

Lesotho

## Children's Protection and Welfare Act, 2011

### Act 7 of 2011

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# Lesotho

## Children's Protection and Welfare Act, 2011

### Act 7 of 2011

Published in Government Gazette 40 on 31 March 2011

**Commenced on 31 March 2011**

*[This is the version of this document from 31 March 2011.]*

**An Act to consolidate and reform the laws relating to the protection and welfare of children and to provide for incidental matters.**

Enacted by the Parliament of Lesotho.

### Part I – Preliminary

#### 1. Short title and commencement

This Act may be cited as Children's Protection and Welfare Act, 2011 and shall come into operation on the date of its publication in the *Gazette*.

#### 2. Objects

- (1) The objects of this Act are to extend, promote and protect the rights of children as defined in the 1989 United Nations Convention on the Rights of the Child, the 1990 African Charter on the Rights and Welfare of the Child and other international instruments, protocols, standards and rules on the protection and welfare of children to which Lesotho is a signatory.
- (2) This Act shall be administered and enforced so as to enhance the promotion, protection and realisation of the rights and welfare of children.
- (3) Nothing in this Act is intended to prevent, discourage or displace the application of informal and traditional regimes that are more promotive or protective of the rights of children except where those regimes are contrary to the best interests of children.
- (4) Where there is anything to the contrary or less protective or less promotive in any law, the provisions of this Act shall apply.

#### 3. Interpretation

In this Act, unless the context otherwise requires—

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

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

(g) subjecting a child to harmful substances such as alcohol and drugs.

**“adoption agencies”** means non-governmental organisations authorised by their governments to carry out mandates of adoption processes under supervision of departments responsible for children’s welfare and protection;

**“approved school”** means a school designated as such under [section 188](#);

**“approved school order”** means an order made by a Children’s Court requiring a child to be sent to an approved school;

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

**“Bureau of Statistics”** means a unit within a Ministry responsible for statistics;

**“chief”** has the meaning assigned to it in the Chieftainship Act, 1968;

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

**“children’s court”** has the meaning assigned to it under [section 134](#);

**“Commissioner of Police”** has the same meaning as in the Police Services Act 1998;

**“community service”** has the same meaning as in the Community Service Rules, 1999;

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

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

**“Department of Social Welfare”** means a department responsible for social welfare;

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

**“Director of Probation Unit”** means an officer heading the probation unit;

**“District Administrator”** has the same meaning as in the Local Government Act, 1997;

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

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

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

**“family foster care”** means placement of a child by the Department of Social Welfare with family members who are not the child’s biological parents;

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

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

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

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

**“inquiry magistrate”** means an officer presiding in a preliminary inquiry;

**“institutional foster care”** means placement of a child by the Department of Social Welfare at a care facility for a specified period of time;

**“local authority”** has the same meaning as in the Local Government Act, 1997;

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

**“Minister”** means the Minister responsible for children’s affairs;

**“person”** means a natural person or juristic person;

**“place of detention”**—

- (a) means any place of detention established or appointed under [section 181](#); and
- (b) includes accommodation in police station, police cell or lockup, prison, approved school, probation hostel, separate or apart from adult offenders;

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

**“police officer”** has the same meaning as in the Police Service Act 1998;

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

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

**“probation hostel”** means a hostel established or appointed as a place of residence for children required to reside there under [section 182](#);

**“probation officer”** means a person who holds a qualification recognised by the responsible Minister and includes auxiliary probation officer and shall by virtue of such status be an officer of court;

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

**“probation unit”** means a department, in the Ministry responsible for justice which deals with the rehabilitation and re-intergration of children in conflict with the law and at risk of offending;

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

**“Registrar of Births and Deaths”** has the same meaning as in the Registration of Births and Deaths Act, 1973;

**“sentence involving residential element”** means a sentence referred to under [section 154](#) (3) or a programme referred to under [section 159](#) where part of that sentence or programme involves compulsory residence in a residential facility or a place other than a child’s home;

**“social worker”** means a person who holds a qualification recognised by the National Council of Social Workers and includes auxiliary social workers and shall by virtue of such status be an officer of court;

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

**“vulnerable child”** is a person who is below the age of 18, who has one or both parents who have deserted or neglected him to the extent that he has no means of survival and as such is exposed to dangers of abuse, exploitation or criminality and is, therefore, in need of care and protection.

## **Part II – Principles**

### **4. The best interests of a child**

- (1) All actions concerning a child shall take full account of his best interests.
- (2) The best interests of a child shall be the primary consideration for all courts, persons, including parents, institutions or other bodies in any matter concerning a child.

### **5. Evolving capacity**

All actions concerning a child shall take full account of his evolving capacities.

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

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

## **Part III – Rights of a child and responsibilities of parents and the State**

### **7. Identity of a child**

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

### **8. Right to registration**

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

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

- (1) Orphaned and vulnerable children shall have a right to registration.
- (2) The Department responsible for registration of births and deaths shall maintain and administer a systematic and comprehensive data in relation to all groups of orphaned and vulnerable children.
- (3) Bureau of Statistics shall have access to data in relation to all groups of orphaned and vulnerable children.

### **10. Right to live with parents and grow up in a caring environment**

A child has a right to live with his parents and grow up in a caring and peaceful environment unless it is proved in court that living with his parents shall—

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

**11. Right to education and Health**

- (1) A child has a right to access education, adequate diet, clothing, shelter, medical attention, social services or any other service required for the child's development.
- (2) A child shall not be denied or hindered from medical treatment by reason of religious or other beliefs.
- (3) A child has a right to education regardless of the type or severity of the disability he has.
- (4) No child shall be expelled or denied the right to education by any educational institute on account of pregnancy, initiation or other cultural rituals.
- (5) No child shall be compelled to undergo cultural rites and practices which may negatively affect his right to education.
- (6) A child has a right to sexual and reproductive health information and education appropriate to his age.

**12. Right to social activity**

A child shall not be deprived or hindered to participate in sports, cultural or artistic activity or any other leisure activity except where it is not in the best interests of the child.

**13. Rights of child with disabilities**

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

**14. Right of opinion**

- (1) A child has a right to express his opinion freely and to have that opinion taken into account in any matter or procedure affecting the child.
- (2) An opinion of a child under subsection (1) shall be given due weight in accordance with the age and maturity of the child.

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

A child has a right to be protected from exploitative labour as provided for under [section 226](#) of this Act and other international instruments on child labour.

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

- (1) A child has a right to be protected from torture or other cruel, inhuman or degrading treatment or punishment, including any cultural practice which degrades or is injurious to the physical, psychological, emotional and mental well-being of the child.
- (2) A child shall be chastised in accordance with his age, physical, psychological, emotional and mental condition and no discipline is justifiable if by reason of tender age or otherwise the child is incapable of understanding the purpose of the discipline.

**17. A child not to be subjected to harmful cultural rites, custom and traditional practices**

A child shall not be subjected to any cultural rites, customs or traditional practices that are likely to negatively affect the child's life, health, welfare, dignity or physical, emotional, psychological, mental and intellectual development.

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

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

**19. Right to parental property**

A child has a right to the property of his parents but where the child is born out of wedlock, the child has a right to the property of his biological mother irrespective of the mother's marital status.

**20. Parent's and guardian's duties and responsibilities**

- (1) A parent or guardian of a child, whether—
  - (a) married or not; or
  - (b) the parents of the child continue to live together or not, shall not deprive the child of his welfare.
- (2) A parent or guardian has a responsibility, whether imposed by law or otherwise, towards the child, including the responsibility to—
  - (a) protect the child from neglect, discrimination, violence, abuse, exploitation, exposure to physical and moral hazards and oppression;
  - (b) provide good guidance, care, assistance and maintenance for the child to ensure his survival and development;
  - (c) ensure that during temporary absence, the child shall be cared for by a competent person;
  - (d) exercise joint primary responsibility for raising the child; and
  - (e) ensure that the child is not subjected to cultural rites, customs or traditional practices that may negatively affect the child's health, life, welfare, dignity, physical, emotional, psychological, mental or intellectual development,

except where the parent or guardian has surrendered his rights and responsibilities in accordance with the law.
- (3) A parent or guardian shall be responsible for the registration of the birth of his child and the name of the parent or guardian shall appear on the birth certificate.
- (4) Where a parent or guardian is unknown, the Registrar of Births and Deaths shall cause the registration of birth of a child.
- (5) A person who contravenes this section commits an offence and is liable on conviction to community service and the court shall direct the offending party to register the child.

**21. Children's duties and responsibilities**

In the application of the provisions of this Act, a child shall have due regard to his duties and responsibilities to—

- (a) respect a parent, guardian, superior and an elder at all times and assist them in case of need;
- (b) serve the community by placing his physical and intellectual abilities at its service;
- (c) preserve and strengthen social and national solidarity; and



- (d) uphold the positive values of the community in the child's relations with other members of that community;

provided that due regard is had to the age and ability of the child.

