the family; or
- (d) Master of the High Court.

(2) A guardian may be appointed by any of the parties referred to under subsection (1) acting alone or in conjunction with the surviving parent of the child where one of the parents is deceased, or the father of a child born out of wedlock who has acquired parental responsibility for the child, or one of the parents where the parents of the child are no longer living together.

(3) A guardian may be appointed in respect of any child who is resident in Swaziland whether or not the child was born in Swaziland or is a citizen of Swaziland.

(4) A guardian appointed under this Act need not be a Swazi citizen.

(5) A guardian may be appointed in respect of the person or estate of the child or both.

(6) Where the guardian is appointed only in respect of the estate of the child, he need not have actual custody of the child but shall, with the authority of the Master of the High Court, have -

- (a) the power and responsibility to administer the estate of the child and in particular to receive and recover and invest the property of the child in his own name for the benefit of the child;
- (b) the duty to take all reasonable steps to safeguard the estate of the child from loss or damage;
- (c) the duty to produce and avail accounts in respect of the child's estate to the parent or custodian of the child or to such other person as the Children's Court may direct, or to the Children's Court, as the case may be, on every anniversary of the date of his appointment; and
- (d) to produce any account or inventory in respect of the child's estate when required to do so by the Children's Court.

***Rights of surviving parent to guardianship.***

204. (1) On the death of the father of a child, the mother if surviving, shall subject to the provisions of this Act, be the guardian of the child.

(2) On the death of the mother of a child, the father if surviving, shall subject to the provisions of this Act, be the guardian of the child.

***Appointment of testamentary guardian.***

205. (1) A parent of a child may, by will appoint any person to be a guardian of the child after that parent's death.

(2) A guardian of a child may by will or deed appoint another individual to take his place as the guardian of the child in the event of his death.

(3) Any appointment made under subsection (1) or (2) shall not have effect unless will or deed is dated and is signed by the person making the appointment.

(4) A guardian so appointed shall act as such after the death of the surviving parent unless the surviving parent has requested otherwise.

(5) If the child, member of the family or guardian appointed considers that the parent is unfit to have legal custody of the child, they may apply to the Children's Court which may -

(a) refuse to make any order in which case the parent shall remain the only guardian; or

(b) make an order that the guardian shall act jointly with the parent; or

(c) make an order appointing a relative of the child or a person who is willing to act, a guardian of the child, to act jointly with the parent or guardian or both of them; or

(d) make an order that the guardian shall be the only guardian of the child, in which case the Children's Court may order the parent to pay the guardian a financial provision towards the maintenance of the child having regard to the means of the parent, as the Children's Court may consider reasonable but the Children's Court shall not appoint the guardian as only guardian for the child if he is not a relative of the child, unless circumstances exist with regard to the welfare of the child.

(6) Where guardians are appointed by both parents, the guardians so appointed shall, after the death of the surviving parent, act jointly.

(7) Subject to subsection (5), a guardian who has been appointed to act jointly with the surviving parent, shall continue to act as guardian after the death of the parent, but if the surviving parent has appointed a guardian, the guardian appointed by the Children's Court shall act jointly with guardian appointed by the parent.

***Appointment of guardian by the Children's Court.***

206. The Children's Court may appoint a guardian on the application made by any person where the child's parents are no longer living, or cannot be found and the child has no guardian and there is no other person having parental responsibility for him or where the parents of the child are no longer living together.

***Guardianship revocation.***

207. An appointment made under section 203 revokes an earlier appointment made by the same person in respect of the same child, unless it is clear that the purpose of the latter appointment is to appoint an additional guardian.

***Extension of guardianship beyond child's eighteenth birthday.***

208. (1) The appointment of a guardian shall be terminated upon the child attaining the age of eighteen years, unless exceptional circumstances exist that would require a Children's Court to make an order that the appointment be extended.

(2) Where an order is made under subsection (1), it shall be made prior to the child's eighteenth birthday.

(3) A Children's Court making an order under this section may attach such conditions as to the duration of the order and containing directions as to how it shall be carried out, imposing such other conditions that shall be complied with and with such incidental, supplemental or consequential provisions as the Children's Court deems fit.

(4) A Children's Court shall have power to vary, modify or revoke any order made under this section on the child's eighteenth birthday on the application made by the child, the parent or guardian of the child, a relative of the child or the Director of Social Welfare or where the child marries on his eighteenth birthday, his spouse.

***Disputes between guardians.***

209. Where two or more persons act as joint guardians to a child, or where the surviving parent and a guardian act jointly and are unable to agree on any question affecting the welfare of the child, any of them may apply to the Children's Court for its direction, and the Children's Court may make orders regarding the matters of difference as it may think proper.

***Neglect or misapplication of assets by the guardian of the estate of a child.***

210. A guardian of the estate of a child, whether or not that guardian is also a guardian of the person of the child, who neglects to recover or safeguard, or misplaces any asset forming part of the estate of the child, or subjects the estate to loss or damage, commits an offence and on that account is liable to make good any loss or damage so occasioned.

***Offences by guardians of the estate of a child.***

211. Any guardian of the estate of a child who -

- (a) neglects to receive and safeguard any asset forming part of the estate, misapplies any such asset to loss, waste or damage; or
- (b) fails to produce to the Children's Court or the parent or guardian of the child any account or inventory required by the Children's Court; or
- (c) produces any such inventory or account which is false,

commits an offence and is liable on conviction to a fine not less than fifteen thousand emalangeni or to imprisonment for a term not exceeding five years or to both.

## PART XXIV MAINTENANCE OF CHILDREN

***Duty to maintain a child.***

212. (1) A parent or any other person who is legally liable to maintain a child or contribute towards the maintenance of the child is under a duty to supply the necessities of food, clothing, health, life, basic education and reasonable shelter for the child.

(2) For the purposes of this section basic education means primary up to secondary education or its equivalent.

***Application for maintenance order.***

213. (1) The following persons may apply to the Children's Court for maintenance order of a child -

- (a) a child;
- (b) a parent of a child;
- (c) a guardian of the child;
- (d) relatives of the child;
- (e) a social worker; and
- (f) any other person.

(2) The application for maintenance may be made against any person who is liable to maintain a child or contribute towards the maintenance of the child.

***Consideration for maintenance orders.***

214. The Children's Court shall consider the following when making a maintenance order -

- (a) the source income and wealth of both parents of the child or of the person legally liable to maintain the child;
- (b) any impairment of the earning capacity of the person with a duty to maintain the child;
- (c) the financial responsibility of the person with respect to the maintenance of other children;
- (d) the cost of living in the area where the child resides;
- (e) the rights of the child under this Act; and
- (f) any other matter which the Children's Court considers relevant.

***Request for social enquiry report.***

215. The Children's Court may request that a social worker prepares a social enquiry report on the issue of maintenance and submit it to the Children's Court for consideration before the Children's Court makes a maintenance order.

***Maintenance order.***

216. (1) The Children's Court may award maintenance to the child whether the parents are married or not and the maintenance order shall include the following -

- (a) medical expenses for the child;

(b) a periodic allowance for the maintenance of the child; and

(c) the payment of a reasonable sum to be determined by the Children's Court for the education of the child.

(2) The Children's Court may order a periodic payment or lump sum payment for the maintenance of a child and the emoluments, property or debts of the person liable may be attached.

(3) The attachment order shall be applicable in all cases of failure to pay maintenance.

(4) A maintenance order may be directed to an employer of a person liable to pay maintenance to deduct the sum of maintenance money every time payment of the salary or other earnings is made.

(5) When considering an application for maintenance, the Children's Court may make a maintenance order which it considers reasonable for any child in the household.

(6) The Children's Court may make an order for arrears of maintenance against any person liable to pay maintenance.

***Persons entitled to maintenance order.***

217. (1) Any person who has custody of a child who is the subject of a maintenance order is entitled to receive and administer on behalf of the child the maintenance order made by the Children's Court.

(2) If a parent, guardian or whoever has custody of the child ceases to be a fit person, the Children's Court of the area where the child is resident may appoint another person to have custody of the child and administer the maintenance order and that person shall act as if originally appointed by the Children's Court.

***Duration of order.***

218. (1) A maintenance order issued by the Children's Court shall expire when the child attains the age of eighteen years or dies before that age.

(2) A maintenance order shall lapse before the child attains the age of eighteen years if before that age the child is gainfully employed as referred to under section 234.

***Continuation of maintenance orders.***

219. (1) Notwithstanding the provisions of section 217, the Children's Court may continue a maintenance order after a child has attained eighteen years if the child is engaged in a course of secondary education or training after that age.

(2) An application made under this section may be brought by a parent of the child, any person who has custody of the child or the child himself.

