

**SUPPLEMENT TO
THE
SWAZILAND GOVERNMENT
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CHILDREN'S PROTECTION AND WELFARE ACT, 2012

(Act No. 6 of 2012)

**I ASSENT****King Mswati III**
of Swaziland20th August, 2012**AN ACT**
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.

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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, 2012 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;

"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;

"appropriate adult" means any suitable or proper person who is in charge or control of a child and is in a position to offer counsel, and ensure that the child offender is receiving the care he/she is entitled to.

"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;

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

"auxiliary social worker" means a designated person who assists social workers with their tasks;

"Bill of Rights" means the rights and freedoms of individuals contained in Chapter 3 of the Constitution;

"care" means to have duties and responsibilities towards a child including custody and day-to-day control of the activities of a child.

"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.

"child care provider" means any person other than a parent or guardian who factually cares for a child and includes -

- a) a foster parent;
- b) a person who cares for a child with the implied or express consent of a parent or guardian of the child;
- c) a person who cares for a child whilst the child is in temporary safe care; the person at the head of a shelter; a child care worker who cares for a child who is without appropriate family care in the community; and the child at the head of a child headed household.

"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;

"decent name" means a socially acceptable name that is not derogatory.

"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;

"family time order" means an order directing a child to spend time with family or in a family environment.

"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;

"indvuna" means the chief's headman.

"medical officer" means any officer who is working in the medical profession and is qualified to do so.

"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;

"orphan" means a child who has lost one or both parents.

"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;

"remand home" means a place designated as a detention home for juvenile offenders.

"restorative justice" means an approach to justice which fosters dialogue between the victim and offender and focuses on the needs of victims, offenders, as well as the involved community, as opposed to satisfying abstract legal principles or punishing the offender.

"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;

"social worker" used to include 'auxiliary social worker'.

"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.

"vulnerable child" means a child with or without parents who lacks the basic needs for survival and living in circumstances with high risk or whose prospects for health, growth and development are seriously impaired.

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 harmful 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 should 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 and religious 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 not exceeding the monetary jurisdiction of a Magistrate or to an appropriate term of imprisonment.

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 to -

- (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, 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, chief 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 in the manner prescribed.

(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, who shall follow the procedure in subsection (1).

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 in order to review the appropriateness of the taking of the child.

(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 the 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 emalangeni 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 Emalangeni 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) For the purposes of subsection(1), the Department of Social Welfare shall submit a report about the suitability of a caregiver or foster parent, which makes an assessment whether the person is fit and proper to be entrusted with parental responsibilities and rights in respect of the child, and willing and able to undertake, exercise and maintain those responsibilities and rights.

(3) 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.

(4) 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.

(5) 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.

(6) Before making an order under subsection (1) or (5), the Children's Court shall consider and take into account a report prepared by a social worker in the manner prescribed 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.

(7) 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).

(8) 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.

(9) 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.

(10) 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.

(11) 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.

(12) 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.

(13) 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 assignment;
- (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.

(9) 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.

(10) 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. (1) 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.

(2) A child has a right to the death certificate of a deceased 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 Emalangi 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;
- (h) on inquiry by the minor children of the deceased estate concerned, provide adequate information on the status of the properties or monies invested on their behalf;
- (i) assist a minor child of a deceased estate to open an account in a financial institution;
- (j) notify the Director of Social Welfare in writing of the opening of such an account;
- (k) cause the Director of Social Welfare to undertake periodic reviews of the socio-economic status of the child.

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

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

- (a) ensure 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.

(2) The Chief shall ensure that minor children of the deceased are not unduly dispossessed.

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 a minor child who is a beneficiary of a deceased estate 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 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 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), 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 is 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 -

- (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.

(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 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 of such person; or
- (b) be placed in a place of safety or 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 section care of a child means 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 ADOPTION

Adoption

55. (1) 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 69.

(2) The purpose of this part is to give effect to the Hague Convention on Intercountry Adoptions.

(3) For the purposes of the Hague Convention on Intercountry Adoptions in relation to Swaziland 'competent authority' means the Principal Secretary in the Ministry responsible for children's issues.

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) The adoption committee shall conduct an assessment to determine whether a child is adoptable after a report is made by a social worker.

(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) child is in need of a permanent alternative placement.

Person who can foster or adopt.

57. (1) A child may be adopted by any person eligible under this section.

(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 adoption committee.

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

(2) The Adoption committee shall consist 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) a representative of Non-governmental Organisations;
- (d) two other people from the community with interest in the welfare of children selected by the Director of Social Welfare; and
- (e) a representative of the Child Protection and Domestic Violence Unit of the police.

(3) The Adoption Committee shall screen potential adoptive parents and names of children to be put on the register on prospective adoptive parents and adoptable children.

(4) Members of the Adoption Committee shall meet as and when there are applications of potential adoptive parents to screen.

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 in order to match the needs of the prospective adoptive parents to the prospective adoptable child.

(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 adoptive parents and the conditions surrounding the child to be 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) 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.

(4) 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.

(5) 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.

(5) 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 social enquiry report in the manner prescribed to assist the High Court in 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.

(9) A person who contravenes any provision of this section shall be guilty of an offence and shall on conviction be liable to a fine up to a maximum of E15 000.00 or imprisonment up to a maximum of two years or both.

(10) Applications for intercountry adoptions shall only be approved where the prospective adoptive parents reside in a country which has ratified the Hague Convention on Intercountry Adoptions.

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 in the manner prescribed 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
 - (iii) 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 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 on conviction to imprisonment for a term not exceeding 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 on conviction to imprisonment for a term not exceeding 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.

Responsibilities of 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) A child referred to in this Part is considered to be a child in need of care and protection in terms of section 23(1)(a) and the social worker shall take the child into a place of safety in terms of the procedure set out in section 24 of this Act.

