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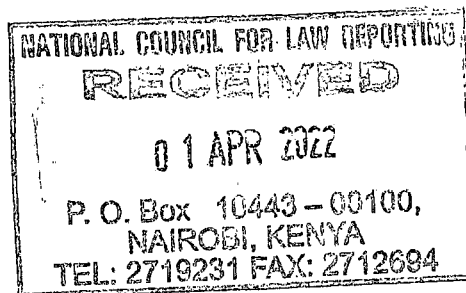
NAIROBI, 10th March, 2022

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THE CHILD JUSTICE BILL, 2022

A Bill for

AN ACT of Parliament to establish a criminal justice system for children suspected or accused of committing offences; to protect the rights of children as recognized in international instruments; to increase the minimum age of criminal culpability and for connected purposes

ENACTED by the Parliament of Kenya as follows—

PART I—PRELIMINARY

1. This Act may be cited as the Child Justice Act, 2022 and, shall come into force on such date as the Cabinet Secretary may, by notice in the *Gazette*, appoint and different dates may be appointed for different sections.

Short title and commencement.

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

Interpretation.

“an appropriate adult” means any member of a child’s family or a custodian or guardian of a child but does not include a parent or a primary care-giver as defined in the Children Act;

“assessment” means assessment of a child by a children officer as contemplated in Part V of this Act;

“Cabinet Secretary” means the Cabinet Secretary responsible for matters relating to children;

“child” means a person below the age of eighteen years;

“children court” means a court defined as such under Part V;

“child voluntarily acknowledges responsibility” means an admission of responsibility for an offence by a child without formal admission of guilt;

“community service” means work for a community organization or other work of value to the community performed by a child without payment;

“detention” includes confinement in a police cell, lock-up, place of safety, remand home, rehabilitation center or other residential facility;

“diversion option’ means an option contemplated in Section 48, and includes an option developed in terms of this Act;

“family group conference” means a conference contemplated in section 49;

“*guardian ad litem*” means an adult appointed by the court to represent the best interests of the child;

“independent observer” means a representative from a community or organization, or community police forum, who is not in the full-time employ of the State and, who is accredited in terms of this Act;

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

“preliminary inquiry” means an inquiry contemplated in Part VI of this Act;

“prescribed” means prescribed by regulation made under this Act;

“residential facility” means any residential facility established and designated to receive sentenced children;

“residential requirement” means compulsory residence in a residential facility or a place other than the home of the child;

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

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

3. The objects of this Act are to—

- (a) enhance the protection of the rights of a child accused of or charged with a criminal offence by providing a legal framework for realization of Article 53 of the Constitution of Kenya and international Conventions ratified by Kenya and, in particular, the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child; and

Object and
purpose of the
Act.

- (b) promote and protect the duties and responsibilities of the child in the child justice system by—
 - (i) fostering the sense of dignity and worth of a child;
 - (ii) reinforcing a child's respect for the human rights and fundamental freedoms of other persons through holding the child accountable for their actions and safe-guarding the interests of the victim and the community;
 - (iii) promoting reconciliation through restorative justice; and
 - (iv) involving the victim, parents, family members, and members of the community in the child justice processes to promote the reintegration of child back to the community; and
- (c) promote co-operation between government departments and other organizations and agencies involved in implementing an effective child justice system.

4. (1) A person performing any function under this Act shall be guided by the following principles—

General principles.

- (a) the best interests of the child shall be taken into account as a primary consideration in every action in court involving a child;
- (b) a court shall not discriminate against any child on the basis of race, colour, ethnicity, creed, sex, social origin, political affiliations, culture or any other grounds;
- (c) detention and institutionalization of a child shall be applied as a means of last resort;
- (d) a child shall be accorded the opportunity to be heard and respond before any decision affecting them is taken;
- (e) the dignity of the child shall be preserved at all stages of the trial from pre-arrest to post trial period;
- (f) every child shall be addressed in a manner appropriate to their age and intellectual

development, and shall be spoken to and be allowed to speak in their language of choice, through an interpreter where necessary;

- (g) every child shall be treated in a manner which takes into account cultural values and beliefs;
- (h) all procedures required under this Act shall be conducted and completed speedily;
- (i) every child has the right to maintain contact with their family and have access to legal and social services;
- (j) parents and families have the right to assist their child in proceedings under this Act and, wherever possible, to participate in decisions affecting them;
- (k) all consequences arising from the commission of an offence by a child shall be proportionate to the circumstances of the child, the nature of the offence and the interests of society, and a child shall not be treated more severely than an adult would have been in the same circumstances;
- (l) a child lacking in family support, or educational or employment opportunities must have equal access to available services and every effort must be made to ensure that children receive equal treatment when having committed similar offences.

(2) A police officer, the Director of Public Prosecutions, any prosecutor designated thereto by the Director, a magistrate or any officer presiding in a Child Justice Court shall consider the following principles when making a decision which involves release of a child from detention—

- (a) preference shall be given to the release of a child into the care of the parent or an appropriate adult and may impose conditions for the release;
- (b) release of the child on bail where release of the child into the care the parent or an appropriate adult is not feasible;

- (c) detention shall be used as a measure of last resort and recourse shall be heard to the least restrictive form of detention appropriate to the child and the offence;

(3) A child detained in police custody shall—

(a) be detained—

- (i) held in separate confinement from adults and boys shall be held separate confinement from girls; and
- (ii) under conditions that reduce the risk of harm to the child, including the risk of harm caused by other children;

(b) have the right to—

- (i) adequate food and water;
- (ii) medical treatment;
- (iii) reasonable visits by parents, guardians, legal representatives, registered social workers, children officers, health workers and religious counsellors;
- (iv) access to reading material;
- (v) access to education and life skills as appropriate if detained for a long period;
- (vi) adequate exercise; and
- (vii) adequate clothing and sufficient blankets and bedding.

5. (1) Subject to subsections (2) and (3), this Act applies to—

Application of the Act.

- (a) any person in Kenya, irrespective of their nationality, country of origin or immigration status alleged to have committed an offence and who, at the time of commission of the alleged was under the age of eighteen years; and
- (b) a person contemplated in paragraph (a) who attains the age of eighteen years before proceedings instituted against him or her in terms of this Act have been concluded.

(2) The Criminal Procedure Act applies to any person contemplated in subsection (1), except in so far as this Act provides different procedures in respect of such person. Cap. 75

(3) The Director of Public Prosecutions or a prosecutor designated by the Director may, under exceptional circumstances, direct that this Act applies to a person who is alleged to have committed an offence and who, at the time of commission of the alleged offence, was above the age of eighteen years and not above the age of twenty-one years.

(4) The circumstance contemplated in subsection (3) include—

- (a) an instance where there are several co-accused and majority of them are under the age of eighteen years; or
- (b) where a person commits a further offence while serving a residential sentence imposed in terms of this Act and after attaining the age of eighteen years.

6. (1) No prosecution shall not be commenced under this Act for an offence committed by a child who is below the age of eight years. Criminal culpability.

(2) A child who commits an offence while under the age of twelve years shall be presumed not to have had the capacity to appreciate the difference between right and wrong, unless the prosecution proves criminal capacity on the part of the child.

(3) Where the Director of Public Prosecutions intends to charge a child contemplated in subsection (2) with an offence, the Director of Public Prosecution shall issue a certificate confirming intention to prosecute the child.

(4) Where the certificate contemplated in subsection (3) is not issued within fourteen days after the preliminary inquiry, the Director of Public Prosecutions shall be deemed to decline to institute prosecution.

(5) In issuing the certificate contemplated in subsection (3), the Director of Public Prosecutions may consider any relevant information including—

- (a) the appropriateness of diversion;
- (b) educational level, cognitive ability, domestic and environmental circumstances, age and maturity of the child;
- (c) the nature and gravity of the alleged offence;
- (d) the impact of the alleged offence on the victim; and
- (e) the children officer's assessment report.

PART II—PRELIMINARY INQUIRY

7. (1) Any of the following methods may be used to secure the attendance of a child at a preliminary inquiry—

Methods of securing attendance.

- (a) written notice;
- (b) summons; or
- (c) arrest.

(2) Before a police officer uses any method contemplated in subsection (1), the police officer may request the Director of Public Prosecutions to determine whether the matter should be set down for conduct of a preliminary inquiry.

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

Arrest.

(2) A warrant of arrest issued in respect of a child shall direct that the child be produced to appear at a preliminary inquiry.

(3) Where a warrant of arrest is executed outside normal court hours, the police officer concerned shall take into account the principles set out in section 4(2).