***Variation or discharge of orders.***

220. A Children's Court may, if satisfied, vary or discharge a maintenance order on the application of a parent or guardian, or the person who has custody of the child or the young person himself or any other person legally liable to maintain the child.

***Enforcement of maintenance orders.***

221. (1) Maintenance order shall be enforced thirty days after the order is made.

(2) Whenever any person against whom a maintenance order has been made under this Act has failed to make any particular payment in accordance with that maintenance order, such order shall be enforceable in respect of any amount which that person has so failed to pay together with any interest thereon-

- (a) by execution against property;
- (b) by the attachment of emoluments; or
- (c) by the attachment of any debt.

(3) If any maintenance order made under this Act has remained unsatisfied for a period of ten days from the day on which the relevant amount became payable, the person in whose favour any such order was made may apply to the Children's Court where the order was made-

- (a) for the authorisation of the issue of a warrant of execution referred to in paragraph (a) of subsection (2); or
- (b) for an order for the attachment of emoluments referred to in paragraph (b) of subsection (1); or
- (c) for an order for the attachment of any debt referred to paragraph (c) of subsection (1).

(4) The application shall be made in the prescribed manner and shall be accompanied by-

- (a) a copy of the maintenance; and
- (b) a statement under oath or affirmation setting forth the amount which the person against whom such order was made has failed to pay.

(5) The Children's Court shall not authorise the issue of a warrant of execution or make any order for the attachment of emoluments or any debt in order to satisfy a maintenance order if the payment of maintenance in accordance with that maintenance order has been suspended by an appeal against the order under section this Act.

(6) Notwithstanding anything to the contrary contained in any law, any pension, annuity, gratuity or other allowance or other similar benefit shall be liable to be attached or subjected to execution under any warrant of execution or any order issued or made under this Act in order to satisfy a maintenance order.

***Warrants of execution.***

222. (1) The Children's Court may, on the application of a person referred to in section 221 (2)(a), authorize the issue of a warrant of execution against the movable property of the person against whom the maintenance was made and, if the movable property is insufficient to satisfy such order, then against the immovable property of the person liable to the amount necessary to cover the amount which the person liable has failed to pay, together with any interest thereon as well as the costs of the execution.

(2) A warrant of execution authorised under this section shall be -

- (a) issued in the prescribed manner by the clerk of the Children's Court; and
- (c) executed in the prescribed manner by the sheriff or other officer of the Children's Court.

(3) The Children's Court may, on application in the prescribed manner by a person against whom a warrant of execution has been issued under this section, set aside the warrant of execution if the Children's Court is satisfied that he has complied with the maintenance.

(4) The Children's Court may, on application in the prescribed manner by a person against whom a warrant of execution has been issued under this section,-

- (a) in summary manner enquire into the circumstances mentioned in subsection (5); and
- (b) if the Children's Court so decides, suspend the warrant of execution and make an order -
  - (i) for the attachment of emoluments referred to in section (1); or
  - (ii) for the attachment of any debt referred to in section (1).

(5) At the enquiry the Children's Court shall take into consideration-

- (a) the existing and prospective means of the person against whom the warrant of execution has been issued;
- (b) the financial needs and obligations of or in respect of the person maintained by the person against whom the warrant of execution has been issued;
- (c) the conduct of the person against whom the warrant of execution has been issued in so far as it may be relevant concerning his failure to satisfy the maintenance order; and
- (d) the other circumstances which should, in the opinion of the Children's Court, be taken into consideration.

(6) Any person who wishes to make an application under subsection (3) or (4) shall give notice in the prescribed manner of his intention to make the application to the person in whose favour the maintenance or other order in question was made which notice shall be served at least 14 days before the day on which the application is to be heard.

(7) The Children's Court may call upon -

- (a) the person who has made the application to adduce such evidence, either in writing or orally, in support of his application as the Children's Court may consider necessary; or
- (b) the person in whose favour the maintenance was made to adduce such evidence, either in writing or orally, in rebuttal of the application as the Children's Court may consider necessary.

#### *Attachment of emoluments.*

223. (1) The Children's Court may -



- (a) on the application of a person referred in section (4)(b); or
- (b) when such court suspends the warrant of execution under section (4) (b), make an order for the attachment of any emoluments at present or in future owing or accruing to the person against whom the maintenance was made to the amount necessary to cover the amount which person liable has failed to pay, together with any interest thereon, as well as the costs of the attachment or execution, which order shall authorise any employer of the person liable to make on behalf of the person liable such payments as may be specified in the order from the emoluments of the person liable until such amount, interest and costs have been paid in full.

(2) An order under this section may at any time, on good cause shown, be suspended, amended or rescinded by the Children's Court.

(3) Any person who wishes to make an application for the suspension, amendment or rescission of an order under this section, shall give notice in the prescribed manner of his intention to make the application to the person in whose favour that order was made, which notice shall be served at least 14 days before the day on which the application is to be heard.

(4) The Children's Court may call upon -

- (a) the person who has made the application to adduce such evidence, either in writing or orally, in support of his application as the Children's Court may consider necessary; or
- (b) the person in whose favour an order under this section was made to adduce such evidence, either in writing or orally, in rebuttal of the application as the Children's Court may consider necessary.

***Notice relating to attachment of emoluments.***

224. (1) In order to give effect to an order for the attachment of emoluments referred to in section 223(1), the clerk of the Children's Court shall, within seven days after the day on which such order was made by the Children's Court or whenever it is afterwards required, in the prescribed manner cause a notice, together with a copy of such order, to be served on the employer concerned directing that employer to make the payments specified in the notice at the times and in the manner so specified.

(2) Whenever any person to whom the notice relates leaves the service of the employer, that employer shall, within seven days after the day on which the person leaves the service, give notice thereof in the prescribed manner to the clerk of the Children's Court where the order in question was made.

(3) Any employer on whom a notice has been served for the purposes of satisfying a maintenance order shall give priority to the payments specified in that notice over any order of court requiring payments to be made from the emoluments due to the person against whom that maintenance order was made.

(4) If any employer on whom a notice has been served for the purposes of satisfying a maintenance order has failed to make any particular payment in accordance with that notice, that maintenance order may be enforced against that employer in respect of any amount which that employer has so failed to pay, and the provisions of this Part shall, with the necessary changes, apply in respect of that employer, subject to that employers right or the right of the person against whom that maintenance order was made to dispute the validity of the order for the attachment of emoluments referred to in section 223(1).

***Attachment of debts.***

225. (1) The Children's Court may -

- (a) on the application of a person referred to in section 221 (2)(c), or
- (b) when such court suspends the warrant of execution under section 222 (4)(b),

make an order for the attachment of any debt at present or in future owing or accruing to the person against whom the maintenance was made to the amount necessary to cover the amount which the person liable has failed to pay, together with any interest thereon, as well as the costs of the attachment or execution, which order shall direct the person who has incurred the obligation to pay the debt to make such payment as maybe specified in that order within the time and in the manner so specified.

(2) (a) An order under this section may at any time, on good cause shown, be suspended, amended or rescinded by the maintenance court;

- (b) Any person who wishes to make an application for the suspension, amendment or rescission of an order under this section shall give notice of his intention to make the application to the person in whose favour that order was made, which notice shall be served at least 14 days before the day on which the application is to be heard;

(c) The Children's Court may call upon -

- (i) the person who has made the application to adduce such evidence, either in writing or orally, in support of his application as the Children's Court may consider necessary; or
- (ii) the person in whose favour an order under this section was made to adduce such evidence, either in writing or orally, in rebuttal of the application as the Children's Court may consider necessary.

(3) An order made under subsection (1) maybe enforced as if it were a civil judgment of the court.

***Non-custodial parent to have access to child.***

226. A non-custodial parent in respect of whom an application is made to the Children's Court for an order of maintenance under this Part shall have access to the child who is the subject of the maintenance order.

***Offence.***

227. Any person who fails to supply the necessities of food, clothing, health, life, basic education and reasonable shelter for a child when legally liable to do so, commits an offence and -

- (a) on first conviction is liable to pay the maintenance due;
- (b) on the second or every subsequent conviction for continuous refusal to maintain a child is liable to a sentence to be determined by the Children's Court.

***Joint maintenance of child.***

228. Unless the Children's Court otherwise directs, and subject to any financial contribution ordered to be made by any other person, the following presumptions shall apply with regard to the maintenance of a child -

- (a) where the parents of a child were married to each other at the time of the birth of the child and are both living, the duty to maintain a child shall be their joint responsibility;
- (b) where two or more guardians of the child have been appointed, the duty to maintain the child shall be the joint responsibility of all guardians, whether acting in conjunction with the parents or not;
- (c) where two or more custodians have been appointed in respect of the child it shall be the joint responsibility of all custodians to maintain a child; and
- (d) where the mother and father of a child were not married to each other at the time of the birth of a child and have not subsequently married, regardless of where the child resides, it shall be the joint responsibility of the mother and father of the child to maintain that child

***Maintenance during matrimonial proceedings.***

229. The Children's Court shall have power to make a maintenance order, whether or not proceedings for nullity, judicial separation, divorce or any other matrimonial proceedings have been filed by the parent of a child or during such proceedings or after a final decree is made in such proceedings.