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 not exceeding twenty 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 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 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 twelve 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 twelve 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 twelve 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

(c) 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. After an assessment in terms of section 87 the social worker shall forward a written report to the senior prosecutor of the Children's Court having jurisdiction in the matter.

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.

(2) 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.

(3) 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 emalangi 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) determine release or placement of the child pending -
 - (i) the finalisation of the preliminary inquiry; or
 - (ii) referral to the Children's Court.
 - (g) to determine whether or not the child possesses criminal capacity under section 79(2).

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.

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 to divert and factors to be considered.

110. (1) In regard to all matters brought before the preliminary inquiry, the prosecutor shall decide whether to divert the matter or not and inform the inquiry Magistrate accordingly.

(2) In order to establish whether or not diversion is possible, the prosecutor 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 cause of conducting the preliminary inquiry.
- (e) the criteria specified in section 127(1).

(3) After consideration of the social assessment report, if the assessment has not been dispensed with under section 109 (2), and decision by the prosecutor, the inquiry magistrate may-

- (a) make an order to 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.

(4) After the prosecutor has made a decision to divert the matter in terms of subsection (2), 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 prosecutor shall, as far as is possible, develop a diversion strategy which meets the standards 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 or origin and the alleged offence.

(5) The inquiry magistrate shall-

- (a) if a referral to the Children's Court has been made in terms of section 110 (3) (b), record written reasons for such referral; 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 (3) (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 a 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 shall 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 under Section 129 by a prosecutor and fails to comply with a condition of diversion, or with any other order, or fails to attend a programme, 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 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 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 and if diversion has not been ordered, the inquiry magistrate shall-

- (a) refer the matter for trial 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.

(3) 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.

(6) 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.

(7) 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.

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

(9) 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.

(10) 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.

(11) 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.

(12) 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.

(13) 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 (12), 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.

(14) A family group conference reconvened under subsection (13) may confirm, rescind or modify its previous decision, recommendation or plan.

(15) Any decision, recommendation or plan confirmed or modified under subsection (14), and any new decision, recommendation or plan made or formulated under that subsection, shall be deemed to have been made in the previous conference.

(16) 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.

(17) Admission of any information, statement or any admission made or disclosed in the course of a family conference shall be subject to the principles of admission of evidence in any court.

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

(19) Nothing under subsection (18) 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;
- (c) police;
- (d) social worker;
- (e) prosecutor; and
- (f) 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 prosecutor 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 or recommending a diversion option 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 sergeant for purposes of the administration of a police caution without conditions;
- (c) referral to a senior police officer above the rank of sergeant 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 approved 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 approved 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 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 approved 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) 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.

(2) Where a social worker has recommended diversion in relation to a child alleged to have committed a minor offence not listed in the schedule, the prosecutor may divert the matter without opening a preliminary inquiry.

(3) Where the prosecutor has made a decision to divert under section 129(1), he shall cause the matter to be brought before a Magistrate in chambers in the presence of the child for the decision to divert to be made an order of Court.

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 matters in accordance with the provisions of this Act.

(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) For the purposes of this Act, any suitable room may be regarded as a Children's Court provided it is presided over by a Magistrate.

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 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 and is in the best interests of the child.

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 bail or trial 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 prosecutor decides to divert, the Court may order the child to attend to any diversion option referred to under section 115 without making a pronouncement of guilt.

(2) If, at any time 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 (3) (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 and there is a likelihood of a residential sentence.

(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 not 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.

(7) 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) 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;

- (b) 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
- (c) any form of symbolic restitution;
- (d) an oral or written apology to a specified person or institution;
- (e) a correctional reprimand;
- (f) placement under a good behaviour order for a period not exceeding six months;
- (g) placement under a family time order for a period not exceeding six months;
- (h) placement under a compulsory school attendance order for a period not exceeding six months;
- (i) placement under a positive peer association order for a period not exceeding six months;
- (j) 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 ;
- (k) placement under the care and control of an appropriate adult specified by the court;
- (l) placement under a supervision and guidance order for a period not exceeding 12 months;
- (m) 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;
- (n) 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 -
 - (i) imposed upon a child under the age of thirteen years; or
 - (ii) 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 process.

155. (1) A sentence involving a restorative justice process 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 as prescribed under sections 123 and 124.

(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 five 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).

(3) Any imposing a sentence of imprisonment under subsection (1) must be satisfied that it is a measure of last resort and for the shortest appropriate period of time.

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 5 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 (1) (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 below 18 years 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 shall not 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
 - (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
- (b) 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
 - (ii) the person in charge of the probation hostel.
- (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.

(7) 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, which ever 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 emalangenji 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 social assessment 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
- (b) 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 in the manner prescribed.

(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 prescribe regulations for monitoring and 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 in the manner prescribed.

(3) In the event of the death of a child in an institution, the Department of Social Welfare shall cause the police to investigate the circumstances surrounding the death and submit a written report to the Director of Public Prosecutions who shall determine what further cause of action should be taken if any.

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;
- (e) a chief; or
- (f) 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 emalangenzi 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;
- (d) Master of the High Court; or
- (e) a chief.

(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 emalangi or to imprisonment for a term not exceeding five years or to both.

PART XXIV
MAINTENANCE OF CHILDREN

Duty to maintain a child.

212. 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, education and reasonable shelter for the child.

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 chief;
- (f) a social worker; and
- (g) 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
- (b) 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.

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
 - (b) 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) proper medical advice is given to the child; and
- (b) 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) Reformatories Act, No. 82 of 1921 is repealed to the extent that it is inconsistent with the provisions of this Act.

(7) Age of Majority Act, No. 11 of 1853 is repealed.

(8) 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.

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.

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

LEGAL NOTICE NO. 171 OF 2012

THE INCOME TAX ORDER, 1975
(Order No. 21 of 1975)

THE DOUBLE TAXATION AGREEMENT BETWEEN THE
KINGDOM OF SWAZILAND AND THE REPUBLIC OF SEYCHELLES,
NOTICE, 2012
(Under Section 68)

In exercise of the powers conferred by Section 68 of the Income Tax Order, 1975, the Minister for Finance makes the following Notice -

Citation and Commencement

1. (1) This Notice may be cited as the Double Taxation Agreement between the Kingdom of Swaziland and the Republic of Seychelles, Notice, 2012.