(3) The police officer responsible for arresting a shall—

- (a) inform the child of the nature of the allegation against them;
- (b) inform the child in prescribed manner of their rights in relation to the arrest;

- (c) explain to the child the immediate procedures relating to the arrest in terms of this Act; and
- (d) notify the child's parent, the children's officer or an appropriate adult of the arrest.

(4) The arresting officer shall, not later than twenty-four hours after the arrest, inform the relevant children's officer of such arrest in the prescribed manner.

(5) A police officer who arrests a child shall whether assessment of the child has been conducted or not, produce the child to appear at a preliminary inquiry within twenty-four hours of the arrest or, if twenty four hours expire outside court hours or on a day which is not a court day, no later than the end of the first court day after the expiry of the twenty four hours.

(6) Where a police officer is unable to inform a children's officer of the arrest, the police officer shall submit a written report to the inquiry magistrate at the preliminary inquiry furnishing reasons for the non-compliance.

(7) Where a child accused of an offence listed in the First Schedule is not released from detention before appearing at a preliminary inquiry, the investigating police officer shall provide the inquiry magistrate with a written report in the prescribed manner citing reasons for the non-release.

(8) A police officer may not arrest a child under the age of twelve years alleged to have committed an offence, but—

- (a) shall inform the relevant children's officer of such particulars regarding the child as may be prescribed; and
- (b) may remove the child to a place of safety, if the police officer has reason to believe that the child is a child in need of care and protection under the Children Act.

9. (1) A summon issued in respect of a child shall specify the place, date and time for conduct of the preliminary inquiry.

Summons.

(2) A copy of the summons served on a child shall be served on the parent of the child or an appropriate adult.

(3) A police officer shall—

- (a) not later than twenty-four hours after service of the summons, inform the relevant children's officer of the service of such summon in the prescribed manner; and
- (b) as soon as practicable but before commencement of the preliminary inquiry, explain the rights contemplated in section 8(3) to the child.

10. (1) A police officer may notify a child to appear at a preliminary inquiry at a specified time on a specified date and remain in attendance at the proceedings.

Notice to appear
at preliminary
inquiry.

(2) An officer under subsection (1) shall inform the parent of the child or an appropriate adult to produce the child or cause the child to be produced at the preliminary inquiry and, have the child remain in attendance at the proceedings.

(3) A police officer who notifies a child under subsection (1) shall complete and hand to the child and to the parent of the child or an appropriate adult, as the case may be, a written notice which shall indicate the alleged offence, the date, the time and place at which the child shall appear.

(4) The police officer shall—

- (a) upon delivery of the notice, inform the child, the parent of the child or the appropriate adult, as the case may be of the rights contemplated in section 8 (3) of this Act; and
- (b) not later than twenty-four hours after serving the summons inform the relevant children's officer in the prescribed manner.

11. (1) Where the age of a person alleged to have committed an offence cannot be ascertained through a birth certificate, but there exists grounds to determine that the age of the person would render the person subject to this Act, the police officer shall consider the person to be a child for purposes of this Act, subject to estimation of the age of the person at the preliminary inquiry.

Age of child.

(2) In making the estimation, the officer shall consider the available information in the following order—

- (a) any statements made by the parent, the legal guardian or any other person likely to have direct knowledge of the age of the child;
- (b) any statement made by the child;
- (c) baptismal certificate, school registration form or school report, or other information of a similar nature; or
- (d) any estimation of age made by a medical practitioner.

12. (1) A police officer shall release a child accused of an offence referred to in the First Schedule from police custody into the care their parent or an appropriate adult before the child appears at the preliminary inquiry, unless—

Release of a child.

- (a) there exists exceptional circumstances as prescribed in this Act which warrant detention ;
- (b) the parent of the child or an appropriate adult is not available, and all reasonable efforts have been made to locate the parent or appropriate adult; or
- (c) there is substantial risk that the child may be a danger to themselves or any other person.

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

- (a) is in detention in police custody and who is accused of an offence referred to in the Second Schedule; or
- (b) is accused of an offence referred to in the First Schedule but has not been released in terms of subsection (1), into the care of the parent of the child or an appropriate adult on any one or more of the conditions referred to in subsection (3).

(3) A child may be released in terms of subsection (2) on condition that the child—

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

- (b) does not interfere with a witness, tamper with evidence or associate with a person or group of persons; and
- (c) resides at a particular address.

13. The Director of Public Prosecutions may, notwithstanding the decision of a police officer to the contrary, authorize the release of a child contemplated in section 12(2) from detention in police custody into the care of the parent of the child or an appropriate adult and, where the release is authorized, the written notice referred to in section 15(1)(a) shall be handed to the child and the person into whose care the child is released.

Authority to release child by Director of Public Prosecutions.

14. A police officer who releases any child from detention in accordance with section 12 or 13 and places such child in the care of a parent or an appropriate adult, shall—

Duty of police officer and person into whose care a child is released.

- (a) at the time of release of the child, complete and hand to the child and the person to whose care the child is released, a written notice in the prescribed form on which alleged offence shall be entered, any conditions relating to the release of the child and the place, date and time for conduct of the preliminary inquiry;
- (b) inform the parent or appropriate adult to produce the child or cause the child to be produced to appear at the preliminary inquiry at a specified place, date and time and remain in attendance;
- (c) where conditions are imposed, ensure that the child complies with such conditions; and
- (d) inform the child to appear at the preliminary inquiry at a specified place, date and time and remain in attendance and, if any conditions have been imposed, comply with such conditions.

15. (1) Notwithstanding the provisions of the Criminal Procedure Act, the Director of Public Prosecutions or a prosecutor may, in consultation with the police officer in charge of the investigation, authorize the release of a child accused of an offence referred to in the Second Schedule on bail prior to the appearance of that child at a preliminary inquiry, subject to reasonable conditions where

Authority to release on bail to be in writing.
Cap. 75

release of the child into the care of the parent or an appropriate adult is not appropriate.

(2) The Director of Public Prosecutions may, after consultation with the Cabinet Secretary for the time being responsible for justice, issue directives regarding amounts that may be set for bail in terms of subsection (1).

16. Subject to section 17, a police officer shall not release a child accused of an offence referred to in the Third Schedule from detention in police custody.

Non-releasable offences.

17. Where a child cannot for any reason be released into the care of a parent or an appropriate adult or cannot be released on bail, the child shall, be placed in a place of safety where such a place is available within a reasonable distance from the place where the child has to appear for a preliminary inquiry.

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

18. (1) Where a child in detention in police custody complains of any injury sustained during arrest or detention, the police officer to whom such complaint is made shall report the complaint to the Officer Commanding Station who shall delegate a police officer to take the child to a medical practitioner for examination as soon as practicable.

Injuries during arrest or detention.

(2) The report by the medical practitioner under subsection (1) shall be included in the appropriate police docket.

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

19. (1) The Officer Commanding station for each police station shall keep a register in which the prescribed details of all children detained in the station shall be recorded distinctively.

Register of children detained in police cells.

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

20. Upon receipt of a notification that a child has been arrested, served with a summons or issued with a written notice, the children's officer shall make immediate arrangements for assessment of the child appearance of the child at the preliminary inquiry.

Assessment of a child before preliminary inquiry.

21. (1) The assessment of a child may take place in any suitable place identified by the children officer, and such a place may include a room at the magistrate's court or at the offices of the Department of Children's Services.

Place of assessment.

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

22. (1) A child shall be present at the assessment in terms of this Act.

Persons to attend assessment.

(2) Subject to section 23(3), a child's parent or an appropriate adult shall attend the assessment of the child.

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

- (a) the Director of Public Prosecutions or a prosecutor duly designated by the Director;
- (b) the legal representative of the child;
- (c) any police officer;
- (d) any person whose presence is necessary or desirable for the assessment; and
- (e) any other person whose attendance is deemed necessary, including a social worker, child psychologist or researcher.

(4) A children's officer may exclude any person referred to in subsection (2) and (3), except the legal representative of the child, from attending the assessment where presence of such a person is likely to obstruct the completion of the assessment.

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

Notice to attend assessment.

(2) A notice contemplated in subsection (1) shall be delivered by a police officer upon the request of the children officer in the prescribed manner.

(3) A person who has been notified in terms of subsection (1) may apply to the children officer not to

attend the assessment, and the children officer may in writing, exempt the person attending assessment.

(4) Where a person who is notified in terms of subsection (1) and is not exempted in terms of subsection (3) fails to attend the assessment, the person commits an offence and, upon conviction, be liable to a fine not exceeding fifty thousand shillings or imprisonment for a term not exceeding three months, or to both.