***Financial provisions.***

230. The Children's Court may order the person against whom a maintenance order is made to make financial provisions for the child by periodical payments or such lump sum payment as the Children's Court shall deem fit to the person in whose favour the order is made or to any other person appointed by the Children's Court.

***Power to make maintenance monies to be paid to the person other than the applicant.***

231. Whenever a maintenance order is made under this section, the Children's Court may, at the time of making the order, or from time to time thereafter, on being satisfied that the person in whose favour the order is made -

- (a) is not a fit or proper person to receive any maintenance monies specified in the order in respect of a child; or
- (b) has left the jurisdiction of the Children's Court for an indefinite period, or is dead, or is incapacitated or has become of unsound mind, or has been imprisoned or has been declared insolvent; or
- (c) has misappropriated, misapplied or mismanaged any maintenance monies paid to him for the benefit of the child,

appoint any other person it considers fit and responsible to receive and administer any maintenance monies required to be paid under a maintenance order, or order the person required to make a payment of the maintenance monies under this section to secure the whole or any part of it by vesting the sums or any other property and subject thereto in trust for the child.

**PART XXV**  
**EMPLOYMENT OF CHILDREN**

***Exploitative child labour.***

232. (1) No person shall engage a child in exploitative labour.

(2) For the purposes of this Act, labour is exploitative if it deprives or hinders the child access to health, education or development.

***Prohibition of child labour at night and in industrial undertakings.***

233. No person shall engage a child in night work or work in industrial undertakings.

***Minimum age for child labour.***

234. The minimum age for admission of a child to employment shall be fifteen years.

***Minimum age for night work.***

235. (1) The minimum age for the engagement of a child in night work shall be sixteen years.

(2) For the purposes of this Act, night work constitutes work between the hours of six o'clock in the evening to six o'clock in the morning.

***Minimum age for hazardous employment.***

236. (1) No child below the age of eighteen years shall be engaged in any form of hazardous employment.

(2) Work is hazardous when it poses a danger to the morals, health, safety and development of a person.

(3) Hazardous work includes -

- (a) mining and quarrying;
- (b) portorage of heavy loads;
- (c) manufacturing industries where chemicals are produced or used;
- (d) work in places where heavy machines are used;
- (e) work in places such as bars, hotels and places of entertainment where a person may be exposed to immoral behaviour;
- (f) looking after domestic animals (kwelusa);
- (g) commercial sexual work; or
- (h) tobacco production and trafficking.

***Non - engagement of children and young persons in industrial undertakings.***

237. (1) No employer in an industrial undertaking shall engage a child in employment without satisfactory proof of the child's age.

(2) An employer in an industrial undertaking shall keep a register of the children employed by him and of the dates of their births.

(3) An industrial undertaking is an undertaking other than one in commerce or agriculture and includes -

(a) mines, quarries and other works of the extraction of minerals from the earth; or

(b) undertakings in which articles are manufactured, altered, cleaned, repaired, ornamented, finished, adopted for sale; broken up or demolished, or in the generation, transformation or transmission of electricity or motive power of any kind;

(4) Any person or organisation which has a reasonable suspicion that a child is engaged in an industrial undertaking shall report to the Minister of Labour and Employment.

(5) The Minister responsible for labour affairs shall investigate cases of children engaged in industrial undertakings and take appropriate action.

(6) The Minister responsible for labour affairs shall in the investigation of cases referred to under subsection (5), request medical officers, social workers and other professionals to provide any expert information necessary.

***Offences.***

238. (1) Any person who contravenes the provisions of this Part commits an offence and is liable on conviction a fine of not less than fifteen thousand or to imprisonment for a term of not less than two years or both.

(2) Notwithstanding subsection (1), any person who contravenes the provisions of sections 232 (1), 234 and 236 commits an offence and -

(a) on first conviction is liable to a fine of not less than one hundred thousand emalangeni or to imprisonment for a term of not less than five years or both;

(b) on second or subsequent conviction to imprisonment for a minimum term of ten years without the option of a fine.

**PART XXVI**  
**PROTECTIVE MEASURES RELATING TO**  
**THE HEALTH OF CHILDREN**

***Consent to medical treatment or surgical operation.***

239. (1) A child may be subjected to medical treatment or surgical operation only if the child's consent for such treatment has been given in terms of either subsection (2) or (3), or alternatively (4) or (5).

- (2) A child may consent to medical treatment provided the child is -
- (a) at least 12 years of age; and
  - (b) of sufficient maturity and has the mental capacity to understand the benefits, risks, social and other implications of the treatment or operation.
- (3) A child may not consent to a surgical operation without the assistance of -
- (a) the parent or guardian of the child; or
  - (b) the care-giver of the child.
- (4) The parent, guardian or care-giver of the child may consent to the medical treatment or surgical operation of the child if the child is -
- (a) under the age of 12 years; or
  - (b) over that age but is of insufficient maturity or does not have the mental capacity to understand the benefits, risks and social implications of the treatment or operation.
- (5) The superintendent of a hospital or the person in charge of a hospital in the absence of the superintendent, shall consent to the medical treatment or surgical operation on a child if-
- (a) the treatment is necessary to preserve the life of the child or to save the child from serious or lasting physical injury or disability; and
  - (b) the need of the treatment or operation is so urgent that it cannot be deferred for the purposes of obtaining consent that would otherwise have been required.
- (6) A Children's court may consent to the medical treatment or surgical operation on a child if -
- (a) the child has been abandoned; or
  - (b) the parent, guardian or care-giver of the child -
    - (i) unreasonably refuses to give consent or to assist the child in giving consent;
    - (ii) is physically or mentally incapable of giving consent or assisting the child in giving consent;
    - (iii) is deceased; or
    - (iv) cannot readily be traced.
- (7) No parent, guardian or care-giver of a child may refuse to assist a child under subsection (2) (b) or withhold consent under subsection (3) by reason only of religious, cultural or other beliefs, unless the parent, guardian or care-giver can show that there is a medically accepted alternative choice to the medical treatment or surgical operation concerned.

#### ***HIV Testing.***

240. (1) No child may be tested for HIV except when this is in the best interests of the child and consent has been given under subsection (2).

(2) Consent for an HIV test on a child may be given by -

- (a) the child, if the child is 12 years or older;
- (b) the parent, guardian or care-giver, if the child is under the age of 12 years or is not of sufficient maturity or does not have the mental capacity to understand the benefits, risks and social implications of such a test;
- (c) a social worker arranging the placement of the child, if the child is under the age of 12 years or is not of sufficient maturity or does not have mental capacity to understand the benefits, risks and social implications of such a test;
- (d) the head of a hospital, if -
  - (i) the child is under the age of 12 years or is not of sufficient maturity or does not have the mental capacity to understand the benefits, risks and social implications of such a test;
  - (ii) the child has no parent or guardian and there is no designated child protection organisation arranging the placement of the child; or
- (e) the Children's Court, if -
  - (i) consent under paragraph (a), (b), c) or (d) is unreasonably withheld; or
  - (ii) the child or the parent or guardian of the child is incapable of giving consent.

***HIV testing for adoption and placement purposes.***

241. If HIV testing of a child is done for adoption or placement purposes, the Crown shall bear the cost of such test.

***Counselling before and after HIV testing.***

242. (1) A child may be tested for HIV only after proper counselling of -

- (a) the child, if the child is of sufficient maturity to understand the benefits, risks and social implications of such a test; and
- (b) the child's parent or guardian has an understanding of the implications of the test.

(2) Post-test counselling shall be provided to -

- (a) the child, if the child is of sufficient maturity to understand the implications of the result; and
- (3) the child's parent or guardian, if the parent or guardian has knowledge of the test.

***Confidentiality of information on HIV/AIDS status of children.***

243. (1) No person may disclose the fact that a child is HIV-positive without consent given under subsection (2) except

- (a) within the scope of that person's powers and duties under this Act or any other legislation;

- (b) when necessary for the purpose of carrying out the provisions of this Act;
- (c) for the purpose of legal proceedings; or
- (d) in terms of an order of court.