(2) This Notice shall come into force on the date of publication.

Double Taxation Agreement

2. Notice is given of the attached Double Taxation Agreement between the Kingdom of Swaziland and the Republic of Seychelles.

MAJOZI V. SITHOLE
MINISTER FOR FINANCE

Mbabane
2nd November, 2012

S127

AGREEMENT

BETWEEN

THE GOVERNMENT OF THE REPUBLIC OF SEYCHELLES

AND

THE GOVERNMENT OF THE KINGDOM OF SWAZILAND

FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE

PREVENTION OF FISCAL EVASION WITH RESPECT TO

TAXES ON INCOME

Preamble

Desiring to conclude an Agreement for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and to promote and strengthen the economic relations between the two countries, the Government of the Kingdom of Swaziland and the Government of the Republic of Seychelles (hereinafter referred to as 'the Contracting States')

Have agreed as follows:

ARTICLE 1

General Definitions

1. For the purposes of this Agreement, unless the context otherwise requires:
 - a) the term "business" includes the performance of professional services and of other activities of an independent character;
 - b) the term "company" means any body corporate or any entity that is treated as a body corporate for tax purposes;
 - c) the term "competent authority" means:
 - (i) in the case of Swaziland, the Minister of Finance or an authorized representative;
 - (ii) in the case of Seychelles, the Minister of Finance or an authorised representative of the Minister of Finance;
 - d) the terms "a Contracting State" and "the other Contracting State" mean Swaziland or Seychelles, as the context requires;
 - e) the term "enterprise" applies to the carrying on of any business;
 - f) the terms "enterprise of a Contracting State" and "enterprise of the other Contracting State" mean respectively an enterprise carried on by a resident of a Contracting State and an enterprise carried on by a resident of the other Contracting State;
 - g) the term "international traffic" means any transport by a ship, aircraft or rail or road transport vehicle operated by an enterprise of a Contracting State, except when the ship, aircraft or rail or road transport vehicle is operated solely between places in the other Contracting State;
 - h) the term "national" means:
 - (i) any individual possessing the nationality or citizenship of a Contracting State; and
 - (ii) any legal person or association deriving its status as such from the laws in force in a Contracting State
 - i) the term "Seychelles" means the territory of the Republic of Seychelles including its exclusive economic zone and continental shelf where Seychelles exercises sovereign rights and jurisdiction in conformity with the provisions of the United Nations Convention on the Law of the Sea;

- j) the term "Swaziland" means the Kingdom of Swaziland;
 - k) the term "tax" means Swaziland tax or Seychelles tax, as the context requires, but shall not include any amount which is payable in respect of any default or omission in relation to the taxes to which this Agreement applies or which represents a penalty imposed relating to those taxes.
2. As regards the application of the provisions of this Agreement at any time by a Contracting State, any term not defined therein shall, unless the context otherwise requires, have the meaning that it has at that time under the law of that State for the purposes of the taxes to which this Agreement applies, any meaning under the applicable tax laws of that State prevailing over a meaning given to the term under other laws of that State.

ARTICLE 2

Persons Covered

This Agreement shall apply to persons who are residents of one or both of the Contracting States.

ARTICLE 3

Taxes Covered

1. This Agreement shall apply to taxes on income imposed on behalf of a Contracting State or of its political subdivisions or local authorities irrespective of the manner in which they are levied.
2. There shall be regarded as taxes on income all taxes imposed on total income or on elements of income, including taxes on gains from the alienation of movable or immovable property.
3. The existing taxes to which the Agreement shall apply are:
 - a) in the case of Swaziland, the taxes covered under the Income Tax Order 1975, as amended.
(hereinafter referred to as "Swaziland tax"); and
 - b) in the case of Seychelles:
 - (i) the business tax;
 - (ii) the income and non-monetary benefits tax; and
 - (iii) the petroleum income tax;(hereinafter referred to as "Seychelles tax").
4. This Agreement shall also apply to any identical or substantially similar taxes that are imposed after the date of signature of this Agreement in addition to, or in place of, the existing taxes. The competent authorities of the Contracting States shall notify each other of any significant changes that have been made in the respective taxation laws.

ARTICLE 4

Resident

1. For the purposes of this Agreement, the term "resident of a Contracting State" means any person who, under the laws of that State, is liable to tax in that State by reason of that person's domicile, residence, place of incorporation or registration, place of management, or any other criterion of a similar nature, and also includes that State or any political subdivision or local authority of that State. This term, however, does not include any person who is liable to tax in that State in respect only of income from sources in that State.
2. Where by reason of the provisions of paragraph 1 an individual is a resident of both Contracting States, then that individual's status shall be determined as follows:
 - a) an individual shall be deemed to be a resident solely of the Contracting State in which a permanent home is available to him; if a permanent home is available to that individual in both States, that individual shall be deemed to be a resident only of the State with which that individual's personal and economic relations are closer (centre of vital interests);
 - b) if sole residence cannot be determined under the provisions sub-paragraph (a), that individual shall be deemed to be a resident solely of the State in which that individual has an habitual abode;
 - c) if that individual has an habitual abode in both States or in neither of them, he shall be deemed to be a resident solely of the State of which that individual is a national;
 - d) if that individual is a national of both States or of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement.
3. Where by reason of the provisions of paragraph 1 a person other than an individual is a resident of both Contracting States, then it shall be deemed to be a resident solely of the State in which its place of effective management is situated.