## 22. State duties and responsibilities

The state has a duty to formulate policies which will ensure—

- (a) protection of children from any form of discrimination and to take positive action to promote their rights;
- (b) that appropriate assistance for raising children when parents or others charged with that responsibility fail to do so is provided;
- (c) a child's survival and development;
- (d) that there is awareness about children with disabilities, their rights, their needs, their potential and their contribution in society;
- (e) the provision of rehabilitation services including community based rehabilitation, support services including assistive devices, equal education opportunities in an integrated setting, full participation in family life, equal opportunities in recreation and sports for children with disabilities;
- (f) that a child's right to freedom of thought, conscience and religion is respected, subject to appropriate parental guidance;
- (g) the accessibility to children of information and materials from a diversity of sources, and it shall encourage the mass media to disseminate information which is of social and cultural benefit to a child, and take steps to protect him from harmful information and material;
- (h) protection of a child from all forms of maltreatment by parents or others responsible for the care of the child and establish appropriate social programmes for the prevention of abuse and the treatment of the victims;
- (i) provision of special protection for a child deprived of family environment and ensure that appropriate alternative family care or institutional placement is available in such cases;
- (j) that there is special emphasis on the provision of primary and preventive health care, public health education, reduction of infant mortality and that no child is deprived of access to effective health services;
- (k) that primary education is free and compulsory, all forms of secondary education are accessible, higher education is available on the basis of capacity and that school discipline is consistent with a child's rights and dignity;
- (l) that minimum ages for employment and regulated working conditions are set;
- (m) protection of children from sexual exploitation and abuse, including commercial sex and involvement in pornography;
- (n) that every effort to prevent the sale, trafficking and abduction of children is made;
- (o) that children do not take part in hostilities or are not recruited into armed forces, and ensure the protection and care of children who are affected by armed conflict;
- (p) that child-victims of armed conflicts, torture, neglect, maltreatment or exploitation receive appropriate treatment for their recovery and social reintegration; and
- (q) that every child alleged as having infringed the penal law is treated in a manner consistent with his sense of dignity or worth and that he is reintegrated into society.

## Part IV – Child in need of care and protection

### 23. Child in need of care and protection

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

- (n) the child is below the age of fifteen years and is engaged in regular economic activity detrimental to his health, educational advancement and development.
- (2) For the purposes of this Part, a child is—
  - (a) physically injured if there is injury to any part of the child's body as a result of the non-accidental application of force or an agent to the child's body;
  - (b) emotionally and psychologically injured if there is impairment of the child's mental or emotional functioning that is evidenced by, among other things, a mental or behavioural disorder, including anxiety, depression, withdrawal, aggression or delayed development;
  - (c) sexually abused if he has taken part, whether as a participant or an observer, in any activity which is sexual in nature for the purposes of—
    - (i) any pornographic, obscene or indecent material, photograph, recording, film, videotape or performance; or
    - (ii) sexual exploitation by any person for that person's or other person's sexual gratification or for commercial gain.

## 24. Taking child into place of safety

A police officer, the department of social welfare, a chief or member of the community who is satisfied on reasonable grounds that a child is in need of care and protection may take the child and place him in a place of safety.

## 25.- Presentation before Children's Court

- (1) Subject to [section 24](#), a child who is taken into a place of safety under [section 24](#) shall be brought before a Children's Court within 48 hours exclusive of the time necessary for the journey from the place the child was so taken into custody to the Children's Court.
- (2) If it is not possible to bring a child before a Children's Court within the time specified under subsection (1), the child shall be brought before a magistrate who may direct that the child be placed in—
  - (a) a place of safety; or
  - (b) the care of a fit and proper person,until such time as the child can be brought before the Children's Court.
- (3) If a child is in a place of safety or in the care of a fit and proper Person under subsection (2)—
  - (a) the person in charge of the place of safety or such fit and proper person shall have control over, and responsibility for the maintenance of the child as the parent or guardian of the child would have had; and
  - (b) the child shall continue in the care of the person referred to in paragraph (a) notwithstanding that the child is claimed by the parent or guardian or any other person.
- (4) The Department of Social Welfare, a police officer, chief or member of the community who takes a child into a place of safety under this section shall, immediately upon such taking, cause the parent or guardian of the child to be notified of such taking.
- (5) A police officer, chief or member of the community who takes a child into temporary care under this section shall, immediately upon such taking, notify the social worker of such taking.

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

- (1) If the Department of Social Welfare, a police officer, chief or member of the community who takes a child into a place of safety under [section 24](#) is of the opinion that the child is in need of medical examination or treatment, the Department of Social Welfare, police officer, chief or member of the community may, instead of bringing the child before a Children's Court or magistrate, as the case may be, present the child before a medical officer.
- (2) If the Department of Social Welfare, a police officer, chief or member of the community does not take a child into a place of safety under [section 24](#) but is satisfied on reasonable grounds that the child is in need of medical examination or treatment, he may direct, in writing, a person who appears to him to have the care of the child for the time being to immediately take the child to a medical officer.
- (3) If the person referred to under subsection (2) fails to comply within forty-eight hours with a direction made under that subsection, the Department of Social Welfare, a police officer, chief or member of the community may take a child into temporary care for the purpose of presenting the child before a medical officer.

**27. Medical examination and treatment**

- (1) A medical officer before whom a child is presented under [section 26\(1\)](#)—
  - (a) shall conduct or cause to be conducted an examination of the child;
  - (b) may, in examining the child and if so authorised by a social worker or police officer, administer or cause to be administered such procedures and tests as may be necessary to diagnose the child's condition;
  - (c) may provide or cause to be provided such treatment as the medical officer considers necessary as a result of the diagnosis.
- (2) A child who is presented before a medical officer under subsection (1) shall be exempted from medical fees with the authority of the Department of Social Welfare.

**28. Authorisation of hospitalisation**

- (1) If a medical officer who examines a child under [section 27](#) is of the opinion that the hospitalisation of the child is necessary for the purposes of medical care or treatment, the Department of Social Welfare or a police officer may authorise the child to be hospitalised.
- (2) Where a police officer authorises a child to be hospitalised, he shall inform the Department of Social Welfare where an exemption for medical expenses is necessary.

**29. Control over hospitalised children**

Where a child is hospitalised under [section 28](#), the director of social welfare shall have the same control over and responsibility for the maintenance of the child as the person in charge of a place of safety would have had if the child had been placed in the place of safety.

**30. Authorisation of medical treatment**

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

- (2) If, in the opinion of a medical officer, a child referred to in [section 26](#) is suffering from a serious illness, injury or condition, or requires surgery or psychiatric treatment, the Department of Social Welfare or police officer—
- (a) shall immediately notify or take reasonable steps to notify and consult the parent or guardian of the child or any person having authority to consent to such treatment; and
  - (b) may, with the written consent of the parent or guardian or such person, authorise such medical or surgical or psychiatric treatment as may be considered necessary by the medical officer.
- (3) If a medical officer has certified in writing that there is immediate risk to the health of a child, a social worker or police officer may authorise, without obtaining the consent referred to in subsection (2), such medical or surgical or psychiatric treatment as may be considered necessary by the medical officer but only under any of the following circumstances—
- (a) that the parent or guardian of the child or any person having authority to consent to such treatment has unreasonably refused to give, or abstained from giving, consent to such treatment;
  - (b) that the parent or guardian or the person referred to in paragraph (a) is not available or cannot be found within a reasonable time; or
  - (c) the Department of Social Welfare believes on reasonable grounds that the parent or guardian or the person referred to in paragraph (a) has ill-treated, neglected, abandoned, exposed or sexually abused the child.

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

- (1) A child who is taken into a place of safety under [section 24](#) and is medically examined or treated under [section 27](#) shall be brought before a Children's Court within forty-eight hours—
- (a) of the completion of such examination or treatment; or
  - (b) if the child is hospitalised, on his discharge from the hospital.
- (2) If it is not possible to bring a child before a Children's Court within the time specified in subsection (1), the child shall be brought before a magistrate who may direct that the child be placed in—
- (a) a place of safety; or
  - (b) the care of a fit and proper person,
- until such time as the child can be brought before a Children's Court.
- (3) A child who is taken into care under [section 25 \(3\)](#) and subsequently undergoes medical examination or treatment shall be returned to the person under whose care the child was taken—
- (i) upon the completion of such examination or treatment; or
  - (ii) if the child is hospitalised, upon discharge from the hospital.

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

- (1) Where a child is examined or treated pursuant to [section 27](#)—
- (a) a social worker or police officer who authorises such examination or treatment;
  - (b) a medical officer who examines or treats the child; and
  - (c) all persons acting in aid of the medical officer,
- shall not incur any civil or criminal liability at law by reason only that the child is examined or treated pursuant to that section.