(2) Consent to disclose the fact that a child is HIV-positive may be given by -

- (a) the child, if the child is 12 years of age or older;
- (b) the parent or guardian, if the child is under the age of 12 years or is not of sufficient maturity or does not have the mental capacity to understand the benefits, risks or social implications of such a disclosure;
- (c) a social worker arranging the placement of the child, if the child is under the age of 12 years or is not of sufficient maturity or does not have the mental capacity to understand the benefits, risks or social implications of such a disclosure;
- (d) the head of a hospital, if -
  - (i) the child is under the age of 12 years or is not of sufficient maturity or does not have the mental capacity to understand the benefits, risks or social implications of such a disclosure; and
  - (ii) the child has no parent or guardian and there is no social worker arranging for the placement of the child;
- (e) a Children's Court, if -
  - (i) consent under paragraph (a), (b), (c) or (d) is unreasonably withheld and disclosure is in the best interest of the child;
  - (ii) the child or the parent or guardian of the child is incapable of giving consent; or
  - (iii) the mother of a child is under eighteen years and still under the care of her parent or guardian.

***Access to reproductive health information and protective devices and technologies.***

244. (1) No person may refuse -

- (a) to provide reproductive health information to a child; or
- (b) to sell any reproductive health protective devices or technologies to a child; or
- (c) to provide a child with reproductive health devices or technologies where such are provided or distributed free of charge.

(2) Reproductive health protective devices and technologies may be provided to a child on request by the child and without the consent of the parent or guardian of the child where -

- (a) the child is at least twelve years of age;
- (b) proper medical advice is given to the child; and



- (c) a medical examination is carried out on the child to determine whether there are any medical reasons why a specific reproductive health protective device and technology should not be provided to the child.

(3) A child who obtains reproductive health protective devices and technologies under this Act is entitled to confidentiality in this respect.

(4) A child who is a victim of a sexual abuse and exploitation shall, as soon as possible, be provided with emergency contraceptives.

## **PART XXVII**

### **MISCELLANEOUS**

#### ***Regulations.***

245. The Minister may, by notice in the Gazette, make regulations generally for giving effect to the provisions of this Act.

#### ***Repeals and savings.***

246. (1) Child Care Service Order No. 30 of 1977 is repealed.

(2) Adoption of Children Act No.64 of 1952 is repealed to the extent that it is inconsistent with the provisions of this Act.

(3) Maintenance Orders Act, No. 77 of 1921 is repealed to the extent that it is inconsistent with the provisions of this Act.

(4) The Administration of Estates Act No. 28 of 1902 is repealed to the extent that it is inconsistent with the provisions of this Act.

(5) the Births, Marriages and Deaths Registration Act No. 5 of 1983 is repealed to the extent that it is inconsistent with the provisions of this Act.

(6) Notwithstanding the repeals under subsection (1), (2), and (3), any proceedings before any court under the repealed laws shall be continued as if those laws have not been repealed until they are concluded.

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### **SCHEDULE**

( under sections 2, 90, 91 134, 148, 150, 159 and 239)

Assault where grievous bodily harm has not been inflicted.

Assault, including assault involving the infliction of grievous bodily harm.

Malicious injury to property where the damage does not exceed E1000.00

Any offence under any law relating to the illicit possession of dependence producing drugs where the quantity involved does not exceed 25 grams.

S125

Theft, where the value of the property involved does not exceed E1000.00

Any statutory offence where the maximum penalty determined by that statute is a fine of less than E300.00 or three months imprisonment.

Conspiracy, incitement or attempt to commit any offence referred to in this schedule.

Public violence.

Culpable homicide.

Arson.

House breaking, whether under common law or a statutory provision, with intent to commit an offence, if the amount involved in the offence does not exceed E20,000

Robbery, other than robbery with aggravating circumstances, if the amount involved in the offence does not exceed E20,000

Theft where the amount involved does not exceed E20,000

Any other offence under any law relating to the illicit possession of dependence producing drugs.

Forgery, uttering or fraud, where the amount concerned does not exceed E20,000

**THE SMALL CLAIMS COURT ACT, 2011**

(Act No. 1 of 2011)



**I ASSENT**

**MSWATI III**  
King of Swaziland

..... 2011

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**AN ACT  
ENTITLED**

**AN ACT** to establish the Small Claims Court for the adjudication of small claims and provide for incidental matters.

**ENACTED** the King and the Parliament of Swaziland

*Arrangement of sections*

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## SCHEDULE

**PART I**  
**PRELIMINARY PROVISIONS*****Short title and commencement***

1. (1) This Act may be cited as the Small Claims Courts Act, 2008 and shall come into operation on a date to be determined by the Minister and published in the Government Gazette.

(2) Different dates may be determined under subsection (1) in respect of different provisions of this Act.

***Interpretations***

2. In this Act, unless the context otherwise requires-

“commissioner” means a commissioner for Small Claims Court appointed under section 10;

“court” means a court established under section 3;

“Minister” means the Minister responsible for Justice;

“prescribed” means prescribed under section 26;

“record” means to take down in writing or in shorthand;

“regulations” means the regulations made under section 26 and section 50;

“the rules” means the rules made under section 26;

“this Act” includes the rules and regulations.

**PART II**  
**ESTABLISHMENT AND NATURE OF SMALL CLAIMS COURTS*****Establishment of court***

3. (1) The Minister, after consultation with the Chief Justice, may by notice published in the Gazette-

(a) establish for any area consisting of one or more Regions of the regions of the country or a part of a Region a court to be known as a Small Claims Court for the adjudication of claims in terms of this Act;

(b) determine the seat of such the court;

(c) determine one or more places in the area concerned for the holding of sessions of such a court;

(d) alter the area for which such a court has been established by including therein or exercising therefrom any Region or Regions or part thereof;

(e) abolish a court established in terms of this section; and

(f) amend or withdraw any notice issued in terms of this section.

(2) Where the Minister deems it necessary and expedient, the Minister or a principal magistrate of a Region, if so authorized by the Minister and the Chief Justice, may, notwithstanding the provisions of subsection (1) -

- (a) establish for a Region or part of that Region a court for the adjudication of any particular claim or claims in terms of this Act; and
- (b) determine the place in the Region for the holding of sessions of such a court.

***Nature of courts and force of process***

4. (1) Subject to the provisions of subsection (2), the court shall not be required to electronically record its proceedings.

(2) The presiding officer shall record or cause to be recorded a brief statement of the proceedings and the verdict, judgment or order of the court and shall sign it.

(3) The process of the court shall be served or executed in the prescribed manner.

(4) Every process of the court shall be of force throughout the country.

***Courts open to public***

5. (1) Subject to the provisions of subsection (2), the proceedings of the court shall take place in open court.

(2) A court may, in the interest of the administration of justice or of good order or of public morals or at the request of the parties to the proceedings for reasons considered sufficient by the court, order that the proceedings be held behind closed doors or that specified persons shall not be present at those proceedings.

(3) If any person present at the proceedings of a court disturbs the order of the court, the court may order that such person be removed and or detained in custody until the court adjourns, or the court may, if in its opinion order cannot be otherwise maintained, order that the court room be cleared and that the public shall not be present at the proceedings.

***Language medium at proceedings***

6. (1) Subject to subsection (2) either of the official languages of the country may be used at any stage of the proceedings of the court.

(2) A commissioner shall record the proceedings of the Court in English unless it is provided otherwise by another applicable law.

(3) If evidence is given in a language with which one of the parties is in the opinion of the court not sufficiently conversant, a competent interpreter may be called by the court to interpret that evidence into a language with which that party appears to be sufficiently conversant, irrespective of whether the language in which the evidence is given is one of the official languages.

***Inspection of documents by public and custody of those documents***

7. (1) Subject to the provisions of the rules, the documents of a court shall be available for inspection by the public under the supervision of the clerk of the court at the prescribed times and upon payment of the prescribed fees, and those documents shall be preserved at the seat of the magistracy of the Region in which the seat of that court is situated or some other place as the presiding officer may direct.

(2) The documents mentioned in subsection (1) shall be kept for such period as the Minister or Attorney General may, in writing or by notice published in the Gazette, determine.

(3) The Attorney General may order that after the expiry of the period contemplated in subsection (2) the documents so preserved shall be removed to a specified place of custody or be destroyed or otherwise disposed of.

***Parties who may appear in court***

8. (1) Only a natural person may institute an action in a court and, subject to the provisions of section 15 (2), a juristic person may become a party to an action in a court only as defendant.

(2) A party to an action shall appear in person before the court and, subject to the provisions of subsection (3), shall not be represented by any person during the proceedings.

(3) A juristic person shall be represented in a court by its duly nominated director or other officer.

**PART III**

**PRESIDING OFFICERS AND OFFICERS OF THE COURT**

***Presiding officers***

9. The officer presiding at a court shall be known as a Commissioner for Small Claims Court and shall be appointed under section 10.

***Appointment of commissioners***

10. (1) Subject to the provisions of subsection (2), the Minister in consultation with the Chief Justice, may appoint one or more commissioners for any court under this Act.