ARTICLE 5

Permanent Establishment

1. For the purposes of this Agreement, the term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on.
2. The term "permanent establishment" includes especially:
 - a) a place of management;
 - b) a branch;
 - c) an office;
 - d) a factory;
 - e) a workshop;
 - f) a mine, an oil or gas well, a quarry or any other place of extraction or exploitation of natural resources;

- g) a building site, a construction, assembly or installation project or supervisory activity connected therewith where such site, project or activity continues for a period of more than 183 days; and
 - h) the furnishing of services, including consultancy services, by an enterprise through employees or other personnel engaged by the enterprise for such purposes, but only where activities of that nature continue for the same or a connected project within a Contracting State for a period or periods exceeding in the aggregate 90 days in any twelve month period commencing or ending in the year of assessment concerned.
 - i) the performance of professional services or other activities of an independent character by an individual, but only where those services or activities continue within a Contracting State for a period or periods exceeding in the aggregate 183 days in any twelve-month period commencing or ending in the year of assessment concerned.
3. Notwithstanding the preceding provisions of this Article, the term "permanent establishment" shall be deemed not to include:
- a) the use of facilities solely for the purpose of storage, display of goods or merchandise belonging to the enterprise;
 - b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display;
 - c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;
 - d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise or of collecting information, for the enterprise;
 - e) the maintenance of fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity of a preparatory or auxiliary character;
 - f) the maintenance of a fixed place of business solely for any combination of activities mentioned in sub-paragraphs a) to e), provided that the overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character.
4. Notwithstanding the provisions of paragraphs 1 and 2, where a person - other than an agent of an independent status to whom paragraph 5 applies - is acting in a Contracting State on behalf of an enterprise of the other Contracting State, that enterprise shall be deemed to have a permanent establishment in the first-mentioned State in respect of any activities which that person undertakes for the enterprise, if such a person:
- (a) has and habitually exercises in that State an authority to conclude contracts in the name of the enterprise, unless the activities of such person are limited to those mentioned in paragraph 3 which, if exercised through a fixed place of business, would not make this fixed place of business a permanent establishment under the provisions of that paragraph; or
 - (b) has no such authority, but habitually maintains in the first-mentioned State a stock of goods or merchandise from which such person regularly delivers goods or merchandise on behalf of the enterprise

5. An enterprise shall not be deemed to have a permanent establishment in a Contracting State merely because it carries on business in that State through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business.
6. The fact that a company which is a resident of a Contracting State controls or is controlled by a company which is a resident of the other Contracting State, or which carries on business in that other State (whether through a permanent establishment or otherwise), shall not of itself constitute either company a permanent establishment of the other.
7. Notwithstanding the preceding provisions of this Article, an insurance enterprise of a Contracting State shall, except in regard to reinsurance, be deemed to have a permanent establishment in the other Contracting State if it collects premiums in the territory of that other State or insures risks situated therein through a person other than an agent of an independent status to whom paragraph 5 applies.

ARTICLE 6

Income from Immovable Property

1. Income derived by a resident of a Contracting State from immovable property (including income from agriculture or forestry) situated in the other Contracting State may be taxed in that other Contracting State.
2. The term "immovable property" shall have the meaning which it has under the law of the Contracting State in which the property in question is situated. The term shall in any case include property accessory to immovable property, livestock and equipment used in agriculture and forestry, rights to which the provisions of general law respecting landed property apply, usufruct of immovable property and rights to variable or fixed payments as consideration for the working of, or the right to work, mineral deposits, sources and other natural resources shall also be considered as "immovable property". Ships, boats, aircraft and rail or road transport vehicles shall not be regarded as immovable property.
3. The provisions of paragraph 1 shall apply to income derived from the direct use, letting, or use in any other form of immovable property.
4. The provisions of paragraphs 1 and 3 shall also apply to the income from immovable property of an enterprise.

ARTICLE 7

Business Profits

1. The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of the profits as is attributable to that permanent establishment.
2. Subject to the provisions of paragraph 3, where an enterprise of a Contracting State carries on business in the other Contracting State through a permanent establishment situated therein, there shall in each Contracting State be attributed to that permanent establishment the profits which it might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a permanent establishment.

3. In determining the profits of a permanent establishment, there shall be allowed as deductions expenses which are incurred for the purposes of the business of the permanent establishment, including executive and general administrative expenses so incurred, whether in the Contracting State in which the permanent establishment is situated or elsewhere. However, no such deduction shall be allowed in respect of amounts, if any, paid (otherwise than towards reimbursement of actual expenses) by the permanent establishment to the head office of the enterprise or any of its other offices, by way of royalties, fees or other similar payments in return for the use of patents or other rights, or by way of commission, for specific services performed or for management, or, except in the case of a banking enterprise by way of interest on moneys lent to the permanent establishment. Likewise, no account shall be taken, in the determination of profits of a permanent establishment, for amounts charged (otherwise than towards reimbursement of actual expenses), by the permanent establishment to the head office of the enterprise or any of its other offices, by the way of royalties, fees or other similar payments in return for the use of patents or other rights, or by way of commission for specific services performed or for management, or, except in the case of a banking enterprise by way of interest on moneys lent to the head office of the enterprise or any of its other offices.
4. Insofar as it has been customary in a Contracting State to determine the profits to be attributed to a permanent establishment on the basis of an apportionment of the total profits of the enterprise to its various parts, nothing in paragraph 2 shall preclude that Contracting State from determining the profits to be taxed by such an apportionment as may be customary. The method of apportionment adopted shall, however, be such that the result shall be in accordance with the principles contained in this Article.
5. No profits shall be attributed to a permanent establishment by reason of the mere purchase by that permanent establishment of goods or merchandise for the enterprise.
6. For the purposes of the preceding paragraphs, the profits to be attributed to the permanent establishment shall be determined by the same method year by year unless there is good and sufficient reason to the contrary.
7. Where profits include items of income which are dealt with separately in other Articles of this Agreement, then the provisions of those Articles shall not be affected by the provisions of this Article.