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

### **33. Duty of medical officer**

- (1) If a medical officer is of the opinion that a child he is examining or treating is physically, psychologically or emotionally injured as a result of being ill-treated, neglected, abandoned or exposed, or is sexually abused, he shall immediately inform a social worker or police officer.
- (2) A medical officer who fails to comply with subsection (1) commits an offence and is liable on conviction to a fine not exceeding two thousand maloti or to imprisonment for a period not exceeding two months or to both.

### **34. Duty of member of the family**

- (1) If a member of the family of a child is of the opinion that the child is physically, psychologically or emotionally injured as a result of being ill-treated, neglected, abandoned or exposed, or is sexually abused, he shall immediately inform a social worker, police officer or any local authority.
- (2) A member of the family who fails to comply with subsection (1) commits an offence and is liable on conviction to a community service.

### **35. Duty of child-care provider**

- (1) If a child-care provider is of the opinion that a child is physically, psychologically or emotionally injured as a result of being ill-treated, neglected, abandoned or exposed, or is sexually abused, he shall inform a social worker or police officer.
- (2) A child-care provider who fails to comply with subsection (1) commits an offence and is liable on conviction to a community service.

### **36. Duty of member of the community**

- (1) If a member of the community is of the opinion that a child is physically, psychologically or emotionally injured as a result of being ill-treated, neglected, abandoned or exposed to intoxication or is sexually abused, he shall immediately inform a chief, police or the Department of Social Welfare.
- (2) A member of the community who fails to comply with subsection (1) commits an offence and is liable on conviction to a community service.

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

- (1) Where a Children's Court is satisfied that any child brought before it under section 25 is a child in need of care and protection, it may—
  - (a) order the parent or guardian to enter into a binding agreement to exercise proper care and guardianship for a period specified by the Children's Court;
  - (b) make an order placing the child in the custody of a fit and proper person for a period specified by the Children's Court;
  - (c) without making any other order or in addition to an order made under paragraph (a) or (b), make an order placing the child under the supervision of—
    - (i) the Department of Social Welfare; or
    - (ii) some other person appointed for the purpose by the Children's Court, for a period specified by the Children's Court;

- (d) make an order placing the child in a place of safety for a period of two years from the date of the order or until he attains the age of eighteen years, whichever is the shorter; or
  - (e) in the case of the child who has no parent or guardian or who has been abandoned, make an order placing the child in the care, custody and guardianship of a foster parent found to be suitable by the Director of Social Welfare for a period of two years or until the child attains the age of eighteen years, whichever is the shorter, and pending that, place the child in a place of safety.
- (2) Where a Children's Court makes an order under subsection (1)(e), the Director of Social Welfare shall, in order to give effect to the order, immediately endeavour to place the child in the care, custody and control of a foster parent.
- (3) Where at any subsequent time a foster parent intends to return a child who has been placed in his care, custody and guardianship pursuant to subsection (1) (e), he shall report in person to a social worker and bring the child before the Department of Social Welfare, and the Department of Social Welfare shall place the child temporarily in a place of safety and inform a Children's Court.
- (4) If during the period mentioned under subsection (1) (e) the parent or guardian of the child concerned has not claimed the child or made any appearance, a Children's Court may—
  - (a) at the expiry of that period; and
  - (b) if the Children's Court is satisfied that reasonable steps have been taken by the Department of Social Welfare to trace the parent or guardian of the child, make an order placing the child for adoption by the foster parent or any person who wishes to adopt the child, and in any such case, the parent's or guardian's consent for the adoption of the child shall be dispensed with.
- (5) Before making an order under subsection (1) or (4), a Children's Court shall consider and take into account a report prepared by the Department of Social Welfare which—
  - (a) shall contain such information as to the social background, general conduct, home surrounding, school record and medical history of a child as may enable the Children's Court to deal with the case in the best interests of the child; and
  - (b) may include any written report of a registered medical practitioner or any other person whom the court thinks fit to provide a report on the child.
- (6) In order to enable the Department of Social Welfare to prepare and submit the report referred to in subsection (6), a Children's Court may—
  - (a) adjourn the case for a period not exceeding two months; and
  - (b) make in respect of a child, as an interim order having effect only during the period of adjournment, any order which it could have made under subsection (1).
- (7) A Children's Court may, in making any order under subsection (1), impose such conditions or give such directions as it may deem fit for the purpose of ensuring the safety and well-being of a child in respect of whom such order is made, and such conditions or directions may include the following—
  - (a) that the parent or guardian of the child accompanied by the child shall attend interactive workshops organised at designated places;
  - (b) if the child is placed at a place of safety, the Department of Social Welfare shall accompany the parent or guardian for the first visit to see the child and thereafter the parent or guardian shall visit the child on a regular basis as determined by the Children's Court; or
  - (c) if the child is in an educational institution, that the parent or guardian shall consult with the child's teacher and principal once a month.

- (8) A parent or guardian who fails to comply with any of the conditions imposed or directions given under subsection (7) commits an offence and is liable on conviction to a fine not exceeding twenty five thousand maloti or to imprisonment for a period not exceeding two years or to both.
- (9) An order made under subsection (1) shall not be made without giving a child, parent or guardian of the child an opportunity to attend the proceedings and be heard.
- (10) Notwithstanding subsection (9), an order made under subsection (1) may be made if a Children's Court is satisfied on information given by a social worker that a parent or guardian of a child, having been required to attend, has failed to do so, or is not available or cannot be found within a reasonable time.
- (11) Where a Children's Court is not satisfied that a child brought before it under subsection (5) or (10) is in need of care and protection, it shall order the child to be returned to the care and custody of his parent or guardian with close monitoring by the Department of Social Welfare.
- (12) A Children's Court may, on the application of—
  - (a) the Department of Social Welfare;
  - (b) a person in charge of a place of safety;
  - (c) a parent or guardian of a child;
  - (d) a child; or
  - (e) any person who has information, amend, vary or revoke any order made under this section—
    - (i) if it is satisfied that it is in the best interests of the child to do so; or
    - (ii) upon proof that the circumstances under which the order was made have since changed after the making of the order.

## **Part V – Administration of property of children by office of the Master of the High Court**

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

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

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

- (1) A surviving parent, guardian, closest relative or any member of the community shall seek permission of the office of the Master of the High Court when alienating, disposing of or selling children's property.
- (2) A surviving parent, guardian, closest relative or any member of the community who fails to comply with the provisions of this section, commits an offence and is liable on conviction to a fine not exceeding five thousand maloti or to imprisonment for a period not exceeding five months.

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

The master of the high court shall—

- (a) in administering a child's share of parental property, ensure that the best interests of the child are met;



- (b) where assets of an estate are being alienated, disposed of or sold, ensure that permission has been granted and a child is not left destitute or homeless;
- (c) have power to administer or confiscate property belonging to children and to delegate such powers to any person or institution;
- (d) where he discovers that the property belonging to children has been negligently used by the successful heir or any person, request the concerned person to pay for that property, failing which he shall make an application to court for such a person to pay for such property;
- (e) where parents married in community of property desert, neglect or abandon children, hear evidence to determine the contribution of the surviving spouse towards maintenance of such children;
- (f) where the surviving spouse is found not to have made any contribution under paragraph (e)—
  - (i) give to such spouse a child's share only;
  - (ii) exercise discretion to award any amount of money depending on the circumstances of the case; or
  - (iii) divide the half share of the abandoning spouse between his children; or
- (g) have power to invest money brought to his office with any financial institution.

#### **41. Duties of the District Administrator in the administration of the property of children**

The district administrator before whom a successful heir of a deceased person is presented shall—

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

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

- (1) An employer shall, after the death of his employee who has minor children, send all monies to the office of the Master of the High Court who will administer and invest such monies where necessary.
- (2) An employer who fails to comply with the provisions of this section commits an offence and is liable on conviction to a fine not exceeding ten thousand Maloti or to imprisonment for a period not exceeding ten months.

#### **43. Duties of financial institutions**

- (1) No financial institution shall open and operate any account in respect of an orphaned child without prior consent of the Master of the High Court.
- (2) A financial institution which contravenes the provisions of this section commits an offence and is liable to a fine not exceeding ten thousand Maloti or imprisonment for a period not exceeding ten months.

### **Part VI – Offences in relation to health and welfare of children**

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

- (1) A person who, being a person having the care of a child, abuses, neglects, abandons or exposes the child in a manner likely to cause the child physical, psychological or emotional injury or causes or permits the child to be so abused, neglected, abandoned or exposed commits an offence and is liable on conviction to a fine not exceeding two thousand Maloti or to imprisonment for a period not exceeding two months or both.