(2) An officer in the employ of the Government, with the exception of the Law Officer, shall not be appointed as a commissioner.

(3) A principal magistrate who establishes a court in terms of section 3 (2), may, subject to the provisions of this section, appoint a commissioner for such a court.

(4) A person shall not be appointed as a commissioner unless that person is qualified -

- (a) to be or is admitted as an attorney of the High Court in terms of the Legal Practitioners Act, 1964;
- (b) as an admitted advocate of the High Court in terms of the Legal Practitioners Act, 1964;
- (c) to be appointed, at least, as a senior magistrate; or
- (d) as a law lecturer,

and for an uninterrupted period of at least five years practised as an advocate or attorney or occupied the post of senior magistrate, or for that period was involved in the teaching of law at a higher level in a recognised university, and is a fit and proper person in the opinion of the Minister to be appointed as a commissioner.

(5) A commissioner shall hold office at the pleasure of the Minister.



(6) A commissioner may resign by notice in writing to the Minister.

(7) The Minister may at any time withdraw the appointment of a commissioner if in the opinion of the Minister there is sufficient reason for doing so.

(8) A person appointed under subsection (1) or subsection (3) shall, before commencing with the functions of a commissioner, take an oath or make an affirmation subscribed by that person in the form set out in the First Schedule.

(9) The oath or affirmation referred to in subsection (8) shall be taken or made in open court before a Commissioner of Oaths and the Commissioner of Oaths shall at the foot thereof make a note to the effect that it was taken or made, before that Commissioner of Oaths, and of the date on which it was so taken or made, and append a signature thereto.

#### *Procedure in case of absence or incapacity of commissioners*

11. Where by reason of absence or incapacity a commissioner is unable to complete the hearing of an action, that hearing shall be commenced afresh before another commissioner.

#### *Officers of court*

12. (1) The Civil Service Commission, or such other authority prescribed by law, shall appoint clerks and assistant clerks of the court, interpreters and legal assistants for any court as may be necessary for the performance of the prescribed functions.

(2) The messenger of the court appointed under section 10 of the Magistrates' Courts Act, 1938, for the magistrate's court exercising jurisdiction over the Small Claims Court, shall act as messenger of the Small Claims Court.

(3) The Government, a clerk of the court, an assistant clerk of the court or a legal assistant shall not be liable for any damage or loss resulting from assistance given in good faith by that clerk of the court, assistant clerk of the court or legal assistant to any party or prospective party to an action before a court or to the enforcement of a judgment or order in terms of section 42 in the form of legal advice or the compilation or preparation of a summons, statement or other document.

(4) The Commissioner shall not be liable for any civil claim, damage or loss arising from any matter he has presided over in good faith.

### **PART IV JURISDICTION**

#### *Area of jurisdiction*

13. The area of jurisdiction of a court under this Act shall be the area or region for which it is established.

#### *Transfer of actions*

14. An action may, with the consent of all the parties, or upon the application of one of the parties who satisfies the court that the hearing of the action in that court may result in undue expense or inconvenience to one or such party, be transferred by the court to any other court under this Act, and in such a case the latter court shall, notwithstanding anything to the contrary in this Act contained, have jurisdiction to hear that action.

***Jurisdiction in respect of persons***

15. (1) Subject to the provisions of subsection (2), a court shall have jurisdiction in respect of -

- (a) any person who resides, carries on business or is employed within the area of jurisdiction of the court;
- (b) any partnership, as defendant, which has business premises situated or any member of the partnership who resides within the area of jurisdiction of the court;
- (c) any person in respect of any proceedings incidental to any action instituted in that court by such person;
- (d) any person, whether or not that person resides, carries on business or is employed within the area of jurisdiction of the court, if the cause of action arose wholly within that area;
- (e) any defendant, whether in convention or reconvention, who appears and takes no objection to the jurisdiction of the court;
- (f) any person who owns immovable property within the area of jurisdiction of the court in actions in respect of such property or a mortgage bond over that property.

(2) An action shall not be instituted against the Government in the court.

(3) A court shall not have jurisdiction in respect of any claim or counterclaim based in whole or in part upon a cession or assignment of rights.

***Jurisdiction in respect of causes of action***

16. (1) Subject to the provisions of this Act, a court shall have jurisdiction in respect of causes of action in-

- (a) actions for the delivery or transfer of any property, movable or immovable, not exceeding in value the sum of ten thousand Emalangeni or such an amount as may be prescribed by the Minister from time to time by notice in the Gazette, after consultation with the Attorney General and the Chief Justice;
- (b) subject to paragraph (c), actions for ejectment against the occupier of any premises or land within the area of jurisdiction of the court;
- (c) actions for ejectment where the right of occupation of the premises or land is in dispute between the parties, that right does not exceed in clear value to the occupier the sum of ten thousand Emalangeni or such an amount as may be prescribed by the Minister from time to time as provided in paragraph (a);
- (d) actions based on or arising out of a liquid document or a mortgage bond, where the claim does not exceed the sum of ten thousand Emalangeni or such an amount as may be prescribed by the Minister from time to time as provided in paragraph (a);
- (e) actions based on or arising out of a credit agreement, sales, purchases, loans, recovery of monies paid over or delivered and such similar debts where the claim or the value of the property in dispute does not exceed the sum of ten thousand Emalangeni or such an amount as may be prescribed by the Minister from time to time as provided in paragraph (a);

- (f) actions other than those already mentioned in this section, where the claim or the value of the matter in dispute does not exceed the sum of ten thousand Emalangeni or such an amount as may be prescribed by the Minister from time to time as provided in paragraph (a);
- (g) actions for counterclaims not exceeding the sum of ten thousand Emalangeni or such an amount as may be prescribed by the Minister from time to time as provided in paragraph (a) in respect of any cause of action mentioned in paragraph (a) to (e).

(2) No person shall eject another person from land which is on Swazi National Land unless the cause of ejectment is a transaction involving a lease agreement on the land and that right does not exceed in clear value to the occupier the sum of ten thousand Emalangeni or such an amount as may be prescribed by the Minister from time to time as provided in paragraph (a).

***Matters beyond jurisdiction***

17. A court shall have no jurisdiction in matters-

- (a) in which the dissolution of any marriage is sought;
- (b) concerning the validity or interpretation of a will or other testamentary document;
- (c) concerning the status of a person in respect of the mental stability or capacity of the person;
- (d) in which is sought specific performance without an alternative claim for payment of damages, except in the case of-
  - (i) the rendering of an account in respect of which the claim does not exceed the sum of ten thousand Emalangeni or such an amount as may be determined by the Minister from time to time by notice in the Gazette under section 16 (a);
  - (ii) the delivery or transfer of any property, movable or immovable, not exceeding in value the sum of ten thousand Emalangeni or such an amount as may be determined by the Minister from time to time by notice in the Gazette for the purposes of this section;
- (e) in which is sought a decree of perpetual silence;
- (f) in which is sought damages in respect of -
  - (i) defamation;
  - (ii) malicious prosecution;
  - (iii) wrongful imprisonment;
  - (iv) wrongful arrest;
  - (v) seduction; or
  - (vi) breach of promise to marry;
- (g) in which an interdict is sought.

***Incidental jurisdiction***

18. (1) In an action in which the sum claimed does not exceed the jurisdiction of the court and is the balance of an account, the court may enquire into and hear evidence upon the whole account, even though that account relates to items and transactions exceeding the jurisdiction of the court.

(2) Where the amount claimed or other relief sought does not exceed the jurisdiction of the court, the court shall not be deprived of that jurisdiction merely because it is necessary for the court, in order to arrive at a decision, to give a finding upon a matter beyond its jurisdiction.

(3) In determining whether a claim falls within the jurisdiction of a court, a claim for interest on a principal sum claimed or for costs or for general or alternative relief shall not be taken into account.

***Abandonment of part of claim***

19. (1) In order to bring a claim or counterclaim within the jurisdiction of a court, a party may in that party's summons or statement of defence, or at any time thereafter, explicitly abandon a part of that claim or counterclaim.

(2) Subject to subsection (3), that part of a claim or counterclaim so abandoned, shall thereby be extinguished.

(3) If the claim or counterclaim is granted in part only the abandonment shall be deemed first to apply to that part of the claim or counterclaim which was not granted.

***Deduction of admitted debt***

20. In order to bring a claim or counterclaim within the jurisdiction of a court a party may, in that party's summons or statement of defence or at any time thereafter, deduct from the claim or counterclaim, whether liquidated or unliquidated, any amount admitted by one party to be due by the party admitting to the other party concerned.