ARTICLE 8

International Transport

1. Profits of an enterprise of a Contracting State from the operation of ships, aircraft or rail or road transport vehicles in international traffic shall be taxable only in the Contracting State in which the place of effective management of the enterprise is situated.
2. For the purpose of this Article, profits from the operation in international traffic of ships or aircraft shall include in particular:
 - a) profits derived from the rental or lease by the enterprise on a bare boat charter basis of ships or aircraft used in international traffic where such rental or lease is ancillary to the transportation of passengers or cargo;
 - b) profits derived from the use, maintenance, rental or lease of containers by the enterprise where such use, maintenance, rental or lease is ancillary to the transportation of cargo.

3. If the place of effective management of a shipping enterprise is aboard a ship or boat, then it shall be deemed to be situated in the Contracting State in which the home harbour of the ship or boat is situated, or, if there is no such home harbour, in the Contracting State of which the operator of the ship or boat is a resident.
4. The provisions of paragraph 1 shall also apply to profits from the participation in a pool, a joint business or an international operating agency.

ARTICLE 9

Associated Enterprises

1. Where

- a) an enterprise of a Contracting State participates directly or indirectly in the management, control or capital of an enterprise of the other Contracting State, or
- b) the same persons participate directly or indirectly in the management, control or capital of an enterprise of a Contracting State and an enterprise of the other Contracting State,

and in either case conditions are made or imposed between the two enterprises in their *commercial or financial relations* which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly.

2. Where a Contracting State includes in the profits of an enterprise of that State - and taxes accordingly - profits on which an enterprise of the other Contracting State has been charged to tax in that other State, and where the competent authorities of the Contracting States agree, upon consultation, that all or part of the profits so included are profits which would have accrued to the enterprise of the first-mentioned State if the conditions made between the two enterprises had been those which would have been made between independent enterprises, then that other State may make an appropriate adjustment to the amount of the tax charged therein on those profits. In determining such adjustment, due regard shall be had to the other provisions of the Agreement and the competent authorities of the Contracting States shall, if necessary, consult each other.

ARTICLE 10

Dividends

1. Dividends paid by a company which is a resident of a Contracting State to a resident of the other Contracting State may be taxed in that other State.
2. However, such dividends may also be taxed in the Contracting State of which the company paying the dividends is a resident and according to the laws of that State, but if the beneficial owner of the dividends is a resident of the other Contracting State, the tax so charged shall not exceed :
 - (a) 7.5 per cent of the gross amount of the dividends if the beneficial owner is a company which holds at least 25 per cent of the capital of the company paying the dividends; or

(b) 10 per cent of the gross amount of the dividends in all other cases.

This paragraph shall not affect the taxation of the company in respect of the profits out of which the dividends are paid.

3. The term "dividends" as used in this Article means income from shares, or other rights participating in profits (not being debt-claims), as well as income from other corporate rights which is subjected to the same taxation treatment as income from shares by the laws of the Contracting State of which the company making the distribution is a resident.
4. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the dividends, being a resident of a Contracting State, carries on business in the other Contracting State of which the company paying the dividends is a resident through a permanent establishment situated therein and the holding in respect of which the dividends are paid is effectively connected with such permanent establishment. In such case the provisions of Article 7 shall apply.
5. Where a company which is a resident of a Contracting State derives profits or income from the other Contracting State, that other State may not impose any tax on the dividends paid by the company, except insofar as such dividends are paid to a resident of that other State or insofar as the holding in respect of which the dividends are paid is effectively connected with a permanent establishment situated in that other State, nor subject the company's undistributed profits to a tax on the company's undistributed profits, even if the dividends paid or the undistributed profits consist wholly or partly of profits or income arising in such other State.

ARTICLE 11

Interest

1. Interest arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.
2. However, such interest may also be taxed in the Contracting State in which it arises and according to the laws of that State, but if the beneficial owner of the interest is a resident of the other Contracting State, the tax so charged shall not exceed 7.5 percent of the gross amount of the interest.
3. The term "interest" as used in this Article means income from debt-claims of every kind, whether or not secured by mortgage and whether or not carrying a right to participate in the debtor's profits, and in particular, income from government securities and income from bonds or debentures, including premiums and prizes attaching to such securities, bonds or debentures. Penalty charges for late payment shall not be regarded as interest for the purpose of this Article.
4. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the interest, being a resident of a Contracting State, carries on business in the other Contracting State, in which the interest arises through a permanent establishment situated therein and the debt-claim in respect of which the interest is paid is effectively connected with such permanent establishment. In such case, the provisions of Article 7 shall apply.

5. Interest shall be deemed to arise in a Contracting State when the payer is a resident of that State. Where, however, the person paying the interest, whether that person is a resident of a Contracting State or not, has in a Contracting State a permanent establishment in connection with which the indebtedness on which the interest is paid was incurred, and such interest is borne by such permanent establishment, then such interest shall be deemed to arise in the State in which the permanent establishment is situated.
6. Where, by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the interest, having regard to the debt-claim for which it is paid, exceeds the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount of interest. In such case, the excess part of the payments shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Agreement.

ARTICLE 12

Royalties

1. Royalties arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.
2. However, such royalties may also be taxed in the Contracting State in which they arise and according to the laws of that State, but if the beneficial owner of the royalties is a resident of the other Contracting State, the tax so charged shall not exceed 10 per cent of the gross amount of the royalties.
3. The term "royalties" as used in this Article means payments of any kind received as a consideration for:
 - a) the use of, or right to use any patent, invention, design or model, secret formula or process, trademark, or other like property or right;
 - b) the use of, or right to use any copyright of a literary, artistic, or scientific work (including computer software, cinematograph films or films or video tapes or discs for use in connection with radio or television broadcasting);
 - c) the receipt of, or right to receive, any visual images or sounds, or both, transmitted by satellite, cable, optic fibre, or similar technology in connection with television, radio, or internet broadcasting;
 - d) the supply of any technical, industrial, commercial, or scientific knowledge, experience, or skill;
 - e) the use of or right to use any industrial, commercial, or scientific equipment; or
 - f) the supply of any assistance that is ancillary and subsidiary to, and is furnished as a means of enabling the application or enjoyment of, any property or right referred to in paragraphs (a) through (e).
4. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the royalties, being a resident of a Contracting State, carries on business in the other Contracting State in which the royalties arise through a permanent establishment situated therein and the right or property in respect of which the royalties are paid is effectively connected with such permanent establishment. In such case the provisions of Article 7 shall apply.