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

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

A person who causes or allows a child to be on any street, premises or place for the purposes of—

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

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

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

A person who, being a parent or guardian or a person for the time being having the care of a child, leaves the child—

- (a) without making provision for the supervision and care of the child;
- (b) for a period which is unreasonable having regard to all the circumstances; or
- (c) under conditions which are unreasonable having regard to all the circumstances,

commits an offence and is liable on conviction to a community service.

### **Part VII – Conditions for taking a child into care**

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

- (1) Where a person takes a child into his care or guardianship he shall, together with a person under whose care the child was at the time of the taking of the child, notify a chief, local authority or the Department of Social Welfare, within one week of the taking of the child.
- (2) On receiving a notification under subsection (1), the Department of Social Welfare shall make such inquiry as it thinks fit as to—
  - (a) the circumstances and the reasons for the taking; and
  - (b) the suitability for that purpose of the person who has taken the child into his care or guardianship.
- (3) If, after the inquiry referred to under subsection (2), the Department of Social Welfare thinks it expedient to do so in the best interests of the child, it may either—
  - (a) order that a child be returned to the care of his parent or guardian or the person in whose care the child was at the time of taking; or
  - (b) permit the taking of a child on such terms and conditions as the social worker may require.
- (4) Where the taking of a child by any person has been permitted under subsection (3)(b) subject to any term or condition and default is made in complying with such terms and conditions, the Department of Social Welfare may, by warrant, order that the child—
  - (a) be taken out of the care or guardianship of such person; or

- (b) be placed in a place of safety or under the guardianship of a relative or other fit and proper person on such terms and conditions as the Department of Social Welfare may require until the child attains the age of eighteen years or for the shorter period.
- (5) The Department of Social Welfare shall, on receiving any notification under this section, record the particulars of such notification in a register in such form as may be prescribed.
- (6) A person who fails to comply with subsection (1) commits an offence and is liable on conviction to a community service.

#### **48. Application**

- (1) The provisions of this Part shall apply to the taking of a child—
  - (a) into the care or guardianship of any person—
    - (i) in accordance with an order of court; or
    - (ii) by any social worker or police officer acting under this Act;
  - (b) who is in a place of safety or an orphanage, institution or centre—
    - (i) maintained by government; or
    - (ii) approved by the Minister;
  - (c) as a boarder at an educational institution; and
  - (d) who is regularly attending an educational institution into the care of a friend or relative, or a parent or guardian with the consent of the parent or guardian.
- (2) For the purposes of this Part, a “guardian” of a child means—
  - (a) a person lawfully appointed by a will or any other legal document of a similar nature or by an order of a court to be the guardian of the child;
  - (b) a person who has lawfully adopted the child; or
  - (c) a relative who has been formally elected and left with up-bringing of orphaned children and any other children left by parents for various reasons.

#### **49. Subsequent obligations towards taking child into care**

- (1) Where a person has taken a child in accordance with [section 47](#), he shall, if—
  - (a) he intends to return the child to the parent or guardian of the child or any other person from whom the child was taken; or
  - (b) the child has left his care without his knowledge or consent,  
report in person to the Director of Social Welfare.
- (2) The Director of Social Welfare shall, on receiving a report made pursuant to subsection (1)—
  - (a) return the child to the parent, guardian or any other person from whom the child was taken if the parent, guardian or any other person is available;
  - (b) take the child into temporary care until the parent, guardian or any other person from whom the child was taken is available;
  - (c) notify, in writing, the parent, guardian or any other person from whom the child was taken;  
or

- (d) where the parent, guardian or any other person from whom the child was taken cannot be traced, sent to his last known address, a letter notifying the parent, guardian or any person of the child's intention to return to him.

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

- (1) Where a social worker or any other designated person, such as chief, has reasonable grounds to believe that there is, within the area of his jurisdiction, a child in respect of whose taking no notification has been made pursuant to [section 48](#), he may, by written notice or summons under his hand addressed to the person who has or is believed to have the care or guardianship of the child, require that person to appear and to present the child before him at the time and place specified in the written notice or summons for the purposes of an inquiry under subsection (4).
- (2) Where a person to whom a written notice or summons has been served under subsection (1) fails to present a child at the time and place specified in the written notice, the Department of Social Welfare or any other designated person charged with the similar responsibility may apply to a magistrate for a search warrant to search for the child and to produce the child before the Department of Social Welfare.
- (3) A child named or described in such warrant may be temporarily—
  - (a) placed in a place of safety; or
  - (b) placed in the care of a relative or other fit and proper person on such terms and conditions as the Department of Social Welfare may require, until the Department of Social Welfare has completed its inquiry under this Part.
- (4) The Department of Social Welfare shall make such inquiry as it thinks fit as to—
  - (a) the circumstances and the reasons for the taking of a child referred to in subsection (1); and
  - (b) the suitability of the person who has taken a child into his care or guardianship.
- (5) If, after the inquiry mentioned under subsection (4), the Department of Social Welfare deems it expedient in the best interests of the child, it may—
  - (a) order that the child be returned to the care of the parent or guardian or the person in whose care the child was at the time of such taking; or
  - (b) permit the taking of the child on such terms and conditions as the Department of Social Welfare may require.
- (6) Where the taking of a child by any person has been permitted under subsection (5) (b) subject to any terms or conditions and default is made in complying with such terms or conditions, the social worker may by warrant under his hand order that the child—
  - (a) be taken out of the care or guardianship of such person; and
  - (b) be placed in a place of safety or in the care of a relative or other fit and proper person on such terms and conditions as the social worker may require until the child attains the age of eighteen years or for any shorter period.

## **Part VIII – Fosterage and adoption**

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

- (1) A person who—
  - (a) is above the age of twenty-five years;
  - (b) is of good behaviour,

- (c) is of proven integrity,
  - (d) is of sufficient means of livelihood, and
  - (e) has no criminal record,
- may be a foster or adoptive parent to a child.
- (2) A person who is a relative of a child and meets the conditions specified under subsection (1), and is at least nineteen years can foster a child.

## **52. Application to foster or adopt a child**

- (1) An application to foster or adopt a child shall be made to the Minister of Health and Social Welfare.
- (2) The Minister of Health and Social Welfare shall, in considering an application made pursuant to subsection (1), be guided by standards and guidelines set by the Department of Social Welfare.

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

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

## **54. Duties of the Department of Social Welfare**

- (1) The Department of Social Welfare shall facilitate assessment of a potential foster and adoptive parent and the conditions surrounding a child to be fostered or adopted.
- (2) In the case of adoption, after the assessment referred to in subsection (1), the Department of Social Welfare shall make an application in respect of a child to the High Court.

## **55. Application for adoption**

- (1) An application for an adoption order may be made jointly by a husband and wife.
- (2) Where an application for an adoption order is made jointly by a Husband and wife, there shall be a written proof to that effect.
- (3) An adoption order may be granted to an individual person provided he meets the conditions set under [section 61](#).
- (4) Where an application for an adoption order is made in respect of a child who has attained the age of ten years and is open for adoption, the consent of the child shall be sought and his opinion shall be taken into consideration.
- (5) An adoption order can be terminated by the High Court if the adoption is proved not to be in the best interests of the child.
- (6) No payment shall be made to a person who gives away his child for adoption.
- (7) Permission of parents of a child who is being adopted shall be sought and given before an application for adoption order is made.

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

- (1) Where an adoption order is made—
- (a) the rights, duties, obligations and liabilities, including those under customary law of parents of a child or of any other person connected with the child, of any nature whatsoever, shall cease; and

- (b) an adoptive parent of a child shall assume the parental rights, duties, obligations and liabilities of the child with respect to care, guardianship and education as if the child were born to the adoptive parent.
- (2) Where an adoption order is obtained jointly by a husband and wife, they shall assume parental responsibilities jointly and a child shall relate to them as parents as if born naturally to them as husband and wife.
- (3) Where an adoption order is made by an individual, he shall assume parental responsibilities and a child shall relate to him as a parent as if born naturally to him.
- (4) An adopted child shall be a member of the clan, lineage or other group, and as such will be entitled to all rights to the family rituals in accordance with customary law.

### **57. Restriction on making adoption orders**

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

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

### **58. Consent of parents or guardians**

- (1) An adoption order shall only be made with the consent of parents or guardian of a child.
- (2) The High Court may dispense with the consent of any parent or guardian of a child if satisfied that the parent or guardian has neglected or persistently ill-treated the child, or the person cannot be found or is incapable of giving consent or that the consent is unreasonably withheld.
- (3) A parent or guardian of a child who has given consent for the adoption order is not entitled to remove the child from the care and guardianship of the applicant except with the permission of the High Court and in recognition of the best interests of the child.
- (4) The High Court may require the consent of any person for an adoption order if it considers that the person has any rights or obligations in respect of a child such as under an agreement, a court order or under customary law.
- (5) Where an application for adoption is made in respect of a child who is born out of wedlock, the natural father of the child, if known and available, shall be consulted.
- (6) Where an application for adoption is made in respect of a child who was abandoned and his parents or guardian could not be traced, the parents or guardian shall have no power to claim back the child from the adoptive parents.