***Splitting of claims disallowed***

21. A claim exceeding the jurisdiction of a court and based on one and the same cause of action may not be split with the object of recovering it in more than one action, if the parties to those actions and the point in issue in those actions would be the same.

***Cumulative jurisdiction***

22. Where two or more claims, each based upon a different cause of action, are combined in one summons, a court shall have the same jurisdiction to adjudicate upon each claim as it would have had if each claim had formed the sole object of a separate action.

***No jurisdiction by virtue of consent of parties***

23. Subject to the provisions of this Act a court shall not, even by virtue of the consent of the parties, have jurisdiction to hear any action which otherwise exceeds its jurisdiction.

***Cessation of action***

24. (1) Where a court is of the opinion that a case contains difficult or complex questions of law or of fact which cannot adequately or fairly or should not be decided by it, it shall stop the proceedings.

(2) If the proceedings are stopped as contemplated in subsection (1), the plaintiff may institute a fresh action in another competent court of law.

***Defendants subject to jurisdiction of courts***

25. (1) A person shall not be bound to institute an action in terms of this Act in respect of a claim which may also be adjudicated upon in another court of law, but if an action is so instituted, the defendant shall be subject to the jurisdiction of the court in question.

(2) Any provision in an agreement to the effect that the jurisdiction of a court shall be excluded, or that a party thereto shall not institute an action in terms of this Act, other than a provision to the effect that a dispute arising from the agreement shall be resolved by arbitration, shall be void.

**PART V  
RULES OF COURT**

***Power of Minister to make rules and regulations***

26. (1) The Minister may make regulations or rules regulating the following matters in respect of small claims courts -

- (a) the practice and procedure, including the procedure when proceedings are reviewed;
- (b) fees and costs;
- (c) the duties and powers of officers of the court;
- (d) the establishment, duties and powers of one or more boards or committees to advise the Minister on the functioning of courts;
- (e) any other matter which the Minister may consider necessary or expedient to prescribe for carrying out the provisions of this Act or the attainment of its objects.

(2) Different regulations or rules may be made under subsection (1) with regard to different classes of cases.

(3) A regulation or rule relating to Government revenue or Government expenditure shall not be made under subsection (1), except with the concurrence of the Minister of Finance.

(4) A new regulation or rule and an amendment or repeal of a rule shall not come into operation unless it has been published in the *Gazette* at least thirty (30) days before the day upon which it is expected to come into operation.

**PART VI  
PROCEDURE AND EVIDENCE**

***Procedure***

27. (1) Subject to the provisions of this Part, the rules of the law of evidence shall not apply in respect of the proceedings in a court, and a court may ascertain any relevant fact in such manner as it may deem fit.

(2) Evidence to prove or disprove any fact in issue, may be submitted in writing or orally.

(3) A party shall not question or cross-examine any other party to the proceedings in question or a witness called by the latter party, but the presiding commissioner shall proceed inquisitorially to ascertain the relevant facts, and to that end, the presiding commissioner may question any party or witness at any stage of the proceedings or even recall a party or witness.

(4) Notwithstanding subsection (3) the commissioner may in the discretion of the commissioner permit any party to put a question to any other party or any witness.

### ***Evidence***

28. (1) Subject to the provisions of subsection (2), a party may call one or more witnesses to prove the claim, counterclaim or defence of the party.

(2) The provisions of subsection (1) shall not affect the power of the court to decide that sufficient evidence has been adduced on which a decision can be arrived at, and to order that further evidence shall not be adduced.

### ***Evidence to be given under oath***

29. A person shall not testify or be questioned in a court unless the prescribed oath has been administered to that person or the prescribed affirmation has been accepted from that person by the presiding commissioner or by the clerk of the court, or any person acting as the clerk of court, in the presence of that commissioner, or, if the person concerned is to give evidence through an interpreter, by the commissioner through the interpreter.

### ***Institution of actions***

30. (1) The plaintiff-

(a) shall deliver a summons as prescribed personally or through the authorized representative of the plaintiff to the clerk of the court, together with a copy of a written demand which was on a prior occasion delivered to the defendant by the plaintiff by hand or by registered post and in which the defendant was, notwithstanding anything to the contrary in any law contained, allowed at least 14 days, calculated from the date of receipt of that demand by the defendant, to satisfy the plaintiff's claim; and

(b) may not, until judgment has been given in an action arising from a business or profession carried on or exercised by the plaintiff, deliver a summons referred to in paragraph (a) to the clerk of the court in respect of any other action arising from that business or profession.

(2) Upon production of the prescribed proof that the reminder contemplated in subsection (1) was delivered to the defendant, and if the clerk of the court is satisfied that the plaintiff is a natural person and that the summons complies with the prescribed requirements, the clerk of the court shall set a date and time for the hearing of the action and issue the summons and hand it to the plaintiff or the authorized representative of the plaintiff, who shall personally serve it on the defendant, or deliver it to the messenger of the court for service on the defendant.

(3) Apart from the summons pleadings shall not be required of the parties, but the defendant may at any time before the hearing lodge with the clerk of the court a written statement setting out the nature of that defendant's defence and particulars of the grounds on which it is based, and a copy of that statement shall be furnished to the plaintiff by the defendant.

***Withdrawal of claims***

31. (1) A plaintiff may at any time, whether before or during the hearing of the action, withdraw the claim with the consent of the court and on such conditions as the court may determine, whereupon the proceedings shall be ceased.

(2) Notwithstanding the provisions of subsection (1), if proceedings are ceased as provided for under subsection (1) the plaintiff may bring afresh the action with the consent of the court.

***Joinder of plaintiffs***

32. (1) Any number of persons, each of whom has a separate claim against the same defendant, may join as plaintiffs in one action if the right of each to relief depends upon the determination of some question of law or fact which, if separate actions were instituted, would arise in each action.

(2) Notwithstanding subsection (1) where a joint action is instituted the defendant may apply to the court that separate trials be held and the court may in its discretion make such order as it may deem just and expedient.

(3) In a joint action judgment may be granted for one or more or for all of the plaintiffs.

***Joinder of defendants***

33. (1) Two or more defendants may be sued in the alternative or both in the alternative and jointly in one action, where the plaintiff alleges that the plaintiff is uncertain which of the defendants is in law liable for the claim.

(2) The court may, in its discretion and on application by one or more of the defendants, order that separate trials be held or make such other order as it may deem just and expedient.

***Amendment of documents***

34. (1) A court may at any time before judgment amend any summons or other document in connection with a case subject to the fact that amendment shall not be made if any party other than the party applying for the amendment may be prejudiced by that amendment.

(2) The amendment may be made upon such conditions as the court may deem reasonable.

(3) In documents before the court the name of any person or place as commonly known may be employed and the court may, on application, at any time before or after judgment substitute the correct name for that name.

## PART VII

### JUDGMENT AND COSTS

***Judgment***

35. A court may, after the hearing of an action, grant-

- (a) judgment for the plaintiff in respect of the claim in so far as the plaintiff has proved it;

- (b) judgment for the defendant in respect of the defence or counterclaim in so far as the defendant has proved it;
- (c) absolution from the instance, if the court is of the opinion that the evidence does not enable it to give judgment for either party;
- (d) such judgment as to costs contemplated in section 38 as may be just;
- (e) an order, on such conditions as the court may deem fit, against the party for whom judgment has been granted, deferring wholly or in part further proceedings upon the judgment for a specified period pending arrangements by the other party for the satisfaction of the judgment.

***Judgment by default or by consent***

36. (1) If a defendant, upon a summons having been served on the defendant in terms of section 30 -

- (a) admits liability and consents to judgment in writing; or
- (b) fails to appear before the court on the trial date or on any date to which the proceedings have been postponed, the court may, on application by the plaintiff, grant judgment for the plaintiff in so far as the plaintiff has proved the defendant's liability and the amount of the claim to the satisfaction of the court, and the court may dismiss any counterclaim by the defendant.

(2) If a plaintiff fails to appear before the court on the trial date or on any other date to which the proceedings have been postponed, the court may, on application by the defendant-

- (a) dismiss the plaintiff's claim, though the plaintiff may again institute an action for that claim with the consent of the court; and
- (b) with regard to a counterclaim, grant judgment for the defendant in so far as the defendant has proved the plaintiff's liability and the amount of the counterclaim to the satisfaction of the court.

***Rescission of certain judgments***

37. The court may, upon application by any person affected by a judgment issued by a court under this Act or, in a case contemplated in paragraph (c) also the court may on its own -

- (a) rescind or vary any judgment granted by it in the absence of the person against whom that judgment was granted, provided the application for set-down for hearing is made on a date within six weeks after the applicant first had knowledge of the judgment;
- (b) rescind or vary any judgment granted by it which was from beginning or was obtained by fraud or as a result of a mistake common to the parties, provided the application is made not later than one year after the applicant first had knowledge of the voidness, fraud or mistake;
- (c) correct obvious errors in any judgment, provided, in the case of an application, the application is made not later than one year after the applicant first had knowledge of any errors.