(5) A children officer may request a police officer, in the prescribed manner, to—

- (a) obtain any documentation required for the completion of assessment of a child;
- (b) locate a child's parent or an appropriate adult; or
- (c) provide transport in order to secure the attendance at the assessment of a child, the parent of the child or an appropriate adult.

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

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

24. (1) A children officer shall—

- (a) explain the purpose of assessment to the child;
- (b) inform the child of his or her rights in the prescribed manner;
- (c) explain to the child the immediate procedures to be followed in terms of this Act; and
- (d) inquire from the child whether or not he or she intends to acknowledge responsibility for the alleged offence.

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

- (a) the Director of Public Prosecutions or a prosecutor designated in writing by the Director of Public Prosecutions;

Duties of a
children officer
during
assessment.

- (b) the police officer who arrested the child, served the summons, issued the written warning or is responsible for investigation of the matter; or
- (c) any person who may provide information necessary for the assessment.

(4) The children officer may consult any person who is not present at the assessment and who has any information relating to the assessment, and where additional information is obtained, the child shall be informed of such information.

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

(6) The children officer shall encourage the participation of the child during the assessment process.

(7) The children officer shall complete an assessment report in the prescribed manner with recommendations on—

- (a) the prospects of diversion;
- (b) the possible release of the child into the care of a parent or an appropriate adult, if the child is in detention;
- (c) the placement, where applicable, of a child in a particular place of safety, remand; or
- (d) the transfer of the matter to a children's court, stating reasons for such recommendation.

(8) If it appears to the children officer that the child does not intend to acknowledge responsibility for the alleged offence, the children officer shall indicate this accordingly in the assessment report.

(9) The report referred to in subsection (7) must be submitted to the Director of Public Prosecutions or a prosecutor duly designated by the Director before the commencement of the preliminary inquiry.

25. (1) If the age of a child who is to be assessed is uncertain, the children officer shall make an estimation of the child's age in accordance with section 11(2) and shall

Estimation of age.

complete the prescribed form.

(2) The children officer shall submit the estimation on the prescribed form together with any relevant documentation to the inquiry magistrate before the child's appearance at a preliminary inquiry.

PART III—PRELIMINARY INQUIRY

26. (1) A preliminary inquiry shall be held in respect of every child prior to plea.

Objectives of preliminary inquiry.

(2) A child's appearance at a preliminary inquiry shall be regarded as his or her first appearance in a court as contemplated in the Criminal Procedure Act.

Cap. 75.

(3) The objectives of a preliminary inquiry are to—

- (a) establish whether the matter can be diverted before plea;
- (b) identify a suitable diversion option, where applicable;
- (c) establish whether the matter should be transferred to a children's court under the Children Act;
- (d) provide an opportunity for the Director of Public Prosecutions, or a prosecutor duly designated by the Director, to assess whether there are sufficient grounds for the matter to proceed to trial;
- (e) ensure that all available information relevant to the child, his or her circumstances and the offence is considered in order to make a decision on diversion and placement of the child;
- (f) ensure that the views of all person's present are considered before a decision is taken;
- (g) encourage the participation of the child and his or her parent or an appropriate adult in decisions concerning the child; and
- (h) determine the release or placement of the child pending—
 - (i) conclusion of the preliminary inquiry;
 - (ii) appearance of the child in a court; or
 - (iii) transfer of the matter to the children's court.

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(4) A preliminary inquiry may be held in a court or any other suitable place.

(5) The inquiry magistrate shall conduct the proceedings in an informal manner by asking questions, interviewing persons at the inquiry and eliciting any other relevant information.

27. The registrar shall designate a magistrate as the inquiry magistrate for each sub-county unless there exists a One-Stop Child Justice Centre in the respective sub-county.

Designation of inquiry magistrate.

28. (1) The following persons shall attend the preliminary inquiry—

Persons to attend preliminary inquiry.

- (a) the child;
- (b) the parent of the child or an appropriate adult;
- (c) the children officer; and
- (d) any person contemplated in section 30 (1) (a).

(2) The inquiry magistrate may exclude the child's parent or an appropriate adult from attending the preliminary inquiry if the presence of the parent or adult at the preliminary inquiry is contrary to the best interest of the child.

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

(4) If a preliminary inquiry proceeds in absence of a children officer, the children officer's assessment report shall be available at the preliminary inquiry unless assessment has been dispensed with in terms of this Act.

(5) The following persons may attend the preliminary inquiry—

- (a) the child's legal representative;
- (b) police official in charge of investigations;
- (c) any social worker, child psychologist, counselor or researcher, with the approval of the inquiry magistrate; and
- (d) any person contemplated in section 30 (1) (b).

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

Procedure during
preliminary
inquiry.

- (a) the inquiry magistrate shall determine the age of a child in accordance with section 11, if necessary;
- (b) the inquiry magistrate shall, in the prescribed manner—
 - (i) explain the purposes of the preliminary inquiry to the child;
 - (ii) inform the child of the nature of the allegation against him or her;
 - (iii) inform the child of his or her rights; and
 - (iv) explain to the child the immediate procedures to be followed in terms of this Act.
- (c) the prosecutor shall ensure that the inquiry magistrate has a copy of the children officer's assessment report, if available, or the form and documentation contemplated in section 25(2);
- (d) information regarding a previous diversion or previous conviction of the child concerned may be submitted produced by any person attending the inquiry.

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

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

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

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

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

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

30. (1) The presiding magistrate may—

Powers and duties
of preliminary
magistrate.

- (a) cause to be summoned any person whose presence is necessary for the conclusion of the preliminary inquiry;
- (b) permit the attendance of any other person who may be able to contribute to the proceedings;
- (c) request any further documentation or information which may be relevant or necessary to the proceedings;
- (d) after consideration of the information contained in the assessment report, elicit any information from any person attending the inquiry to supplement or clarify the information in the assessment report;
- (e) take such steps as may be necessary to establish the truth of any statement or the correctness of any submission; and
- (f) where the conduct of the proceedings of the preliminary inquiry or any aspect concerning the proceedings is in dispute, rule on the conduct of the proceedings in a manner consistent with the provisions of this Act.

(2) If the child has not yet been assessed, the inquiry magistrate may dispense with assessment if it is in the best interests of the child to do so.

(3) The inquiry magistrate shall ensure that the child, the child's legal representative, the child's parent or an appropriate adult are informed of—

- (a) the recommendations in the children officer's assessment report; and
- (b) any diversion option available in the sub-county and the aim and content of such option.

(4) If the children officer is present at the preliminary inquiry, the inquiry magistrate may request the children officer to explain any recommendation or statement made in the assessment report, or provide additional information.

(5) The inquiry magistrate shall consider the reports regarding the arrest of the child and detention in police custody provided by the arresting police official.

31. Despite provisions to the contrary in any law, a fingerprint of a child may not be taken before conclusion of the preliminary inquiry in respect of the child, unless the fingerprints are—

Fingerprints.

- (a) essential for investigations relating to the alleged offence;
- (b) required to establish the age of the person concerned; or
- (c) necessary to establish the previous convictions of a child for purposes of making a decision on diversion, release from detention in police custody or placement in a place of safety, or remand.

32. (1) If the age of the child is uncertain, the inquiry magistrate shall determine the age of the child after considering the form and any documentation submitted by the children officer in terms of this Act.

Age
determination.

(2) For the purposes of a determination—

- (a) an inquiry magistrate may require any relevant documentation, information or statement from any person;
- (b) an inquiry magistrate may summon any person to produce the documentation, information or statements contemplated in paragraph (a); and
- (c) section 11(2) applies with necessary modifications.

(3) The inquiry magistrate shall enter the age determined in terms of subsection (1) in the record as the age of the child and, the age so entered shall be regarded as the correct age of the child until the contrary is proved on a balance of probabilities.

(4) Where the inquiry magistrate determines that the person was above the age of eighteen years at the time of

commission of the alleged of the offence, the magistrate shall close the preliminary inquiry and, defer the proceedings.

(5) If the inquiry magistrate makes a determination of age that is not supported by a valid birth certificate, identity document or passport, a copy of the record of the determination shall be forwarded to the Ministry in charge of issuance of identification documents for the Ministry to issue an identification document to the person.

33. (1) A child or his or her parent, or an appropriate adult, who has been informed to appear at a preliminary inquiry by a police officer in terms of section 10 and who fails to appear at such inquiry, commits an offence and shall be liable on conviction to the punishment prescribed in subsection (2) or (3).

Failure to appear at preliminary inquiry.