### **59. Conditions for adoption order**

- (1) Before the High Court makes an adoption order, the High Court shall be satisfied that—
  - (a) the consent required under this Part for adoption order has been obtained and that a parent or guardian of a child understands that the effect of the adoption order means permanent deprivation of parental rights;
  - (b) it is in the best interests of a child and that the wishes of the child have been considered if the child is capable of forming an opinion;
  - (c) an opinion of a child has been sought and considered;
  - (d) if a child is at least ten years of age, the child's consent to the adoption has been obtained unless it is impossible for the child to grant such consent; and

- (e) the applicant has not received or agreed to receive any payment and that no person has made or agreed to make any payment or given or agreed to give any reward to the applicant for the adoption except where the High Court has ordered otherwise.
- (2) The High Court may impose conditions when granting an adoption order and require the applicant to enter into a binding agreement and make such provisions in respect of a child as the High Court considers necessary.
- (3) The adoption order shall include the following particulars if known—
  - (a) date, place and country of birth of a child;
  - (b) name, gender and surname of a child before and after the adoption;
  - (c) name, surname, age, address, citizenship and occupation of an adoptive parent; and
  - (d) date of the adoption order, unless the High Court directs otherwise.

#### **60. Knowledge of adoption by child**

- (1) An adoptive parent shall, under the guidance of a social worker, inform an adopted child of the fact that he is adopted and of his parentage, but this disclosure shall only be made if it is in the best interests of the child and if the child is of an understanding age.
- (2) No person other than an adoptive parent shall disclose adoption to an adopted child.
- (3) Subject to subsection (1), an adopted child shall, where possible, have access to photos, letters or any form of artifacts that might help him to understand his roots better.
- (4) If an adopted child has any siblings, the child shall be informed of any siblings and be helped to maintain a link with the siblings, either through visits, letters or other communication channels.
- (5) A person who fails to comply with the provisions of this section commits an offence and is liable on conviction to a fine not exceeding two thousand Maloti or to imprisonment for a period not exceeding two months or both.

#### **61. Inter-country adoption**

- (1) A person who is not a citizen of Lesotho may adopt a Mosotho child, if he—
  - (a) has been found eligible to adopt by an adoption agency of his country;
  - (b) does not have a criminal record;
  - (c) has a recommendation concerning his suitability to adopt the child from his country's social welfare office or an adoption agency; and
  - (d) has satisfied the High Court that his country of origin will respect and recognise the adoption order and grant residence or citizenship status to the child.
- (2) For the purposes of an application under this section, the social worker shall submit a report to assist the High Court in considering the application, and the High Court may, in addition, require an applicant's lawyer to make a report in respect of the application.
- (3) The restrictions and conditions under sections [57](#) and [59](#) shall apply in respect of an application under this section.
- (4) The High Court shall make an interim adoption order for a period not less than two years on condition that supervision of a child be done by social workers of the country where the adoptive parents reside and postpone the determination of the application.

- (5) Where a foreign child has been adopted by a Mosotho who is residing in Lesotho, that person shall report the matter to the Department of Social Welfare which shall provide the High Court with such information relevant to the adoption.
- (6) Where a foreign child has been adopted by a Mosotho who is residing in Lesotho, the child shall be afforded all citizenship rights in Lesotho.
- (7) A person who is not a Mosotho but is residing in Lesotho and has a working contract of not less than twelve months may adopt a child at the discretion of the Minister of Health and Social Welfare.
- (8) A supervision referred to in subsection (7) shall be done by a Social worker of the country where the adoptive parents will reside in collaboration with international police office.
- (9) For the purposes of subsection (5), the High Court may order the Department of Social Welfare to report regularly on the welfare status of a concerned child.
- (10) Where an adoptive parent requires medical tests to be administered on a child, he shall bear the costs for testing.

## **62. Devolution of property on adoption**

- (1) Where an adoptive parent dies intestate, his property shall devolve on an adopted child in all respects as if the adopted child is the natural child of the adoptive parent.
- (2) Estates of adoptive parents shall be subject to administration of property by the Master of the High Court.
- (3) If it appears to the High Court on a claim made that a disposition of property devolving on an intestacy has been exercised unfairly against an adopted child, the High Court may make such an order as it thinks equitable to the adopted child in relation to property devolving on the intestacy in accordance with the law.

## **63. Testamentary disposition**

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

## **64. Register of adopted children**

- (1) The Director of Social Welfare shall maintain a register of adopted children, whether adopted inside or outside Lesotho, in which shall be recorded particulars of adoption orders or interim orders as the High Court may direct to be made under this Part.
- (2) Every adoption order or interim order made by the High Court shall be served on the Director of Social Welfare by the Registrar of the High Court within seven days of the making of the order.



**65. Procedure in adoption proceedings**

- (1) Where the High Court hears an adoption application, it shall—
  - (a) proceed *in camera* unless open proceedings will be in the best interests of a child;
  - (b) admit documentary evidence relating to the consent required for the order;
  - (c) require the Department of Social Welfare to represent the interests of a child in the proceedings relating to an adoption order or an interim order;
  - (d) require the Department of Social Welfare to prepare a social inquiry report to assist the court to determine whether the adoption order is in the best interests of the child or not; or
  - (e) request any other information that the High Court may need.

**Part IX – Trafficking and abduction of children****66. Unlawful transfer of possession, custody or control of child**

- (1) A person who takes part in any transaction the object or one of the objects of which is to transfer or confer, wholly or partly, temporarily or permanently, the possession, custody or control of a child for any valuable consideration, commits an offence and is liable on conviction to a fine not exceeding twenty thousand maloti or to imprisonment for a period not exceeding five years or both.
- (2) A person who without lawful authority or excuse harbours or has in his possession, custody or control a child with respect to whom the temporary or permanent possession, custody or control has been transferred or conferred for valuable consideration by any person within or outside Lesotho, commits an offence and is liable on conviction to a fine not exceeding one hundred thousand maloti or to imprisonment for a period not exceeding five years.
- (3) For the purposes of subsection (2), if any person harbours or has in his possession, custody or control a child without lawful authority or excuse, the child shall, until the contrary is proved, be presumed to be the child with respect to whom the temporary or permanent possession, custody or control has been transferred or conferred for valuable consideration.

**67. Trafficking of child by false pretences**

- (1) A person who—
  - (a) by or under any false pretences or representation made; or
  - (b) by fraudulent or deceitful means,  
either within or outside Lesotho, brings into or takes out of or assists in bringing into or taking out of Lesotho, a child who is not in his lawful custody, guardianship or parentage commits an offence and is liable on conviction to a fine not exceeding One Million Maloti and life imprisonment.
- (2) A child's consent to his trafficking shall not be a defence.

**68. Examination of child and person in charge**

The department of social welfare or any person authorised in writing by the department of social welfare may require—

- (a) a child who has entered or been brought into Lesotho; and
- (b) any person who may appear to have custody or control of such child, to appear with the child before the Department of Social Welfare, at any reasonable time and at any convenient place to be examined.

**69. Social worker to cause arrest**

- (1) If a social worker has reasonable cause to believe that a child—
  - (a) has been brought into Lesotho either—
    - (i) after having been transferred for valuable consideration; or
    - (ii) by fraud, misrepresentation or any false pretences;
  - (b) has been transferred to the custody or control of any person for valuable consideration either within or outside Lesotho; or
  - (c) is being detained against his will by some person other than his parent or guardian, the Department of Social Welfare,he shall immediately cause the arrest of the person suspected and assist the police in investigating the matter.
- (2) The Department of Social Welfare shall place such a child into a place of safety.

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

- (1) A person, parent or guardian who—
  - (a) does not have the lawful custody of a child; and
  - (b) takes a child, without appropriate consent, whether within or outside Lesotho;commits an offence and is liable on conviction to a fine not exceeding ten thousand Maloti or to imprisonment for a period not exceeding ten months or both.
- (2) A person has lawful custody of a child under this section if he has been conferred custody of the child by virtue of any written law or by an order of a Children's Court.
- (3) It shall be a defence under this section if a person takes or sends a child away without the consent of the person having lawful custody of the child if—
  - (a) the person—
    - (i) does it in the belief that the other person consented, or would have consented, if he was aware of all the relevant circumstances; or
    - (ii) has taken all reasonable steps to communicate with the other person but has been unable to communicate with him;
  - (b) the person has reasonable grounds to believe that the child has been abused, neglected, abandoned or exposed in a manner likely to cause the child physical, psychological or emotional injury; or
  - (c) the other person has unreasonably refused to consent although he was aware of all the relevant circumstances.