**Costs**

38. Costs awarded in terms of this Act may only include-

- (a) court fees;
- (b) the prescribed amount for the issue of the summons;
- (c) the fees and travelling expenses of the messenger of the court;
- (d) reasonable out of pocket expenses of the defendant at the discretion of the commissioner.

**PART VIII  
EXECUTION**

***Money to be paid direct to judgment creditor***

39. Money payable in terms of a judgment or order of a court shall be paid by the judgment debtor direct to the judgment creditor.

***Inquiry into financial position***

40. (1) When a court grants judgment for the payment of a sum of money, the court shall enquire from the judgment debtor whether the judgment debtor is able to comply with the judgment without delay, and if the judgment debtor indicates that it is unable to do so, the court may, *in camera*, conduct an inquiry into the financial position of the judgment debtor and into the ability of the debtor to pay the judgment debt and costs.

(2) After the inquiry in terms of subsection (1) the court may-

- (a) order the judgment debtor to pay the judgment debt and costs in specified instalments or otherwise;
- (b) suspend the order under paragraph (a) either wholly or in part on such conditions as to security or otherwise as the court may determine.

***Offer by judgment debtor after judgment***

41. If an order has not been made in terms of section 40 (2), the judgment debtor may within ten (10) days after the court has granted judgment for the payment of a sum of money, make a written offer to the judgment creditor to pay the judgment debt and costs in specified instalments or otherwise, and if such an offer is accepted by the judgment creditor, the clerk of the court shall, at the written request of the judgment creditor, accompanied by the offer, order the judgment debtor to pay the judgment debt and costs in accordance with the offer, and such an order shall be deemed to be an order of the court in terms of section 40.

***Manner of execution***

42. (1) When a court has granted judgment for the payment of money or made an order for the payment of money in instalments, that judgment, in the case of failure to pay the money within ten (10) days, or that order, in the case of failure to pay an instalment at the time and in the manner determined by the court, shall be enforceable by execution in the magistrate's court having jurisdiction in accordance with the provisions of the Magistrates' Courts Act, 1938, and the judgment creditor may proceed as if the judgment was granted in the magistrate's court in favour of the judgment creditor for the amount mentioned in the affidavit referred to in subsection (2).

(2) The clerk of the court shall, upon the written application of the judgment creditor accompanied by an affidavit specifying the amount and the costs still owing under the judgment or order and how that amount is arrived at, transmit that affidavit, together with a certified copy of that judgment or order reflecting the nature of the cause of action to the clerk of the magistrate's court having jurisdiction over the court or the area in which the judgment debtor resides, carries on business or is employed, or, if the judgment debtor is a juristic person, of the Region or area in which its registered office or main place of business is situated.

(3) Upon receipt of the documents referred to in subsection (2) the clerk of the magistrate's court concerned shall record the details of the judgment or order and the amount so owing and mentioned in the affidavit in the registers kept by the clerk for that purpose.

***Property exempt from execution***

43. The provisions of section 42 of the Magistrates Court Act, 1938 shall apply with necessary alterations in respect of a warrant of execution in terms of this Act.

***Notice of change of address by judgment debtor***

44. Any person against whom a court has granted judgment or made any order and who has not satisfied in full that judgment or order or has not paid all costs for which that person is liable in connection with that judgment or order, shall, if that person has changed the place of residence, business or employment, within fourteen (14) days from the date of every such change notify the judgment creditor fully and correctly in writing of the new place of residence, business or employment of that person.

***Judgment or order final***

45. A judgment or order of a court under this Act shall be final and an appeal shall not lie from it.

***Grounds of review***

46. (1) Any of the following shall be a ground upon which the proceedings of a court may be taken on review before the High Court-

- (a) absence of jurisdiction on the part of the court;
- (b) interest in the cause, bias, malice or corruption on the part of the commissioner; or
- (c) gross irregularity with regard to the proceedings.

(2) The Chief Justice shall from time to time appoint for a period and Region or area an attorney or advocate on such terms and conditions as the Chief Justice may determine with authority to hear and determine with finality reviews in terms of this section.

**PART IX  
OFFENCES**

***Offences relating to execution***

47. Any person who -

- (a) obstructs a messenger or deputy messenger of the court in the execution of the duties of that messenger or deputy messenger's duties under this Act;

(b) fails to give notice of change of address in terms of section 44,

shall be guilty of an offence and liable upon conviction to a fine not exceeding two thousand Emalangeni (E2,000) or to imprisonment for a period not exceeding two months and, on subsequent conviction, to said imprisonment without the option of a fine.

### ***Contempt of court***

48. (1) Any person who wilfully insults a commissioner during the session of the court, or a clerk or messenger or other officer present at that session, or who wilfully interrupts the proceedings of a court or otherwise misbehaves in the place where the session of a court is held, shall, without prejudice to the provisions of section 5 (3), be liable to be sentenced summarily or upon summons to a fine not exceeding two thousand Emalangeni (E2,000) or to imprisonment for a period not exceeding two months and, on subsequent conviction, to said imprisonment without the option of a fine.

(2) When sentencing any person under this section, the commissioner shall without delay transmit to the registrar of the High Court for consideration and review by a judge in chambers, a statement, certified by the commissioner to be true and correct, of the grounds and reasons for the action taken by the commissioner, and shall also furnish to the person sentenced a copy of that statement.

## **PART X GENERAL PROVISIONS**

### ***Pending proceedings***

49. The provisions of this Act shall not affect any matter pending in any other court of law at the commencement of this Act, and such a matter shall be disposed of in the court in question as if this Act was not passed.

### ***Minister to make regulations***

50. The Minister may in addition to section 26, after consultation and agreement with the Attorney General and the Chief Justice, increase or decrease the jurisdiction under section 16 of one particular court or of all the courts under this Act.

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## **SCHEDULE** (in terms of section 10 (6) )

I, .....do hereby swear (or solemnly) and sincerely affirm and declare that whenever I may be called upon to perform the functions of a commissioner in any court I shall administer justice to all persons alike without fear, favour or prejudice and, as the circumstances of a particular case may require, in accordance with the law and customs of Swaziland.

THE MAGISTRATES COURT (AMENDMENT) ACT, 2011

(Act No. 2 of 2011)



I ASSENT

MSWATI III  
King of Swaziland

..... 2011

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AN ACT  
ENTITLED

AN ACT to amend the Magistrate's Court Act, 1938 so as to increase the basic jurisdiction of Magistrates in civil and criminal matters and confer power to the Minister to increase the civil jurisdiction.

ENACTED by the King and the Parliament of Swaziland.

*Short title and commencement*

1. This Act may be cited as the Magistrate's Court (Amendment) Act, 2008 and shall be read as one with the Magistrate's Court Act, 1938 (hereinafter in this Act referred to as "the Principal Act") and shall come into force on the date of publication.

*Amendment of section 2*

2. Section 2 of the Principal Act is amended by deleting the definition of "court" and replacing it with a new definition as follows -

"court" means a magistrate's court, a senior magistrate's court, a principal magistrate's court;"

*Amendment of section 3*

3. Section 3 of the Principal Act is amended in paragraphs (a), (b) and (c) by deleting those paragraphs and replacing them with new paragraphs (a), (b) and (c) as follows-

- "(a) principal magistrate's court;
- (b) senior magistrate's court; and
- (c) magistrate's court."

*Amendment of the Principal Act and the Magistrate's Court Rules*

4. The Principal Act, the Magistrate's Court Rules and any other law wherever the words -

- (a) "magistrate's courts of the first class" ;
- (b) "magistrate's courts of the second class" and
- (c) "magistrate's courts of the third class",

appear, are deleted and replaced, respectively, with the following words -

- (a) "principal magistrate's courts" ;
- (b) "senior magistrate's courts" and
- (c) "magistrate's courts".

*Amendment of section 16*

5. Section 16 of the Principal Act is amended by -

- (a) replacing it with a new section 16 as follows -

*"Jurisdiction in respect of causes of action.*

16. (1) Subject to section 16 *bis* and any other provision of this Act or other law the jurisdiction of magistrate's courts in civil matters shall be-

- (a) in the case of principal magistrate's courts, all actions permitted by law or practice and actions where the claim or value of the matter in dispute does not exceed thirty (30) thousand Emalangeni;
- (b) in the case of senior magistrate's courts, all actions permitted by law or practice and actions where the claim or value of the matter in dispute does not exceed twenty (20) thousand Emalangeni;
- (c) in the case of any magistrate's courts (lower than a senior magistrate's court), all actions permitted by law or practice and actions where the claim or value of the matter in dispute does not exceed ten (10) thousand Emalangeni.