(2) The inquiry magistrate may—

- (a) if satisfied that the person into whose care the child was released, was notified in terms of section 10(1) and that the person has failed to comply with the warning or condition imposed, issue a warrant for the arrest of that person;
- (b) when the person is brought before the inquiry magistrate, in a summary manner, enquire into his or her failure to appear at the preliminary inquiry or failure to comply with the condition; and
- (c) unless the person satisfies the magistrate that there is a reasonable possibility that the failure contemplated in paragraph (b) was not due to fault on his or her part, sentence him or her to a fine not exceeding fifty thousand shillings or to imprisonment for a period not exceeding three months, or both.

(3) Subsection (2) applies with the changes required by the context, and subject to sections 74 and 76, to a child who has been released into the care of his or her parent or an appropriate adult and who fails to comply with the directions contained in the written notice referred to in section 10(1)(a) or with any condition imposed in terms of section 12(2).

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

Conditions for
release of child.

- (a) the case is not disposed of at the first appearance at the preliminary inquiry; and
- (b) it is in the interests of justice to so release the child.

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

- (a) the best interests of the child;
- (b) whether the child has any previous convictions;
- (c) the availability of the child's parent or an appropriate adult;
- (d) the likelihood of the child returning to the preliminary inquiry for a further appearance;
- (e) the period for which the child has already been in detention since arrest;
- (f) the probable period of detention of the child until conclusion of the preliminary inquiry;
- (g) the risk that the child may be a danger to himself or herself or to any other person;
- (h) the state of health of the child;
- (i) the reason for any delay in the disposal or conclusion of the preliminary inquiry and whether such delay was due to any fault on the part of the State or on the part of the child or his or her legal representative;
- (j) whether detention would prejudice the child in the preparation of the defence case;
- (k) the likelihood that, if the child is convicted of the offence, a sentence of substantial imprisonment will be imposed;
- (l) the fact that the child is between eight and twelve years of age and presumed to lack criminal capacity; and

- (m) the receipt of a written confirmation by the Director of Public Prosecutions of intent to charge the child with an offence under the Third Schedule .

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

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

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

(5) Any person in whose care a child is placed and who fails to comply with subsection (4) commits an offence and shall be liable upon conviction to a fine not exceeding fifty shillings or to imprisonment for a period not exceeding three months, or both.

(6) Subject to sections 75 and 77, a child who has been released into the care of a parent or an appropriate adult and who fails to comply with any condition imposed in terms of subsection (3) commits an offence and shall be liable upon conviction to a fine not exceeding fifty shillings or to imprisonment for a period not exceeding three months, or both.

35. (1) An inquiry magistrate may release a child on the own recognizance of the child and after consideration of the factors contemplated in section 34(2), with or

Release on own
recognizance.

without conditions as set out in section 34(3), and shall order the child to appear at a preliminary inquiry at a specified place and time.

(2) Subject to sections 75 and 77, a child who has been released on his or her own recognizance and who fails to appear at the preliminary inquiry at the place and time contemplated in subsection (1), or to comply with any condition imposed in terms of subsection (1) commits an offence and shall be liable upon conviction to a fine not exceeding fifty shillings or to imprisonment for a period not exceeding three months, or both.

36. (1) An inquiry magistrate may, if the release of a child on his or her own recognizance or into the care of a parent or an appropriate adult is for any reason not possible, after consideration of the factors contemplated in section 34(2), release the child on bail subject to any one or more of the conditions contemplated in section 34(3). Bail.

(2) If bail has been granted previously for a child appearing at a preliminary inquiry by a police officer in terms of section 15(1) or by the Director of Public Prosecutions or a prosecutor designated thereto by the Director, the inquiry magistrate may extend the bail on the same conditions, amended conditions or additional conditions and may increase or reduce the amount of bail.

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

- (a) the proceedings of a preliminary inquiry are postponed in terms of section 38 or 39; and
- (b) the release of a child on his or her own recognizance, into the care of a parent or an appropriate adult or on bail is for any reason not possible.

(2) If a place of safety or remand is not available or if there is no vacancy, the child may be detained in a police station as long as the detention facilities at the police station—

- (a) are suitable for the detention of children; and
- (b) provide for children to be detained separately from adults.

(3) An inquiry magistrate may order the further detention of a child in a place of safety or, subject to subsection (5), a remand home, if—

- (a) the child is to appear for plea and trial as contemplated in section 43(1); and
- (b) the release of a child on his or her own recognizance, into the care of a parent or an appropriate adult or on bail is for any reason not possible.

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

(5) A child of eighteen years or older charged with an offence referred to in the Third Schedule may be detained in a borstal institution if there is—

- (a) no place of safety or remand home within a reasonable distance of the preliminary inquiry at which the child is appearing;
- (b) no vacancy in the place of safety or remand; or
- (c) a substantial risk that the child will cause harm to other children in the place of safety or in the remand.

and an inquiry magistrate who makes an order that a child be detained in a borstal institution shall record the reasons for making such an order.

(6) If an inquiry magistrate orders the further detention of a child in terms of subsections (2), the child shall appear before the magistrate at least every fourteen days.

(7) When a child appears before the inquiry magistrate, the magistrate shall—

- (a) determine whether or not the detention remains necessary;

- (b) if ordering further detention of the child, record the reasons for the detention;
- (c) consider a reduction of the amount of bail, if applicable;
- (d) inquire whether or not the child is being properly treated and kept under suitable conditions; and
- (e) if not satisfied that the child is being properly treated and kept under suitable conditions, inspect and investigate the treatment and conditions and may make an appropriate remedial order.

38. (1) The inquiry magistrate may adjourn the proceedings of a preliminary inquiry for a period not exceeding forty-eight hours for the purposes of—

Postponement of proceedings.

- (a) securing the attendance of a person necessary for the conclusion of the inquiry;
- (b) obtaining information necessary for the conclusion of the inquiry;
- (c) establishing the attitude of the victim regarding diversion;
- (d) planning of a diversion option;
- (e) finding alternatives to pre-trial residential detention; or
- (f) assessing the child, where no assessment has previously been undertaken and it is found that assessment may not be dispensed with.

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

(3) The proceedings of a preliminary inquiry may be adjourned for a further period not exceeding forty-eight hours if the adjournment is likely to increase the prospects of diversion, after which the preliminary inquiry, if it has not been concluded and subject to section 39, shall be

closed and the prosecutor shall set the matter down for plea and trial in a court.

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

Adjournment for purposes of obtaining a detailed assessment.

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

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

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

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

Decision on diversion.

- (a) the assessment report, unless assessment has been dispensed with in section 30(2);
- (b) the views of all the persons present at the preliminary inquiry and any information provided by any such person;
- (c) any information requested in terms of section 30(1)(c); and
- (d) the willingness of the child to acknowledge responsibility for the offence.

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

(3) In addition to the diversion options set out in section 48, the inquiry magistrate may, after consultation with the persons present at the preliminary inquiry, develop an individual diversion option which meets the purposes of and standards applicable to diversion set out in sections 46 and 47.

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

Failure to comply with diversion order.

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

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

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

(4) If the prosecutor decides to proceed with prosecution, the matter shall be set down for plea and trial in a court, in which case section 43 applies with the changes required by the context.

42. (1) If it appears during proceedings at a preliminary inquiry that a child before the court is a child in need of care and protection within the meaning of the Children Act, the matter shall be placed before a children's court and dealt with under the Children Act.

Referral to the children's court.

(2) Referral of a matter to the children's court as a case of a child in need of care and protection shall be considered by an inquiry magistrate if a child—

- (a) has previously been assessed on more than one occasion with regard to minor offences committed to meet the child's basic need for food and warmth, and in the preliminary inquiry in question it is again alleged that the child has committed such an offence;
- (b) is the subject of a current order of the children's court;
- (c) is allegedly abusing dependence-producing substances; or
- (d) does not live at his or her family home or in appropriate substitute care, and is alleged to have committed a minor offence the purpose of which was to meet the child's basic need for food and warmth

43. (1) If no diversion has taken place and the child has not been transferred to a children's court as a case of a child in need of care and protection upon the conclusion of the preliminary inquiry, the prosecutor shall inform the inquiry magistrate of the place, date and time when the child shall appear for plea and trial in a children's court or a Child Justice Court at a One-Stop Child Justice Centre.

Procedure upon referral of matter to court.

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

- (a) is not legally represented, explain to the child and the parent or an appropriate adult, as the case may be, the provisions of Part X regarding legal representation; and
- (b) indicates an intention to apply for legal representation at State expense in terms of section 76, assist the child, as far as is reasonably possible, to make such application.

(3) If the child is—

- (a) in detention, the inquiry magistrate shall inform the child of the place, date and time of the next appearance in court and shall warn the child's parent or an appropriate adult to attend such proceedings at the specified place and time; or
- (b) not in detention, the inquiry magistrate—

- (i) may alter or extend any condition imposed in terms of section 12(2) or section 34(3); and
- (ii) shall warn the child and his or her parent or an appropriate adult, as the case may be, to appear in court at a specified place, date and time.