**71. Inquiries and placement of a child brought into or out of Lesotho or acquired under false pretences**

- (1) If the Department of Social Welfare has reasonable cause to believe that a child—
  - (a) has been brought into or is to be sent out of Lesotho and the custody of the child has been acquired either—
    - (i) after having been procured for the purpose of prostitution; or
    - (ii) by fraud, false representation or false pretence for the purpose of prostitution;

- (b) has been procured either within or outside Lesotho for the purpose of being used, trained or disposed of as a prostitute; or
- (c) is being detained against his will for the purposes of—
  - (i) prostitution or immoral purposes; or
  - (ii) being sent out of Lesotho for the purposes of prostitution or for immoral purposes,the social worker may order the child to be removed to a place of safety and the child shall be temporarily placed in such a place of safety.
- (2) A child who is temporarily placed in a place of safety pursuant to subsection (1) shall be brought before a Children's Court within forty-eight hours exclusive of the time necessary for the journey from the place where the child was so removed to the Children's Court.
- (3) If it is not possible to bring a child before a Children's Court within the time specified under subsection (2), the child shall be placed in a place of safety until such time as the child can be brought before the Children's Court.
- (4) A Children's Court before whom a child is brought in terms of subsection (3) shall order the child to be detained in a place of safety until—
  - (a) an inquiry into the circumstances of the child's case has been completed; and
  - (b) a report of the inquiry has been submitted to the Children's Court by the social worker under subsection (6).
- (5) An inquiry made pursuant to subsection (4) (a) shall be made by the Department of Social Welfare.
- (6) The Department of Social Welfare shall complete the inquiry and submit the report of the inquiry to a Children's Court within a period not exceeding one month from the date of admission of a child into the place of safety.
- (7) If after considering the report submitted under subsection (6) a Children's Court is satisfied that a child brought before it is in need of protection and rehabilitation, it may—
  - (a) order the child to be kept in a place of safety for such period not exceeding three years from the date of the order as the Children's Court may in the best interests of the child deem fit; or
  - (b) make an order placing the child under the supervision of a social worker for a period not exceeding three years from the date of the order as the Children's Court may in the best interests of such child deem fit.
- (8) An order made under subsection (7) may have the effect of extending the period of such placement or supervision, as the case may be, until the date on which the child attains the age of eighteen years.
- (9) If a Children's Court is not satisfied that a child brought before it is in need of protection and rehabilitation, it may order the child to be returned to the care and custody of the parent or guardian.

## 72. Recovery order

- (1) If it appears to a Children's Court that there is reason to believe that a child had been taken or sent away without the consent of a person who has lawful custody of the child as described in [section 70](#), it may make a recovery order.
- (2) A recovery order made pursuant to subsection (1) may be made by a Children's Court on application by or on behalf of any person who has lawful custody of a child.

- (3) For the purposes of this section, a “recovery order” may—
- (a) direct any person who is in a position to do so to produce a child on request to any authorised person;
  - (b) authorise the removal of a child by any authorised person;
  - (c) require any person who has information as to a child’s whereabouts to disclose that information to the authorised person; or
  - (d) authorise any police officer to enter into any premises specified in the order and search for a child.
- (4) A person who obstructs an authorised person from exercising the powers under subsection (3) commits an offence and is liable on conviction to a fine not exceeding two thousand Maloti or to imprisonment for a period not exceeding two months or both.

## **Part X – Child in need of rehabilitation and urgent protection**

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

A child is in need of rehabilitation if the child—

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

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

- (1) The Department of Social Welfare, a police officer, chief or a member of the community who is satisfied on reasonable grounds that a child is in need of rehabilitation may order the child to be removed to a place of safety and the child shall be temporarily kept in such place of safety.
- (2) A child who is temporarily kept pursuant to subsection (1) shall be brought before a Children’s Court within forty-eight hours exclusive of the time necessary for the journey from the place where the child was so removed to the Children’s Court.
- (3) If it is not possible to bring a child before a Children’s Court within the time specified in subsection (2), the child shall be kept in a place of safety for a period not exceeding seven days within which the child shall be brought before the Children’s Court.
- (4) If a Children’s Court is satisfied that a child brought before it is in need of rehabilitation, it may order the child to be kept in a place of safety until—
  - (a) an inquiry into the circumstances of the child’s case under [section 75\(1\)](#) has been completed; and
  - (b) a report of the inquiry has been submitted to the Children’s Court by the social worker pursuant to [section 75](#).
- (5) If a Children’s Court is not satisfied that a child brought before it is in need of rehabilitation, the Children’s Court shall order the child to be returned to the care of the parent or guardian.

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

- (1) An inquiry referred to under [section 74](#)(4) shall be made by a social worker.
- (2) The Department of Social Welfare shall complete the inquiry and submit a report to a Children's Court within a period not exceeding one month from the date of admission of a child to a place of safety under [section 74](#) (1).
- (3) If after considering a report submitted under subsection (2), a Children's Court is satisfied that a child brought before is in need of rehabilitation, the Children's Court may, subject to the other provisions of this section—
  - (a) order the child to be kept in a place of safety for a period not exceeding three years from the date of the admission of the child into a place of safety under [section 74](#) (1) and the order shall be an authority for his admission into a place of safety;
  - (b) make an order placing the child for a period not exceeding three years from the date of the order in the care of the person whether a relative or not who is willing and whom the Children's Court considers to be a fit and proper person to undertake care of such child;
  - (c) make an order requiring the parent or guardian of the child to enter into a binding agreement, with or without sureties, as the Children's Court may determine, for a period not exceeding three years from the date of the order, subject to such conditions as the Children's Court thinks fit for the proper care and guardianship of the child; or
  - (d) make an order placing the child under the supervision of a social worker, subject to such conditions as the Children's Court thinks fit and for a period not exceeding three years from the date of the order.
- (4) An order made under subsection (3)(a) or (d) may have the effect of extending the period of such placement or supervision, as the case may be, until a child attains the age of eighteen years.
- (5) A Children's Court may, on its own or on an application by or on behalf of a child, parent, guardian, the Department of Social Welfare or person in charge of a place of safety, reduce the period of placement upon evidence of material change in the circumstances that gave rise to the order of placement.
- (6) A Children's Court shall, when making an order under subsection (3)(a) or (d), order a parent or guardian of a child to enter into a binding agreement for the duration of the order with such conditions which may include—
  - (a) in the case of the provisions of subsection (3)(a), regular visits to the place of safety where the child is kept; and
  - (b) in the case of the provisions of subsection (3)(d), ensuring that the child remains indoors within stipulated times.
- (7) A person who is ordered to enter into a binding agreement under subsection (3)(a) and (d), as the case may be, and fails to comply with any of the conditions for the agreement, commits an offence and is liable on conviction to a fine not exceeding two thousand Maloti or to imprisonment for a period not exceeding two months or both.
- (8) A child who is kept in a place of safety under subsection (3)(a) shall, on the expiration of the period of placement whether by—
  - (a) lapse of time; or
  - (b) reason of any reduction made pursuant to subsection (6), be placed under the supervision of the Department of Social Welfare or other person appointed by the Director of Social Welfare for such purpose.

- (9) The period of supervision for the purpose of subsection (8) shall be determined by a Children's Court after hearing the recommendations of the Department of Social Welfare and consulting with a child, parent or guardian but the period of such supervision shall not in any case exceed one year from the date of expiration of the period of placement of the child.
- (10) A Children's Court may, on the application of a child, parent or guardian, exempt the child from the application of subsection (8) if satisfied that the case warrants such exemption.

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

- (1) A child is in need of urgent protection if there is reasonable cause to believe that—
  - (a) the child is being threatened or intimidated for purposes of prostitution or for purposes of having sexual intercourse with another or for any immoral purpose;
  - (b) the child is being forced to marry;
  - (c) the child is pregnant and suicidal or rejected by the family due to this condition;
  - (d) the child is subjected to hazardous conditions of labour;
  - (e) the child is forced to undergo cultural or spiritual rituals;
  - (f) the child is compelled to leave school;
  - (g) the child is confined or detained by another person in contravention of this Part; or
  - (h) the well-being of and development of the child is in eminent danger.
- (2) A person or an affected child who is in need of urgent protection may, on his own, make an application to the Department of Social Welfare, chief or police officer for admission into a place of safety.
- (3) The Department of Social Welfare shall satisfy itself that a child referred to in subsection (1) is in need of urgent protection, and if the circumstances so warrant, admit the child.
- (4) Where a person in charge of a place of safety receives any child pursuant to this section, the child shall be attended to by the Department of Social Welfare within forty-eight hours of admission and the Department of Social Welfare shall make an assessment and produce a full report of the circumstances.
- (5) A child admitted pursuant to subsection (2) shall reside in a place of safety for as long as the Department of Social Welfare is satisfied that the child is in need of urgent protection.
- (6) Where—
  - (a) a person receives a child pursuant to subsection (4); or
  - (b) the Department of Social Welfare attends to a child and makes an assessment and produces a report pursuant to subsection (4), the Department of Social Welfare shall immediately inform a Children's Court of such admission with a full report of the circumstances and in the like manner, inform the Children's Court of the child's departure.