5. Royalties shall be deemed to arise in a Contracting State when the payer is a resident of that State. Where, however, the person paying the royalties, whether that person is a resident of a Contracting State or not, has in a Contracting State a permanent establishment with which the right or property in respect of which the royalties are paid is effectively connected, and such royalties are borne by such permanent establishment, then such royalties shall be deemed to arise in the State in which the permanent establishment is situated.
6. Where, by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of royalties, having regard to the use, right or information for which they are paid, exceeds the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case, the excess part of the payments shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Agreement.

ARTICLE 13

Technical Fees

1. Technical fees arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.
2. However, such technical fees may also be taxed in the Contracting State in which they arise, and according to the laws of that State, but if the beneficial owner of the technical fees is a resident of the other Contracting State, the tax so charged shall not exceed 10 per cent of the gross amount of the technical fees.
3. The term "technical fees" as used in this Article means payments of any kind to any person, other than to an employee of the person making the payments, in consideration of any services of a technical, managerial or consultancy nature.
4. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the technical fees, being a resident of a Contracting State, carries on business in the other Contracting State in which the technical fees arise, through a permanent establishment situated therein and the technical fees are effectively connected with such permanent establishment. In such case, the provisions of Article 7 shall apply.
5. Technical fees shall be deemed to arise in a Contracting State when the payer is a resident of that State. Where, however, the person paying the technical fees, whether that person is a resident of a Contracting State or not, has in a Contracting State a permanent establishment in connection with which the obligation to pay the technical fees was incurred, and such technical fees are borne by the permanent establishment, then such technical fees shall be deemed to arise in the State in which the permanent establishment is situated.
6. Where, by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the technical fees paid exceeds the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case, the excess part of the payments shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Agreement.

ARTICLE 14***Capital Gains***

1. Gains derived by a resident of a Contracting State from the alienation of immovable property referred to in Article 6 and situated in the other Contracting State may be taxed in that other State.
2. Gains from the alienation of movable property forming part of the business property of a permanent establishment which an enterprise of a Contracting State has in the other Contracting State, including such gains from the alienation of such a permanent establishment (alone or with the whole enterprise), may be taxed in that other State.
3. Gains of an enterprise of a Contracting State from the alienation of ships, aircraft or rail or road transport vehicles operated in international traffic or movable property pertaining to the operation of such ships, aircraft or rail or road transport vehicles shall be taxable only in that State.
4. Gains from the alienation of shares of the capital stock of a company the property of which consists directly or indirectly principally of immovable property situated in a Contracting State may be taxed in that State.
5. Gains from the alienation of any property, other than that referred to in the preceding paragraphs, shall be taxable only in the Contracting State of which the alienator is a resident.

ARTICLE 15***Income from Employment***

1. Subject to the provisions of Articles 16, 18 and 19, salaries, wages and other similar remuneration derived by a resident of a Contracting State in respect of an employment shall be taxable only in that State unless the employment is exercised in the other Contracting State. If the employment is so exercised, such remuneration as is derived therefrom may be taxed in that other State.
2. Notwithstanding the provisions of paragraph 1, remuneration derived by a resident of a Contracting State in respect of an employment exercised in the other Contracting State shall be taxable only in the first-mentioned State if:
 - a) the recipient is present in the other State for a period or periods not exceeding in the aggregate 183 days in any twelve month period commencing or ending in the year of assessment concerned, and
 - b) the remuneration is paid by, or on behalf of, an employer who is not a resident of the other State, and
 - c) the remuneration is not borne by a permanent establishment which the employer has in the other State.
3. Notwithstanding the preceding provisions of this Article, remuneration derived in respect of an employment exercised aboard a ship, aircraft or road or rail transport vehicle operated in international traffic by an enterprise of a Contracting State may be taxed in that State.

ARTICLE 16***Directors' Fees***

Directors' fees and other similar payments derived by a resident of a Contracting State in the capacity of that residents as a member of the board of directors of a company which is a resident of the other Contracting State may be taxed in that other State.

ARTICLE 17***Entertainers and Sportspersons***

1. Notwithstanding the provisions of Articles 7 and 15, income derived by a resident of a Contracting State as an entertainer, such as a theatre, motion picture, radio or television artiste, or a musician, or as a sportsperson, from that person's personal activities as such exercised in the other Contracting State, may be taxed in that other State.
2. Where income in respect of personal activities exercised by an entertainer or a sportsperson in that capacity accrues not to the entertainer or sportsperson himself but to another person, that income may, notwithstanding the provisions of Articles 7 and 15, be taxed in the Contracting State in which the activities of the entertainer or sportsperson are exercised.
3. Income derived by a resident of a Contracting State from activities of an entertainer or sportsperson exercised in the other Contracting State as envisaged in paragraphs 1 and 2 of this Article, shall be exempt from tax in that other State if the visit to that other State is supported wholly or mainly by public funds of the first-mentioned Contracting State or takes place under a cultural agreement or arrangement between the Governments of the Contracting States.

ARTICLE 18***Pensions and Annuities***

1. Subject to the provisions of paragraph 2 of Article 19, pensions and other similar remuneration, and annuities, arising in a Contracting State and paid to a resident of the other Contracting State, may be taxed in the first-mentioned State
2. The term "annuity" means a stated sum payable periodically at stated times during life or during a specified or ascertainable period of time under an obligation to make the payments in return for adequate and full consideration in money or money's worth.
3. Notwithstanding the provisions of paragraph 1, pensions paid and other payments made under a public scheme which is part of the social security system of a Contracting State, a political subdivision or a local authority of that Contracting State shall be taxable only in that State.