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

PART VI—DIVERSION

44. The purpose of diversion is to—

Purpose of diversion.

- (n) encourage the child to be accountable for the harm caused;
- (o) meet the particular needs of the individual child;
- (p) promote the re-integration of the child into the family and community;
- (q) provide an opportunity to those affected by the harm to express their views on its impact on them;
- (r) encourage the rendering to the victim of some symbolic benefit or the delivery of some object as compensation for the harm;
- (s) promote reconciliation between the child and the person or community affected by the harm caused by the child;
- (t) prevent stigmatizing the child and prevent adverse consequences flowing from being subject to the criminal justice system; and
- (u) prevent the child from having a criminal record.

45. A child shall be considered for diversion if—

Conditions for diversion.

- (a) the child voluntarily acknowledges responsibility for the offence;
- (b) the child understands his or her right to remain silent and has not been unduly influenced to acknowledge responsibility;

- (c) there is sufficient evidence to prosecute; and
- (d) the child and the parent, or a guardian, consent to the diversion.

46. (1) A child may not be excluded from a diversion programme due to an inability to pay any fee required for such programmed.

Standards
applicable to
diversion.

(2) A child may be required to perform community service as an element of diversion, with due consideration to the child's age and development.

(3) Diversion options—

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

(4) Diversion options shall, where reasonably possible—

- (a) impart useful skills;
- (b) include a restorative justice element which aims at healing relationships, including the relationship with the victim;
- (c) include an element which seeks to ensure that the child understands the impact of his or her behavior on others, including the victims of the offence, and may include compensation or restitution; and
- (d) be presented in a location reasonably accessible to the child, and a child who cannot afford transport in order to attend a selected diversion programmed should, as far as is reasonably possible, be provided with the means to do so.

(5) Any diversion option presented by a government department or a non-governmental organization, which has a predetermined content and duration and which involves a

service to groups of children or offers a service to individual children on a regular basis, shall be registered as prescribed.

47. (1) The Cabinet Secretary shall—

Responsibility of
the Cabinet
Secretary.

- (a) develop suitable diversion options as contemplated in this Part; and
- (b) maintain a register or cause a register to be maintained of children who have been subject to diversion in terms of this Act.

(2) Subsection (1)(a) shall not preclude any government department or non-governmental organization from developing suitable diversion options for children who are alleged to have committed offences.

48. (1) For the purposes of this section—

Levels of
diversion options.

- (a) diversion options are set out in three levels with level one comprising the least onerous and level three the most onerous options as follows—
- (2) Level one diversion options include—
 - (a) an oral or written apology to a specified person or persons or institution;
 - (b) a formal caution in the prescribed manner with or without conditions;
 - (c) placement under a supervision and guidance order in the prescribed manner for a period not exceeding three months;
 - (d) placement under a reporting order in the prescribed manner;
 - (e) the issue of a compulsory school attendance order in the prescribed manner for a period not exceeding three months;
 - (f) the issue of a family time order in the prescribed manner for a period not exceeding three months;
 - (g) the issue of a positive peer association order in the prescribed manner in respect of a specified person or persons or a specified place for a period not exceeding three months;
 - (h) the issue of a good behaviour order in the

prescribed manner;

- (i) the issue of an order prohibiting the child from visiting, frequenting or appearing at a specified place in the prescribed manner;
 - (j) referral to counseling or therapy for a period not exceeding three months;
 - (k) compulsory attendance at a specified centre or place for a specified vocational or educational purpose and for a period not exceeding five hours each week, for a maximum of three months;
 - (l) symbolic restitution to a specified person, persons, group or institution; and
 - (m) restitution of a specified object to a specified victim or victims of the alleged offence where the object concerned can be returned or restored.
- (3) Level two diversion options include—
- (a) the options referred to in subsection (3) but the maximum periods contemplated in that subsection shall, for the purposes of this subsection, be construed as six months;
 - (b) compulsory attendance at a specified centre or place for a specified vocational or educational purpose for a period not exceeding eight hours each week, for a maximum of six months;
 - (c) performance without remuneration of some service for the benefit of the community under the supervision or control of an organisation or institution, or a specified person or group identified by the children officer effecting the assessment for a maximum period of fifty hours, and to be completed within a maximum period of six months;
 - (d) provision of some service or benefit to a specified victim or victims in an amount which the child or the family can afford;
 - (e) payment of compensation to a maximum of five thousand shillings to a specified person, persons, group or institution where the child or his or her

family is able to afford this;

- (f) where there is no identifiable person or persons to whom restitution or compensation could be made, provision of some service or benefit or payment of compensation to a community organisation, charity or welfare organisation;
- (g) referral to appear at a family group conference or a victim-offender mediation at a specified place and time; and
- (h) any two of the options listed above used in combination.

(3) Level three diversion options shall apply to children over the age of fourteen years where a court, upon conviction of the child for the offence in question, is likely to impose a sentence of imprisonment for a period not exceeding six months, and include—

- (a) referral to a programme which does not exceed six months and which has a residential element that does not exceed thirty-five days in total and twenty-one consecutive days during the operation of the programme;
 - (b) performance without remuneration of some service for the benefit of the community under the supervision and control of an organisation or institution, or a specified person or group, identified by the children officer and for a period not exceeding two hundred and fifty hours which shall be completed within twelve months of the commencement of the service;
 - (c) where a child is over the age of compulsory school attendance as contemplated in the Children Act and is not attending formal schooling, compulsory attendance at a specified centre or place for a specified vocational or educational purpose for a period not exceeding six months and no more than thirty-five hours per week; and
 - (d) referral to counseling or therapeutic intervention in conjunction with any of the options listed in this subsection.
- (6) Upon the selection of a diversion option, the

inquiry magistrate or court shall identify a children officer or other suitable person to monitor the child's compliance of the selected diversion option.

(7) In the event of a child failing to comply with any condition of the selected diversion option, the officer or person identified in terms of subsection (6) shall notify the inquiry magistrate in writing of such failure.

(8) For purposes of this Section—

“a compulsory school attendance order” means an order requiring a child to attend school every day for a specified period of time, which attendance is to be monitored by a specified person;

“a family time order” means an order requiring a child to spend a specified number of hours with his or her family;

“a good behavior order” means an order requiring a child to abide by an agreement made between the child and his or her family to comply with certain standards of behavior;

“a positive peer association order” means an order requiring a child to associate with persons who can contribute to the child's positive behavior;

“a reporting order” means an order requiring a child to report to a specified person at a time or at times specified in such order so as to enable such person to monitor the child's behavior; and

“a supervision and guidance order” means an order placing a child under the supervision and guidance of a mentor or peer in order to monitor and guide the child's behavior.

(2) In selecting a specific diversion option for a particular child at a preliminary inquiry, consideration shall be given to—

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

- (d) the proportionality of the option recommended or selected to the circumstances of the child, the nature of the offence and the interests of society; and
- (e) the child's age and developmental needs.

49. (1) Where a child has been referred to appear at a family group conference, a children officer appointed by the inquiry magistrate shall, within fourteen days, but not later than twenty-one days, after such referral convene the conference by—

Family group
conference

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

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

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

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

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

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

(a) may include—

- (i) the application of any option contained in section 48(3) or (4); or
- (ii) any other plan appropriate to the child, his or her family and local circumstances which is consistent with the principles contained in this Act:

Provided that the plan shall—

- (a) specify the objectives for the child and the period within which they are to be achieved;
- (b) contain details of the services and assistance to be provided for the child and for a parent or an appropriate adult;
- (c) specify the persons or organisations to provide such services and assistance;
- (d) state the responsibilities of the child and of the child's parent or an appropriate adult;
- (e) state personal objectives for the child and for the child's parent or an appropriate adult; and
- (f) include such other matters relating to the education, employment, recreation and welfare of the child as are relevant.

(6) The children officer shall record the details of and reasons for any plan agreed to at the family group conference and shall furnish a copy of the record to the child and to the officer or person contemplated in section 48(6)(a).

(7) In the event of the child failing to comply with any condition of the plan agreed to at the family group conference, the officer or person must notify the inquiry magistrate in writing of such failure, in which case Section 41 applies.

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

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

50. (1) If a child has been referred to appear at a victim-offender mediation, section 49(1), (5), (6), (7), (8) and (9) shall apply with the necessary modifications.

Victim-offender mediation.

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

PART V—CHILD JUSTICE COURTS

51. (1) For the purposes of this Act, the Children's Courts established under Part V shall be regarded as Child Justice Courts when dealing with criminal cases against children.