## **77. Offences**

A person who—

- (a) sells, lets for hire or otherwise disposes of, or procures or hires or otherwise obtains possession of, a child with intent that the child is to be employed or used for the purpose of commercial sexual exploitation, either within or outside Lesotho, or knowing or having reason to believe that the child will be so employed or used;

- (b) procures a child for purposes of commercial sexual exploitation or for purposes of having sexual intercourse with any other person, either within or outside Lesotho;
- (c) by or under any false pretences, false representation, or fraudulent or deceitful means made or used, either or within or outside Lesotho, brings or assists in bringing into, or takes out of or assists in taking out of Lesotho, a child with intent that the child is to be employed or used for the purposes of commercial sexual exploitation, either within or outside Lesotho, or knowing or having reason to believe that the child will be so employed or used;
- (d) brings into Lesotho, receives or harbours a child knowing or having reason to believe that the child has been procured for purposes of commercial sexual exploitation or for the purposes of having sexual intercourse with any other person, either within or outside Lesotho, and with intent to aid such purpose;
- (e) knowing or having reason to believe that a child has been brought into Lesotho in the circumstances as set out in paragraph (c) or has been sold, let for hire, or hired or procured in the circumstances as set out in paragraph (a), or in contravention of any other written law, receives or harbours the child with intent that he is to be employed or used for purposes of commercial sexual exploitation either within or outside Lesotho;
- (f) detains or confines a child in a brothel or similar place;
- (g) detains or confines a child in any place with intent that the child is to be employed in hazardous labour or used for purposes of commercial sexual exploitation or for any unlawful or immoral purpose;
- (h) by means of any advertisement or other notice published in any manner or displayed in any place offers a child for purposes of commercial sexual exploitation or seeks information for that purpose or accepts such advertisements or notice for publication or display;
- (i) acts as an intermediary on behalf of a child or exercises control or influence over the movements of the child in such a manner as to show that the person is aiding or abetting or controlling the commercial sexual exploitation of that child;
- (j) engages or hires a child to provide services for that person's sexual gratification;
- (k) attempts to do any act in contravention of this section,

commits an offence and is liable on conviction to a fine not exceeding thirty thousand Maloti or to imprisonment for a period not exceeding two years and six months or both.

## 78. Presumptions

Where a person—

- (a) causes a child to be employed or taken into a brothel or similar place;
- (b) receives a child into a brothel or harbours a child in a brothel or similar place or obtains possession of the child;
- (c) detains a child in any brothel or place, employs or uses a child in hazardous labour for the purposes of commercial sexual exploitation or for any unlawful or immoral purpose, and the person—
  - (i) withholds from the child any wearing apparel or any other property belonging to the child or any wearing apparel commonly or last used by the child;
  - (ii) threatens the child with legal proceedings, violence or makes threats of harm or denial of food, if the child takes away any wearing apparel or any other property which has been lent or hired out or supplied to the child;
  - (iii) threatens the child, parent or guardian with legal proceedings for the recovery of any debt or alleged debt or uses any other threat;

- (iv) refuses or hinders access to the place by the child's parent, guardian or social workers; or
- (v) without any lawful authority detains the child's identity card or passport issued under the law relating to national registration,

it may be considered as evidence of the fact that the person intended to commit offences referred to in [section 77](#).

## **Part XI – Children in conflict with the law, age of criminal responsibility and age determination**

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

- (1) No child below the age of ten years shall be prosecuted for a Criminal offence.
- (2) No prosecution for a criminal offence may be instituted against a Child between the ages of ten and fourteen until an inquiry magistrate is satisfied that the child possesses the capacity to appreciate the difference between right and wrong and has the ability to act in accordance with that appreciation.
- (3) An inquiry to establish whether a child appreciates the difference between right and wrong and is able to act in accordance with that appreciation shall be conducted by an inquiry magistrate.
- (4) It shall be presumed that a child between the ages of ten and fourteen lacks the capacity to appreciate the difference between right and wrong, and cannot act in accordance with full appreciation, unless the Crown proves beyond reasonable doubt that such child, as a matter of fact, has that appreciation and is able to act in accordance with the appreciation.
- (5) Evidence of the intellectual, emotional, psychological and social development of a child is relevant to any enquiry into whether such child possesses the capacity to appreciate the difference between right and wrong and has the ability to act in accordance with that appreciation.
- (6) Evidence referred to in subsection (5) shall be supported by a report from a person with expertise in child development or child psychology, who shall testify before an inquiry magistrate in person as to the content and findings of the report.
- (7) Evidence referred to in subsection (5) may be challenged by any person present at the inquiry, and any evidence in rebuttal may be adduced.

### **80. Purposes of assessment of age**

- (1) The purposes of assessment of age are to—
  - (a) establish the probable age of a child;
  - (b) establish the prospects of a child being able to be diverted by a probation officer;
  - (c) establish the prospects for diversion by a prosecutor or inquiry magistrate;
  - (d) provide information to support recommendations to a prosecutor and an inquiry magistrate regarding release of a child into the care of a parent or guardian or placement in a place of safety;
  - (e) in the case of children below the minimum age of prosecution, to establish what measures, if any, need to be taken.
- (2) An assessment shall be effected by a probation officer and may take place at a magistrate's court, the offices of the Department of Social Welfare, a private house, a police station or any other suitable place identified by the probation officer concerned.



- (3) No person other than the following is entitled to attend assessment of a child as referred to in this section—
- (a) the child in respect of whom the assessment is conducted;
  - (b) the child's parent or guardian;
  - (c) the prosecutor in whose district the assessment is being conducted;
  - (d) a legal representative;
  - (e) the police officer responsible for arresting the child;
  - (f) a medical officer; and
  - (g) any person whose presence is necessary or desirable for the completion of the assessment process.

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

If a police officer is uncertain about the exact age of a person suspected of having committed an offence, but has reason to believe that the age of the person would render that person subject to protection under this Act, he shall take such person to a probation officer for assessment of age within the prescribed period or, if a probation officer is not readily available, to a medical officer:

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

### **82. Age assessment by probation officer**

- (1) The probation officer referred to in [section 87](#) shall receive, obtain or request any evidence relevant to assessment into the age of a child or person.
- (2) Upon receipt of information referred to in this subsection (1), a probation officer shall make an assessment in respect of the age of a person brought before him and shall for this purpose, consider the evidence received in the following order:
- (a) a valid birth certificate, identity document or passport;
  - (b) any other form of registration of birth, identity or age acknowledged by the office of the District Administrator;
  - (c) a statement from a parent, guardian or person likely to have knowledge of the age of a child or a statement made by the child or person who alleges that he is the child;
  - (d) an estimation of age made by a medical practitioner;
  - (e) a previous determination of age by a magistrate under this Act;
  - (f) secondary documentary evidence, such as a hospital birth record, baptismal certificate, school registration forms, school reports, or other evidence of a similar nature if relevant to establishing a probable age.
- (3) A probation officer shall make an assessment as to the probable age of a child or person concerned.
- (4) Where a probation officer, after making an assessment, concludes that a child or person referred to him by a police officer in terms of [section 81](#) is over the age of eighteen years or is below the minimum age of prosecution as referred to under [section 79](#), such child or person shall not be subjected to the provisions of this Act:

Provided that the conclusions of the probation officer will not remain valid after evidence to the contrary before an inquiry magistrate.

- (5) Where a probation officer concludes that a child is, by virtue of his age, subject to the provisions of this Act, he shall proceed with the assessment of the child, and the age assessment can form the basis of—
  - (a) the decisions of the probation officer made pursuant to [section 88](#); and
  - (b) the recommendations of the probation officer made pursuant to [section 91](#).
- (6) Where a probation officer is uncertain as to the probable age of a child or person, or where the age of the child or person is in dispute, the probation officer shall cause the child or person to be taken to a medical officer for assessment of age unless the child or person has already been taken to the medical officer by a police officer under [section 81](#), in which case the provisions of [section 87](#) shall apply.

### **83. Age estimation by medical officer**

- (1) A police officer or probation officer may refer a child to a medical officer for an estimation of the age of the child.
- (2) Where a medical officer concludes that a child or person referred to him for estimation of age is—
  - (a) over the age of eighteen years, the person is deemed to be an adult and is not subject to the provisions of this Act, or
  - (b) below the minimum age of prosecution as referred to under [section 79](#), the child shall be referred back to the probation officer for further attention in terms of [section 89](#); or
  - (c) over the minimum age of prosecution as referred to under [section 83](#) and under the age of eighteen years, that child shall be referred back to a probation officer concerned, together with the record of the estimation of age for further procedures under this Act.
- (3) Where a medical officer concludes that he is unable to make accurate assessment of a person's age and it is not clear as to whether the person is subject to the provisions of this Act, he shall refer such person back to a probation officer concerned for the purposes of determination of age by an inquiry magistrate.