ARTICLE 19***Government Service***

1. a) Salaries, wages and other similar remuneration, other than a pension, paid by a Contracting State or a political subdivision or a local authority thereof to an individual in respect of services rendered to that State or subdivision or authority shall be taxable only in that State.

- b) However, such salaries, wages and other similar remuneration shall be taxable only in the other Contracting State if the services are rendered in that State and the individual is a resident of that State who:
 - (i) is a national of that State; or
 - (ii) did not become a resident of that State solely for the purpose of rendering the services.
- 2. a) Any pension paid by, or out of funds created by, a Contracting State or a political subdivision or a local authority thereof to an individual in respect of services rendered to that State or subdivision or authority shall be taxable only in that State.
- b) However, such pension shall be taxable only in the other Contracting State if the individual is a resident of, and a national of, that State.
- 3. The provisions of Articles 15, 16, 17 and 18 shall apply to salaries, wages and other similar remuneration, and to pensions, in respect of services rendered in connection with a business carried on by a Contracting State or a political subdivision or a local authority of that Contracting State.

ARTICLE 20

Students, Apprentices and Business Trainees

A student, apprentice or business trainee who is present in a Contracting State solely for the purpose of the education or training of the student, apprentice or business trainee and who is, or immediately before being so present was, a resident of the other Contracting State, shall be exempt from tax in the first-mentioned State on payments received from outside that first-mentioned State for the maintenance, education or training of the student, apprentice or business trainee.

ARTICLE 21

Professors and Teachers

- 1. Notwithstanding the provisions of Article 15, a professor or teacher who makes a temporary visit to one of the Contracting States for a period not exceeding two years from the date of first arrival in that State, solely for the purpose of teaching or carrying out research at a university, college, school or other educational institution in that State and who is, or immediately before such visit was, a resident of the other Contracting State shall, in respect of remuneration for such teaching or research, be exempt from tax in the first-mentioned State, provided that such remuneration is derived by the professor or teacher from outside that State or such remuneration is not borne by a university, college, school or other educational institution in the first-mentioned State.
- 2. The provisions of this Article shall not apply to income from research if such research is undertaken not in the public interest but wholly or mainly for the private benefit of a specific person or persons.

ARTICLE 22***Other Income***

1. Items of income of a resident of a Contracting State, wherever arising, not dealt with in the foregoing Articles of this Agreement shall be taxable only in that State.
2. The provisions of paragraph 1 shall not apply to income, other than income from immovable property as defined in paragraph 2 of Article 6, if the recipient of such income, being a resident of a Contracting State, carries on business in the other Contracting State through a permanent establishment situated therein and the right or property in respect of which the income is paid is effectively connected with such permanent establishment. In such case the provisions of Article 7 shall apply.
3. Notwithstanding the provisions of paragraphs 1 and 2, items of income of a resident of a Contracting State not dealt with in the foregoing Articles of the Agreement and arising in the other Contracting State may also be taxed in that other State.

ARTICLE 23***Elimination of Double Taxation***

1. Double taxation shall be eliminated as follows:
 - a) In Swaziland, subject to the provisions of the law of Swaziland, from time to time in force, which relates to the allowance of credit against Swaziland tax of tax paid in a country outside Swaziland (which shall not affect the general principle of this Article), Seychelles tax paid under the law of Seychelles and in accordance with this Agreement, whether directly or by deduction, in respect of income derived by a person who is a resident of Swaziland from sources in Seychelles shall be allowed as a credit against Swaziland tax payable in respect of that income but such credit shall not exceed the average rate of Swaziland income tax on that income.
 - b) In Seychelles, subject to the provisions of the law of Seychelles, from time to time in force, which relates to the allowance of credit against Seychelles tax of tax paid in a country outside Seychelles (which shall not affect the general principle of this Article), Swaziland tax paid under the law of Swaziland and in accordance with this Agreement, whether directly or by deduction, in respect of income derived by a person who is a resident of Seychelles from sources in Swaziland shall be allowed as a credit against Seychelles tax payable in respect of that income but such credit shall not exceed the average rate of Seychelles income tax on that income.
2. For the purposes of paragraph 1, the terms "Swaziland tax paid" and "Seychelles tax paid" shall be deemed to include the amount of tax which would have been paid in Swaziland or Seychelles, as the case may be, but for an exemption or reduction granted in accordance with laws which establish schemes for the promotion of economic development in Swaziland or Seychelles, as the case may be, such schemes having been mutually agreed by the competent authorities of the Contracting States as qualifying for the purposes of this paragraph.
3. A grant given by a Contracting State or a political subdivision of that Contracting State to a resident of the other Contracting State in accordance with laws which establish schemes for the promotion of economic development in Swaziland or Seychelles, as the case may be, such schemes having been mutually agreed by the competent authorities of the Contracting States as qualifying for the purposes of this paragraph, shall not be taxable in the other State.