Children court to be known as Child Justice Courts.

(2) The provisions of Part VI shall apply in any matter that is brought before a Children's Court that relates to a child offender.

52. (1) The Cabinet Secretary for the time being in charge of the administration of justice, in consultation with the Cabinet Secretary for the time being in charge of children affairs, safety and security and correctional services, may establish centralized services for child justice to be known as One-Stop Child Justice Centres in every county.

Establishment and jurisdiction of One-Stop Child Justice Centres.

(2) Every One-Stop Child Justice Centre may be situated at a Children's Court or any other appropriate place, but in any event shall have—

- (a) a children's court;
- (b) offices for use by members of the Kenyan Police Service;
- (c) offices of use by children officers;
- (d) facilities to accommodate children temporarily pending the conclusion of a preliminary inquiry;
- (e) offices for use by a child's legal representative
- (f) offices for use by persons who are able to provide diversion and prevention services;

- (g) offices for use by persons authorized to trace the families of a child;
- (h) offices for use by persons who are able to provide correctional supervision.

(3) The Cabinet Secretary for the time being in charge of justice shall be responsible for the provision of resources required to establish such centres and each Cabinet Secretary referred to in subsection (1) shall be severally responsible for the provision of such services as may be required to enable a One-Stop Child Justice Centre to function effectively.

(4) The jurisdiction of One-Stop Child Justice Centres shall be limited to a County.

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

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

53. (1) Subject to subsections (2) and (5), a child shall be assisted by a parent or an appropriate adult at proceedings in a Child Justice Court.

Parental
assistance.

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

(3) The parent of a child or an appropriate adult who has been warned by an inquiry magistrate to attend proceedings in terms of section 43(3), shall attend such proceedings unless exempted in terms of subsection (5).

(4) If a parent or appropriate adult has not been informed to attend as contemplated in subsection (3), the Child Justice Court may at any stage of the proceedings

summon or cause to be issued summons to any parent or appropriate adult to appear at such proceedings.

(5) A parent or an appropriate adult warned to appear as contemplated in subsection (3) or summoned in terms of subsection (4) may apply to the Child Justice Court for exemption from the obligation to attend the proceedings in question, and if the presiding officer of the Child Justice Court exempts a parent or an appropriate adult he or she shall do so in writing.

(6) Where a child is not assisted by a parent or an appropriate adult, and such child requests assistance, the court shall appoint a *guardian ad litem* as provided for under Part VI of the Children Act, who shall assist a child in circumstances referred to in subsection (1) of this section.

54. (1) At the start of proceedings in a Child Justice Court, the presiding officer shall, in the prescribed manner—

Proceedings in
Child Justice
Court.

- (a) inform the child of the nature of the allegations against him or her;
- (b) inform the child of his or her rights; and
- (c) explain to the child the further procedures to be followed in terms of this Act and the Criminal Procedure Act.

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(2) The presiding officer in a Child Justice Court may summon assessors to assist him or her taking into account the circumstances of the case.

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

(4) The proceedings of the Child Justice Court must, with due regard to the child's procedural rights, be conducted in an informal manner to encourage maximum participation by the child and his or her parent or an appropriate adult and must include flexible time, adjournments whenever the child shows any signs of fatigue and play targets during breaks depending on the evolving capacity of the child.

(5) The Child Justice Court shall protect a child from hostile cross-examination where the cross-examination is prejudicial to the well-being of the child or the fairness of the proceedings.

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

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

(3) If a legal representative is not available at the procedures contemplated in subsections (1) and (2), a *guardian ad litem* or a children's officer shall be present at such procedure and assist the child.

(4) The police officer responsible for the case shall request a *guardian ad litem* or children's officer to assist the child if required in terms of subsection (2).

56. (1) Unless there are exceptional circumstances warranting otherwise, no child may be handcuffed when appearing in any Child Justice Court.

Children in
detention at Child
Justice Court.

(2) A child held in a cell in or at the Child Justice Court shall be kept separate from adults and be treated in a manner and kept in conditions which take account of his or her age.

(3) Girls shall be kept separate from boys and shall be under the care of an adult woman.

(4) Where a child is transported to or from a Child Justice Court the child shall, if reasonably possible, be transported separate from adults and with persons of the same sex.

(3) The Cabinet Secretary for the time being responsible for justice shall issue regulations on the treatment and conditions of children while in detention at Child Justice Court.

57. (1) The criminal culpability of a child over the age of eight years but under the age of twelve years shall be proved by the State beyond reasonable doubt.

Establishment of criminal culpability.

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

(3) If an order has been made by the Child Justice Court in terms of subsection (2), the person identified to conduct an assessment of the child shall furnish the Child Justice Court with a written report of the assessment within thirty days of the date of the order.

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

(5) The person who conducts the evaluation may be called to attend the Child Justice Court proceedings and give evidence and, if called, shall be remunerated through the Consolidated Fund.

(6) In any proceedings relating to a child where an expert is called, priority shall be given in taking of their evidence by the courts and in a timely manner.

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

Separation and joinder of trials involving children and adults.

(2) An application for joinder of trials shall be directed to the Child Justice Court in which the child is to appear after notice to the child, such person and their legal representatives.

(3) If the Child Justice Court grants an application for joinder of trials, the matter shall be transferred to the court in which such person is to appear.

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

59. (1) A Child Justice Court shall conclude all trials of accused children as speedily as possible and shall ensure that adjournments are limited in number and in duration.

Time limits relating to conclusion of trials.

(2) Sections 34, 35, 36 and 37 shall apply with the necessary modifications to a Child Justice Court where a child appearing in the Child Justice Court for the first time is in detention.

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

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

Child Justice Court may divert matter.

(2) Part VI shall apply with the necessary modifications if the Child Justice Court makes an order contemplated in subsection (1).

(3) A Child Justice Court that makes a diversion order shall adjourn proceedings pending the child's compliance with the diversion condition in question.

(4) The Child Justice Court shall, upon receipt of a report from the children officer that the child has successfully complied with the diversion conditions, acquit the child on all charges in question.

(5) An acquittal under subsection (4) may be made in the absence of the child.

(6) If a child fails to comply with an order relating to diversion, section 40 shall apply with the necessary modifications.

61. (1) At any sitting of a Child Justice Court, a person may not be present unless his or her presence is necessary in connection with the proceedings of the Child Justice Court or unless the presiding officer has granted him or her permission to be present.

Privacy and confidentiality.

(2) A person may not publish any information which reveals or may reveal the identity of a child or of any

witness under the age of eighteen years appearing at any proceedings before a Child Justice Court.

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

- (a) access to information pertaining to a child if such access would be in the interests, safety or welfare of any such child or of children in general;
- (b) the publication, in the form of a law report, of—
 - (i) information for the purpose of reporting any question of law relating to the proceedings in question; or
 - (ii) any decision or ruling given by any Child Justice Court on such question;
- (c) the publication, in the form of any report of a professional or technical nature, of research results and statistical data pertaining to a child if such publication would be in the interests, safety or welfare of the child or of children in general.

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

PART VI—LEGAL REPRESENTATION

62. (1) A legal representative of a child under this Act shall be an advocate of the High Court of Kenya.

Requirements to be complied with by legal representatives.

(2) A legal representative representing a child shall—

- (a) allow the child, as far as is reasonably possible, to give independent instructions concerning the case;
- (b) explain the child's rights and duties in relation to any proceedings under this Act in a manner appropriate to the age and intellectual development of the child;

(c) promote diversion where appropriate, but may not unduly influence the child to acknowledge responsibility; and

(d) ensure that the trial is concluded without delay.

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

Access to legal representation.

(2) The parent of a child or an appropriate adult may appoint a legal representative of his or her own choice, in which case the payment of the fees for the legal representation rests with that parent or appropriate adult, as the case may be.

64. (1) A child shall be provided with legal representation at State expense at the conclusion of the preliminary inquiry if no legal representative was appointed by the parent or appropriate adult and if—

State to provide legal representation.

(a) the child is in detention pending plea and trial in a Child Justice Court; and

(b) the proceedings are adjourned for plea and trial in a Child Justice Court and it is likely that a sentence involving a residential requirement may be imposed if the child is convicted of the offence in question; or

(c) the child is under the age of fourteen years of age and a certificate contemplated in section 6(3) has been issued in respect of such child;

(d) substantial injustice would occur without legal representation.

(2) The prosecutor shall indicate to the Child Justice Court whether he or she is of the opinion that the matter is a matter contemplated in subsection (1)(b) before the child is asked to plead and if so, no plea may be taken until a legal representative has been appointed.