(2) Where both parties are Swazis, and the cause of action is, in the opinion of the clerk of the court, one suitable to be heard in a Swazi Court of appropriate jurisdiction established or recognized under the Swazi Courts Act, 1950 or the Swazi Administration Act, 1950 or its successor and permissible under the Constitution, the clerk may refuse to issue summons, and may order the plaintiff to commence the action in such Swazi court or other court;

(3) At any time after the issue of summons commencing action in any case where both parties are Swazis, the court may order that the action be transferred to a Swazi court of appropriate jurisdiction or to such other court as specified in this section."; and

- (b) adding a new section 16 *bis* immediately after section 16 as follows -

*"Power to confer increased jurisdiction."*

16 bis. The Minister may, in consultation with the Chief Justice and by notice published in the Gazette, increase the jurisdictional amounts specified under section 16."

*Amendment of section 72.*

6. Section 72 (1) of the Principal Act is amended-

- (a) in paragraph (a), by deleting sub-paragraphs (i) and (ii) and replacing them with new sub-paragraphs (i) and (ii) as follows -

" (a) a principal magistrate's court -

(I) imprisonment for a period not exceeding fifteen (15) years;

(II) fine not exceeding twenty (20) thousand Emalangeni or in default of payment such imprisonment as specified in this paragraph;"

- (b) in paragraph (b), by deleting sub-paragraphs (i) and (ii) and replacing them with new sub-paragraphs (i) and (ii) as follows -

(b) a senior magistrate's court-

(i) imprisonment for a period not exceeding ten (10) years;

(ii) fine not exceeding fifteen (15) thousand Emalangeni or in default of payment such imprisonment as specified in this paragraph;"

- (c) in paragraph (c), by deleting sub-paragraphs (i), (ii) and (iii) and replacing them with new sub-paragraphs (i), (ii) and (iii) as follows -

(b) a magistrate's court (lower than a senior magistrate) -

(i) imprisonment for a period not exceeding seven (7) years;

(ii) fine not exceeding ten (10) thousand Emalangeni or in default of payment such imprisonment as specified in this paragraph;

(iii) whipping, subject to the provisions of section 84 and of this section, not exceeding eight strokes with a cane"

- (d) in the second proviso, by deleting the words "Senior Magistrate" and replacing them with the words "principal magistrate" and further deleting the words "ten years", where they appear, and replacing them with the words "eighteen years".

*Repeal of Legal Notice No. 57 of 1988*

7. The Magistrate's Court (Increase of Jurisdiction) Notice, 1988 is repealed.

LEGAL NOTICE NO. 11 OF 2011

**THE FINANCE MANAGEMENT AND AUDIT ACT, 1967**  
(Act No. 18 of 1967)

**THE APPOINTMENT OF MEMBERS OF THE LOSSES COMMITTEE**  
**NOTICE, 2011**  
(Under Sections 22 and 23)

In exercise of the powers conferred by Sections 22 and 23 of the Finance Management and Audit Act, 1967, the Minister of Finance hereby, appoints the following persons to be members of the Losses Committee with effect from the 1<sup>st</sup> December, 2010 -

- |                      |   |        |
|----------------------|---|--------|
| (a) Mr. Jimson Gwebu | - | Member |
| (b) Ms. Fikile Nkosi | - | Member |

**MAJOZI V. SITHOLE**  
*MINISTER OF FINANCE*

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LEGAL NOTICE NO. 12 OF 2011

THE FINANCE MANAGEMENT AND AUDIT ACT, 1967  
(Act No. 18 of 1967)

THE REVOCATION OF APPOINTMENT OF MEMBERS OF THE  
LOSSES COMMITTEE NOTICE, 2011  
(Under Sections 22 and 23)

In exercise of the powers conferred by Sections 22 and 23 of the Finance Management and Audit Act, 1967, the Minister of Finance hereby revokes the appointment of -

1. Mr. Mfanzile Dlamini
2. Mrs. Sibongile Mdluli

as Members of the Losses Committee with effect from the 26<sup>th</sup> November, 2010.

**MAJOZI V. SITHOLE**  
*MINISTER OF FINANCE*

Mbabane  
26<sup>th</sup> November, 2010



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LEGAL NOTICE NO. 13 OF 2011

THE CIVIL SERVICE ORDER, 1973  
(Order No. 16 of 1973)

APPOINTMENT OF ACTING SECRETARY TO CABINET  
(Under Section 8)

In exercise of the powers vested in me by Section 8 of the Civil Service Order, 1973, I,  
**MSWATI III, KING OF SWAZILAND**, hereby appoint:

**ANDREAS M. MATHABELA**

To act as Secretary to Cabinet with effect from 27<sup>th</sup> November 2010 to 14<sup>th</sup> December 2010.

**THUS SIGNED UNDER MY HAND AT LOZITHEHLEZI ON THIS 15<sup>th</sup> DAY OF  
FEBRUARY, 2011.**

**MSWATI III**  
*KING OF SWAZILAND*

LEGAL NOTICE NO. 14 OF 2011

THE CIVIL SERVICE ORDER, 1973  
(Order No. 16 of 1973)

APPOINTMENT OF ACTING PRINCIPAL SECRETARIES  
(Under Section 8)

In exercise of the powers vested in me by Section 8 of the Civil Service Order, 1973, I, **MSWATI III, KING OF SWAZILAND**, hereby appoint:

**BHEKITHEMBA GAMA**

To act as Principal Secretary in the Ministry of Information, Communications and Technology with effect from 25<sup>th</sup> October 2010 to 6<sup>th</sup> December 2010.

**ZANDILE MADLOPHA**

To act as Principal Secretary in the Ministry of Tinkhundla Administration and Development with effect from 27<sup>th</sup> November 2010 to 14<sup>th</sup> December 2010.

**NORMAN GAMEDZE**

To act as Principal Secretary in the Ministry of Tinkhundla Administration and Development with effect from 4<sup>th</sup> October 2010 to 6<sup>th</sup> November 2010.

**STEPHEN THEMBINKOSI MOTSA**

To act as Principal Secretary in the Ministry of Natural Resources and Energy with effect from 3<sup>rd</sup> October 2010 to 17<sup>th</sup> October 2010.

**THUS SIGNED UNDER MY HAND AT LOZITHEHLEZI ON THIS 15<sup>th</sup> DAY OF FEBRUARY, 2011.**

**MSWATI III**  
*KING OF SWAZILAND*

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**LEGAL NOTICE NO. 15 OF 2011**

**THE CIVIL SERVICE ORDER, 1973**  
(Order No. 16 of 1973)

**APPOINTMENT OF ACTING PRINCIPAL SECRETARIES**  
(Under Section 8)

In exercise of the powers vested in me by Section 8 of the Civil Service Order, 1973, I, **MSWATI III, KING OF SWAZILAND**, hereby appoint:

**STEPHEN THEMBINKOSI MOTSA**

To act as Principal Secretary in the Ministry of Natural Resources and Energy with effect from 17<sup>th</sup> November 2010 to 6<sup>th</sup> December 2010.

**THAMSANQA T. VILANE**

To act as Principal Secretary in the Ministry of Public Works and Transport with effect from 20<sup>th</sup> December 2010 to 10<sup>th</sup> January 2011.

**AMOS ZWANE**

To act as Principal Secretary in the Ministry of Economic Planning & Development with effect from 20<sup>th</sup> December 2010 to 14<sup>th</sup> January 2011.

**DICKSON MKHONTA**

To act as Principal Secretary in the Deputy Prime Minister's Office with effect from 28<sup>th</sup> December 2010 to 11<sup>th</sup> January 2011.

**THUS SIGNED UNDER MY HAND AT LOZITHEHLEZI ON THIS 15<sup>th</sup> DAY OF FEBRUARY, 2011.**

**MSWATI III**  
**KING OF SWAZILAND**

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LEGAL NOTICE NO. 16 OF 2011

**THE CONSTITUTION OF SWAZILAND ACT, 2005**  
(Act No. 001 of 2005)

**APPOINTMENT OF A MEMBER OF LIQOQO NOTICE, 2011**  
(Under Section 231)

In exercise of the powers conferred by Section 231 of the Constitution of Swaziland Act, 2005, **I, MSWATI III KING AND INGWENYAMA** of Swaziland appoint -

**OBED MFANYANA DLAMINI**

to be a Member of Liqoqo with effect from 13<sup>th</sup> September, 2009 for a period not exceeding five years.

**THUS DONE UNDER MY HAND AT LOZITHEHLEZI ON THIS 15<sup>th</sup> DAY OF FEBRUARY, 2011.**

**MSWATI III**  
*KING AND INGWENYAMA OF SWAZILAND*