ARTICLE 24***Non-Discrimination***

1. Nationals of a Contracting State shall not be subjected in the other Contracting State to any taxation or any requirement connected therewith, which is other or more burdensome than the taxation and connected requirements to which nationals of that other State in the same circumstances, in particular with respect to residence, are or may be subjected. This provision shall, notwithstanding the provisions of Article 2, also apply to persons who are not residents of one or both of the Contracting States.
2. The taxation on a permanent establishment which an enterprise of a Contracting State has in the other Contracting State shall not be less favourably levied in that other State than the taxation levied on enterprises of that other State carrying on the same activities. This provision shall not be construed as obliging a Contracting State to grant to residents of the other Contracting State any personal allowances, reliefs and reductions for taxation purposes on account of civil status or family responsibilities which it grants to its own residents.
3. Nothing in this Agreement shall be construed as preventing a Contracting State from imposing under its laws an income tax (referred to as a "branch profits tax") on the deemed repatriated income of a company which is a resident of the other Contracting State in addition to the income tax imposed on the chargeable income of the company in accordance with this Agreement; provided that any branch profits tax so imposed shall not exceed 10 per cent of the amount of the deemed repatriated income in the year of assessment.
4. Except where the provisions of paragraph 1 of Article 9, paragraph 6 of Article 11, paragraph 6 of Article 12 or paragraph 6 of Article 13 apply, interest, royalties, technical fees and other disbursements paid by an enterprise of a Contracting State to a resident of the other Contracting State shall, for the purpose of determining the taxable profits of such enterprise, be deductible under the same conditions as if they had been paid to a resident of the first-mentioned State.
5. Enterprises of a Contracting State, the capital of which is wholly or partly owned or controlled, directly or indirectly, by one or more residents of the other Contracting State, shall not be subjected in the first-mentioned State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which other similar enterprises of the first-mentioned State are or may be subjected.

ARTICLE 25***Mutual Agreement Procedure***

1. Where a person considers that the actions of one or both of the Contracting States result or will result for that person in taxation not in accordance with the provisions of this Agreement, that person may, irrespective of the remedies provided by the domestic law of those States, present a case to the competent authority of the Contracting State of which the person is a resident or, if the case comes under paragraph 1 of Article 24, to that of the Contracting State of which the person is a national. The case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Agreement.

2. The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of taxation which is not in accordance with the Agreement. Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting States.
3. The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Agreement. They may also consult together for the elimination of double taxation in cases not provided for in the Agreement.
4. The competent authorities of the Contracting States may communicate with each other directly for the purpose of reaching an agreement in the sense of the preceding paragraphs.
5. If it seems desirable to amend any Article of the Agreement without affecting the general principles thereof, the necessary amendments may be made by mutual consent by means of exchange of diplomatic notes.

ARTICLE 26

Exchange of Information

1. The competent authorities of the Contracting States shall exchange such information as is foreseeably relevant for carrying out the provisions of this Agreement or to the administration or enforcement of the domestic laws concerning taxes covered by this Agreement. The exchange of information is not restricted by Article 2 of the Agreement.
2. Any information received under paragraph 1 by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, the determination of appeals in relation to the taxes referred to in paragraph 1, or the oversight of the above. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions.
3. In no case shall the provisions of paragraph 1 be construed so as to impose on a Contracting State the obligation:
 - a) to carry out administrative measures at variance with the laws and the administrative practice of that or of the other Contracting State;
 - b) to supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;
 - c) to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information the disclosure of which would be contrary to public policy (*ordre public*).

4. If information is requested by a Contracting State in accordance with this Article, the other Contracting State shall use its information gathering measures to obtain the requested information, even though that other State may not need such information for its own tax purposes. The obligation contained in the preceding sentence is subject to the limitations of paragraph 3 but in no case shall such limitations be construed to permit a Contracting State to decline to supply information solely because it has no domestic interest in such information.
5. In no case shall the provisions of paragraph 3 be construed to permit a Contracting State to decline to supply information requested by the other Contracting State because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person.

ARTICLE 27

Members of Diplomatic Missions and Consular Posts

Nothing in this Agreement shall affect the fiscal privileges of members of diplomatic missions or consular posts under the general rules of international law or under the provisions of special agreements.

ARTICLE 28

Assistance in Recovery

1. The Contracting States shall, to the extent permitted by their respective domestic law, lend assistance to each other in order to recover the taxes referred to in Article 2 as well as interest and penalties with regard to such taxes, provided that reasonable steps to recover such taxes have been taken by the Contracting State requesting such assistance.
2. Claims which are the subject of requests for assistance shall not have priority over taxes owing in the Contracting State rendering assistance and the provisions of paragraph 1 of Article 25 shall also apply to any information which, by virtue of this Article, is supplied to the competent authority of a Contracting State.
3. It is understood that unless otherwise agreed by the competent authorities of both Contracting States,
 - a) ordinary costs incurred by a Contracting State in providing assistance shall be borne by that State;
 - b) extraordinary costs incurred by a Contracting State in providing assistance shall be borne by that other State and shall be payable regardless of the amount collected on its behalf by the first-mentioned State.

As soon as a Contracting State anticipates that extraordinary costs may be incurred, it shall so advise the other Contracting State and indicate the estimated amount of such costs.

4. The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of the provisions of this Article.

ARTICLE 29

Entry into Force

1. Each of the Contracting States shall notify to the other, by means of exchange of diplomatic notes, the completion of the procedures required by its law for the bringing into force of this Agreement. The Agreement shall enter into force on the date of receipt of the later of these notifications.
2. The provisions of the Agreement shall apply:
 - a) with regard to taxes withheld at source, in respect of amounts paid or credited on or after the thirtieth day following the date upon which the Agreement enters into force; and
 - b) with regard to other taxes, in respect of years of assessment beginning on or after the date upon which this Agreement enters into force.

ARTICLE 30

Termination

1. This Agreement shall remain in force indefinitely but either of the Contracting States may terminate the Agreement, through the diplomatic channels, by giving to the other Contracting State written notice of termination not later than 30 June of any calendar year starting five years after the year in which the Agreement entered into force.
2. In such event the Agreement shall cease to apply:
 - a) with regard to taxes withheld at source, in respect of amounts paid or credited after the end of the calendar year in which such notice is given; and
 - b) with regard to other taxes, in respect of years of assessment beginning after the end of the calendar year in which such notice is given.

IN WITNESS WHEREOF the undersigned, being duly authorised thereto, have signed this Agreement.

DONE at Pretoria in duplicate, this 17th day of October 2012

FOR THE GOVERNMENT OF
THE KINGDOM OF SWAZILAND

FOR THE GOVERNMENT OF
THE REPUBLIC OF SEYCHELLES