(3) If a child qualifies for legal representation at State expense, the court shall make an order to that effect.

(4) Such expenses shall be defrayed from the Consolidated Fund, the amount of which shall be set by the

Cabinet Secretary for the time being in charge of the administration of justice.

(5) If the parent or guardian of a child who is granted legal representation at State expense under this Act would otherwise have been ineligible to receive legal representation at State expense due to the fact that the parent or guardian is capable of paying for such services, the government may recover the costs of the legal representation from such parent or guardian.

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

Waiver of right to
legal
representation.

(2) where a child provided with legal representation refuses to give instructions to the appointed legal representative, the legal representative shall bring that fact to the attention of the Child Justice Court, whereupon the Child Justice Court shall question the child to ascertain the reasons for the child's refusal and shall note the reasons on the record of the proceedings.

(3) Where the child does not wish to have a legal representative, the Child Justice Court shall instruct a legal representative to assist the child.

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

(a) shall—

- (i) attend all hearings pertaining to the case;
- (ii) address the Child Justice Court on the merits of the case;
- (iii) note an appeal regarding conviction or sentence at the conclusion of the trial, if he or she considers it necessary; and
- (iv) have access to the affidavits filed and statements made pertaining to the case; and

(b) may—

- (i) cross-examine any State witness with the object of discrediting the evidence of such witness; and
- (ii) raise reasonable doubt about the admissibility

of evidence led by the State and raise objections to the introduction of evidence by the State, when appropriate.

PART VII—SENTENCING

66. A Child Justice Court shall, after convicting a child, impose a sentence in accordance with this Part.

Sentencing convicted children.

67. (1) A Child Justice Court imposing a sentence shall request a pre-sentence report prepared by a children officer or any other suitable person prior to the imposition of sentence.

Pre-sentence reports.

(2) The children officer or other person shall complete the report as soon as possible but not later than thirty days following the date upon which such report was requested.

(3) A Child Justice Court that imposes a sentence other than that recommended in the pre-sentence report shall record the reasons for the imposition of a different sentence.

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

(5) For the purposes of subsection (4), “a sentence with a residential requirement” includes a sentence where the residential requirement of the sentence is suspended.

(6) The officer presiding in a Child Justice Court who imposes any sentence involving detention in a residential facility shall certify on the warrant of detention that a pre-sentence report has been placed before the Child Justice Court prior to imposition of sentence.

(7) If the certification contemplated in subsection (6) does not appear on the warrant of detention, the person admitting the child to the residential facility in question shall refer the matter back to the relevant Child Justice Court.

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

Purpose of sentencing.

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

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

Community-based sentences.

- (a) any of the options referred to in section 48(4);
- (b) placement under a supervision and guidance order in the prescribed manner for a period not exceeding three years;
- (c) in cases which warrant such specialised intervention, referral to counselling or therapy in conjunction with any of the options listed in this section for such period of time as the Child Justice Court deems fit;
- (d) where a child is over the age of compulsory school attendance as contemplated in the Children Act and is not attending formal schooling, compulsory attendance at a specified centre or place for a specified vocational or educational purpose for a period not exceeding twelve months and for no more than thirty-five hours per week;
- (e) performance without remuneration of some service for the benefit of the community under the supervision or control of an organisation or an institution, or a specified person or group

identified by the Child Justice Court, or by the children officer of the district in which the Child Justice Court is situated, for a maximum period of two hundred and fifty hours and to be completed within twelve months;

- (f) any other sentence, subject to section 71, which is appropriate to the circumstances of the child and in keeping with the principles of this Act and which, if it includes a period of time, may not exceed twelve months in duration.

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

70. (1) A Child Justice Court that convicts a child of an offence may refer the matter to a family group conference or for victim-offender mediation.

Restorative justice sentences.

(2) Section 49 applies where a Child Justice Court has referred a matter to a family group conference, and section 50 applies where a Child Justice Court has referred a matter for victim-offender mediation.

(3) Upon receipt of the written recommendations from a family group conference or victim-offender mediation, the Child Justice Court may—

- (a) confirm the recommendations by making them an order of the Child Justice Court; or
- (b) substitute or amend the recommendations and make an appropriate order.

(4) If the Child Justice Court does not agree with the terms of the plan made at a family group conference or victim-offender mediation and imposes a sentence which differs in a material respect from that agreed to or decided upon at the conference or mediation, the Child Justice Court shall note the reasons for deviating from the plan on the record of the proceedings.

(5) If a child has been sentenced in accordance with an order arising from a family group conference or victim-offender mediation, and fails to comply with that order, the children officer shall notify the Child Justice Court of such failure as soon as possible.

(6) The Child Justice Court may issue a warrant of arrest for the child and when the child appears before the Child Justice Court pursuant to such a warrant impose an appropriate sentence on the child.

71. (1) A Child Justice Court may impose a sentence of correctional supervision for a period not exceeding three years on a child over the age of fourteen years.

Sentences involving correctional supervision.

(2) The whole or any part of a sentence contemplated in subsection (1) may be postponed or suspended, with or without conditions contemplated in section 70(3).

72. (1) No sentence involving a residential requirement may be imposed upon a child unless the presiding officer is satisfied that such a sentence is justified by—

Sentence with residential requirement.

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

(2) A presiding officer imposing any sentence involving a residential requirement on a child shall note the reasons for the sentence on the record and explain them to the child in language that he or she can understand.

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

- (a) programme with a periodic residence requirement where the duration of the programme does not exceed twelve months, and no portion of the residence requirement exceeds twenty-one consecutive nights, with a maximum of sixty nights for the duration of the programme;
- (b) residential facility, subject to section 68; and
- (c) committal to a borstal institution, subject to section 69.

73. (1) Subject to subsection (2), a sentence involving a residential requirement may not exceed a period of two years.

Referral to residential facility.

(2) A sentence involving a residential requirement may be imposed for a period exceeding two years if the child is under the age of fourteen years and the child would have been sentenced to imprisonment due to the seriousness of the offence were it not for section 69(1)(a).

(3) A child contemplated in subsection (2) may not be required to reside in a residential facility beyond the age of eighteen years.

(3) Upon completion of a sentence contemplated in subsection (1) or upon attainment of the age of eighteen years in the case of a child referred to in subsection (2), the child concerned may request permission in the prescribed manner from the head of the residential facility to continue to reside at such residential facility for the purposes of completing his or her education.

74. (1) A sentence of imprisonment may not be imposed unless— Referral to prison.

- (a) the child was over the age of twelve years of age at the time of commission of the offence; and
- (b) substantial and compelling reasons exist for imposing a sentence of imprisonment, which may include conviction of a serious offence or a previous failure to respond to alternative sentences, including sentences with a residential element.

(2) No sentence of imprisonment may be imposed on a child—

- (a) in respect of an offence referred to in the First Schedule; or
- (b) as an alternative to any other sentence contemplated in this Act.

(3) If any child fails to comply with a condition of a sentence imposed on him or her, the child may, in the prescribed manner, be brought before the Child Justice Court which imposed the original sentence for reconsideration of an appropriate sentence which may, subject to subsections (1) and (2), include a sentence of imprisonment.

(4) A Child Justice Court imposing a sentence of imprisonment shall announce the period of imprisonment in an open Child Justice Court and the coming into effect of the term of imprisonment shall be antedated by the number of days that the child has spent in remand prior to the sentence being announced in Child Justice Court.

75. (1) The passing of any sentence may be postponed, with or without one or more of the conditions referred to in subsection (3), for a period not exceeding three years.

Postponement of sentence.

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

(3) The conditions contemplated in subsections (1) and (2) may be any condition appropriate to the circumstances of the child which is in keeping with the objects of this Act and which promotes the child's reintegration into society and may include—

- (a) restitution, compensation or symbolic restitution;
- (b) an apology;
- (c) the obligation not to commit a further offence of a similar nature;
- (d) good behaviour;
- (e) regular school attendance for a specified period;
- (f) attendance at a specified time and place of a family group conference or for victim-offender mediation;
- (g) placement under the supervision of a children officer or correctional official;
- (h) a requirement that the child or any other person designated by the Child Justice Court shall appear appear before that Child Justice Court on a date or dates to be determined by such Child Justice Court for a periodic progress report; and
- (i) referral to any diversion option referred to in section 48(3)(d), (e), (f), (g), (h), (i), (j) or (k).

(4) A Child Justice Court that has postponed the

passing of sentence in terms of subsection (1) on one or more conditions may request the children officer concerned for regular progress reports indicating the child's compliance with the conditions.

(5) The conviction of a child in respect of whom passing of a sentence has been postponed shall be expunged from any record if the child has met all the conditions imposed or at the expiration of the period in question, as the case may be.

76. Notwithstanding any other written law, a Child Justice Court convicting a child of an offence for which a fine or imprisonment is prescribed as penalty may impose any one of the following penalties in place of that fine or imprisonment—

Penalty in lieu of fine or imprisonment.

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

77. (1) No sentence of capital punishment, life imprisonment or corporal punishment may be imposed on a child.

Prohibition on certain forms of punishment.

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

78. Any sentence by a magistrate's court, as defined in the Criminal Procedure Act and sitting as a Child Justice Court, involving correctional supervision imposed in terms of section 66 and any sentence with a residential

Automatic review.

Cap. 75.

requirement imposed in terms of section 67, whether wholly or partially suspended, are subject to review in terms of the Criminal Procedure Act.

79. The sentence of any child shall be suspended pending review or appeal and a child sentenced to imprisonment or sentenced to a penalty with a residential requirement shall be released on any condition contemplated in section 34 (3) pending review or appeal.

Suspension of
execution of
sentence.

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

Expunging
records

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

- (a) the nature and circumstances of the offence; and
- (b) the child's personal circumstances.

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

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

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

(6) The order contemplated in subsection (2) and the condition referred to in subsection (5) must be noted on the

record of the conviction and sentence of the child and must be submitted to the Criminal Bureau as soon as is reasonably practicable, and that Bureau must, upon the date set for expungement, cause such record of conviction and sentence to be expunged unless another conviction of a similar or more serious offence has been recorded before the date set for expungement.

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

PART XI— GENERAL PROVISIONS

81. (1) If a person who is charged with an offence in a court at any time before the imposition of sentence alleges that he or she was under the age of 18 years at the time of the alleged commission of the offence, the presiding officer must refer the person to a children officer in the prescribed manner.

Assessment of
age.

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

(3) The children officer must make an estimation of the age of the person in accordance with Section 11 and submit the prescribed form and any relevant documentation contemplated in that Section to the presiding officer concerned.

(4) The presiding officer must determine the age of the person, and for that purpose Section 32 applies with the changes required by the context.

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

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

continue before the presiding officer, but the remainder of the proceedings must be conducted in terms of this Act and the court must be regarded as a Child Justice Court.

82. (1) If patrimonial loss may be recovered from a child on the ground of a delict committed by him or her in the performance of community service in terms of Part VII or IX, that loss may, subject to subsection (3), be recovered from the State.

Liability for
patrimonial loss

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

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

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

(5) If any person as a result of the performance of community service in terms of Part VII or IX has suffered patrimonial loss which cannot be recovered from the State in terms of subsection (1), the Cabinet Secretary for the time being in charge of the administration of justice may, with the concurrence of the Treasury, as an act of grace pay such amount as he or she may deem reasonable to that person.

83. (1) Any person who—

Offences and
penalties

- (a) hinders or obstructs a police officer or children officer in the performance of his or her functions under this Act;
- (b) fails to—
 - (i) comply with a notice contemplated in Section 23(1); or
 - (ii) comply with a warning contemplated in Section 14 or 43(3); or

- (c) publishes information or reveals the identity of persons in contravention of Section 61,

is guilty of an offence.

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

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

84. (1) The Cabinet Secretary may, in consultation with the Cabinet Secretary responsible for matters relating to the administration of justice, make regulations for the better carrying into effect of the provisions of this Act.

Regulations.

(2) Notwithstanding the generality of subsection (1), regulations made under this section may provide for —

- (a) the appointment of a *guardian ad litem*;
- (b) matters relating to the personnel of a Child Justice Court;
- (c) the establishment of One-Stop Child Justice Centres;
- (d) any other matter required to be prescribed to promote the objects of this Act; or
- (e) anything required to be prescribed under this Act

(2) For the purpose of Article 94 (6) of the Constitution—

- (a) the purpose and objective of the delegation under this section is to enable the Cabinet Secretary to make regulations for better carrying into effect the provisions of the Act;
- (b) the regulations made under this section shall be of such a nature and scope, and within the limits specified in this section; and;
- (c) the principles and standards applicable to the

regulations made under this section shall be those set out in—

- (i) the Statutory Instruments Act; No. 23 of 2013.
- (ii) the Interpretation and General Provisions Act; Cap. 2.
- (iii) the general rules of international law as specified under Article 2(5) of the Constitution; and
- (iv) any Treaty and convention ratified by Kenya under Article 2(6) of the Constitution.

85. Whenever there is a conflict between this Act and any other written law, the provisions of this Act shall prevail. Conflict with other laws.

PART XI— REPEALS, SAVINGS AND TRANSITIONAL PROVISIONS

86. (1) Subject to the provisions of subsection (2), the Children Act is repealed. Repeals and savings.

(2) Notwithstanding the provisions of sub-section (1)—

- (a) anything done under the provisions of the Children Act, or by the Minister or by the Cabinet Secretary under the provisions of the Children Act before the commencement of this Act, shall be deemed to have been done under the provisions of this Act; No. 8 of 2001.
No. 8 of 2001.
- (b) any statutory instruments issued by the Minister or by the Cabinet Secretary under the provisions of the Children Act before the commencement of this Act, shall be deemed to be statutory instruments granted by the Minister or by the Cabinet Secretary under the provisions of this Act and shall remain in force until specifically revoked under this Act; No. 8 of 2001.
- (c) any subsidiary legislation issued before the commencement of this Act shall, as long it is not inconsistent with this Act, remain in force until repealed or revoked by subsidiary legislation under the provisions of this Act and shall, for all

purposes, be deemed to have been made under this Act; and

- (d) the contractual obligations existing pursuant to the Children Act are preserved.

MEMORANDUM OF OBJECTS AND REASONS

The principal objective of the Child Justice Bill, 2022 is to provide for the establishment of the Child Justice Courts and, provide the procedure to be applied when prosecuting children accused of or charged with a criminal offence.

The Bill provides the procedure contemplated in the Constitution of Kenya and international conventions ratified by Kenya particularly, the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child.

PART 1 deals with preliminary provisions.

PART II makes provision for the objects and principles of the Act.

PART III deals with the application of the Act and the procedure to be applied during conduct of preliminary inquiry with respect to every child prior to plea taking. The part also contains provisions on persons entitled to attend the inquiry. It also contains provisions on powers and duties of preliminary magistrate. The part also makes provision for postponement of proceedings and failure to comply with a diversion order.

PART IV deals with the purpose of diversion and the conditions for diversion. The part also contains provisions on the standards applicable to diversion. The part contains provisions on different levels of diversion. It further contains provisions on victim offender mediation.

PART V contains provisions on child justice courts. The part establishes one stop justice centers which shall consist of a children's court, offices for use by the enforcement agencies and Children officers and facilities for the temporary accommodation of children pending conclusion of preliminary inquiry.

The part also contains provisions on proceedings in child justice courts and admission of certain evidence. Additionally, the part deals with establishment of criminal culpability.

PART VI deals with legal representation and stipulates the requirements which a legal representative of a child must comply with. It also contains provisions on the waiver of right to legal representation.

PART VII deals with sentencing, it contains provisions on presentencing reports. It also contains dealing with presentencing reports. The part further provides for community-based sentencing.

PART VIII contains miscellaneous provisions.

PART IX deals with transitional provisions and savings.

The First Schedule deals with offences for which a child may not be arrested unless there are compelling reasons for the arrest.

The Second Schedule deals with offences for which a child may be released on bail by the Director of Public Prosecution in consultation with the investigating officer.

The Third Schedule deals with offences for which a child may be convicted and for which the presiding officer in a Child Justice Court may not make an order expunging a record of the conviction of the child.

Statement on the delegation of legislative powers and limitation of fundamental rights and freedoms

This Bill, if enacted into law will confer on the Cabinet Secretary the authority to make regulations having the force of law in Kenya in terms of Article 94(6) of the Constitution. The Bill delegates legislative powers to the Cabinet Secretary to make regulations generally for the better carrying into effect of any provisions of this Act including appointment of a *guardian ad litem*, relate to establishment of Child Justice Courts, the establishment of One-Stop Child Justice Centres, any other matter required to be prescribed to promote the objects of this Act but it does not limit fundamental rights and freedoms.

Statement on how the Bill concerns county governments

This Bill does not concern county governments in terms of Article 109 (4) of the Constitution.

Statement as to whether the Bill is a money Bill within the meaning of Article 114 of the Constitution

The enactment of this Bill shall not occasion additional expenditure of public funds.

Dated the 23rd February, 2022.

MILLIE ODHIAMBO-MABONA,
Member of Parliament.