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

- (1) A probation officer to whom a child has been referred by a medical officer under [section 83](#) (3), shall cause the child or person to appear before an inquiry magistrate for purposes of the determination of the age of that child or person and shall place such inquiry magistrate in possession of a completed age assessment together with relevant documentation referred to under [section 83](#)(1).
- (2) The inquiry magistrate shall, on the available evidence and with due regard to the provisions of [section 83](#) (2), make a determination as to the age of a child or person which shall be entered into the record as the age of the child, and shall be considered to be the correct age until such time as any contrary evidence is placed before the court in which the inquiry magistrate presides or any other court.
- (3) For the purposes of the determination referred to under subsection (2), the inquiry magistrate may require any documentation, evidence or statements relevant to age determination from any person, body or institution to be placed before him.
- (4) If an inquiry magistrate determines that a person is over the age of eighteen years, he shall close the preliminary inquiry and direct that the matter be transferred to a court other than a Children's Court for criminal proceedings.
- (5) Where an inquiry magistrate makes a determination under subsection (2), he shall cause a record of the determination to be forwarded to the office of the Minister responsible for home affairs for the purposes of issuing relevant identification documents.

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

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

- (1) Where a person appearing in a criminal court other than a preliminary inquiry or a Children's Court alleges that he is below the age of eighteen years at any stage in a criminal trial before sentence, or where it appears to such court that the person may be below the age of eighteen years, the officer presiding in that court may conduct an inquiry as to the age in accordance with the provisions of [section 83](#) (2) and (3).
- (2) If the age of a person referred to under subsection (1) is found to be below eighteen years and the trial has not yet commenced, the presiding officer concerned shall transfer the matter to an inquiry magistrate for further proceedings under this Act.
- (3) If the age of the person referred to under subsection (1) is found to be below the age of eighteen years and the trial has commenced, the proceedings shall continue to be conducted before the presiding officer concerned, but the remainder of the proceedings shall be conducted under the provisions of this Act.
- (4) A presiding officer concluding a trial under subsection (3) may, after conviction, deal with the matter in a manner similar to which a Children's Court would do.

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

- (1) A parent or guardian who has been issued with a written notice or a summon to appear at an assessment of a child shall attend the assessment unless exempted from the obligation to do so under subsection (3).
- (2) If a person referred to under subsection (1) has not been notified to attend an assessment, a probation officer may at any time before the assessment direct a police officer to issue a written notice to the person to appear at an assessment.
- (3) A person who has been notified under subsection (1) or (2) may apply to the probation officer concerned for exemption from the obligation to attend the assessment in question, and if the probation officer exempts such person, he shall do so in writing.
- (4) A person who has been notified under subsection (1) or (2) and who has not been exempted from the obligation to attend an assessment under subsection (3) and fails to attend the assessment in question, commits an offence and is liable on conviction to a community service.

#### **87. Duties of probation officer in relation to social assessment**

- (1) A probation officer shall assess all children—
  - (a) who have been arrested and who remain in detention in police custody within 48 hours of such arrest subject to the provision under [section 89\(1\)\(a\)](#).
  - (b) who have been arrested and released from detention in police custody under [section 104](#), after 48 hours, calculated from the time of the arrest;
  - (c) in respect of whom an alternative method of securing attendance at an assessment has been effected within 72 hours.
- (2) A probation officer shall make every effort to locate a parent or a guardian for the purposes of concluding an assessment process of a child:

Except that where all reasonable efforts to locate such person or persons have failed, the probation officer may conclude the assessment in the absence of such person or persons.

- (3) A probation officer shall explain to a child in a language that the child understands—
  - (a) the purposes of an assessment; and
  - (b) that the child has the right to—
    - (i) contradict or challenge any information against him;
    - (ii) remain silent;
    - (iii) have the parent or guardian contacted;
    - (iv) have a person referred to under paragraph (iii) or a legal representative present during the noting by a police officer or a magistrate of a confession, admission, pointing out or during an identification parade;
    - (v) choose and to be represented by a legal practitioner at the child's own cost.
- (4) A probation officer shall interview a child, the child's parents or guardian in order to effect the necessary assessment.
- (5) A probation officer may contact or consult with any other person who has any information relevant to an assessment of a child.
- (6) A probation officer shall obtain evidence relevant to the age assessment referred to under [section 82](#).
- (7) Unless a child is below the minimum age of prosecution as referred to in [section 79](#), the probation officer shall make a report with the following recommendations—
  - (a) the prospects of diversion;
  - (b) the possible release of the child into the care of a parent or guardian; or
  - (c) the placement, where applicable, of the child in a place of safety.
- (8) Transfer or conversion of a matter to a Children's Court shall be considered by a probation officer.
- (9) If a probation officer recommends that the matter be transferred to a Children's Court the report shall reflect his recommendations and reasons as well as recommendations as to the temporary placement of a child pending the opening of the Children's Court inquiry.
- (10) A report made pursuant to subsection (7) shall be submitted to a prosecutor for the opening of the preliminary inquiry.

## **88. Powers of probation officer to obtain relevant evidence or secure attendance of relevant persons**

A probation officer may, by issuing a notice, require an arresting officer or any other police officer to—

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

## **89. Powers of probation officer in relation to children below the minimum age of prosecution**

- (1) After assessment under section 80(1)(a) and (d) of a child below the minimum age of prosecution, a probation officer may—
  - (a) refer the child or the family of the child for counselling or therapeutic intervention;
  - (b) arrange the provision of support services to the child or family of the child;

- (c) arrange a conference, which shall be attended by the child, parents or an appropriate adult, and which may be attended by any other person likely to be able to provide information material for the purposes of the conference; or
  - (d) decide to take no action.
- (2) The purpose of the conference convened by a probation officer under subsection (1)(c) is to assist such probation officer to—
  - (a) establish fully the circumstances surrounding the allegations against the child;
  - (b) formulate a written plan appropriate to the child and relevant to the circumstances; or
  - (c) make an order in terms of this section.
- (3) The written plan under subsection (2)(b) shall—
  - (a) specify the objectives to be achieved for a child and the period within which those objectives are to be achieved;
  - (b) contain details of the service and assistance to be provided for a child and for any parent or guardian;
  - (c) specify persons who or organisations which shall provide such services and assistance;
  - (d) state the responsibilities of a child and a parent or guardian of such a child;
  - (e) state personal objectives of a child and of parent or guardian of such child; and
  - (f) contain such other matters relating to the education, employment, recreation and welfare of a child as are relevant.
- (4) A probation officer shall record the outcome of the assessment and the decision made or given under subsection (1), as well as the reasons for such decision or order.

**90. Powers of probation officer in respect of children above the minimum age of prosecution alleged to have committed offences referred to in Schedule I**

- (1) After an assessment under section 80(1)(a), (b), (d) and (e) of a child of ten years or above as referred to under [section 80](#), a probation officer concerned may, where the child is alleged to have committed an offence referred to in schedule 1—
  - (a) refer the child to a Children's Court for appropriate action;
  - (b) take no further action; or
  - (c) if the child acknowledges responsibility for the alleged offence, refer the child to a diversion option referred to under [section 129](#)(2) or (3), where there are no factors mitigating against such decision.
- (2) A probation order taken by a probation officer under subsection (1) may be effected.
- (3) A probation officer concerned shall record any decision taken under subsection (1), as well as the reasons for such decision.
- (4) If a probation officer does not make a decision under subsection (1), he may recommend that the matter be referred to a prosecutor for the opening of the preliminary inquiry, in which case the probation officer shall make an age assessment and produce an assessment report.

**91. Powers of probation officer in respect of children above the age of prosecution alleged to have committed offences referred to in Schedule II**

- (1) After an assessment under section 80(1)(a), (c), (d) and (e) of a child of ten years of age or above as referred to under [section 79](#), a probation officer concerned shall, where the child is alleged to have committed an offence referred to in Schedule II, make an age assessment report which, together with supporting information, shall be submitted to a prosecutor for the opening of the preliminary inquiry.
- (2) If it appears to a probation officer that a child concerned does not intend to accept responsibility for the alleged offence, that fact shall be indicated in the assessment report referred to under subsection (1).
- (3) After an assessment referred to under subsection (1), a probation officer may recommend—
  - (a) the diversion of a child to a specified process, programme or appropriate alternative order mentioned under [section 129](#);
  - (b) that no further action be taken in respect of the alleged offence;
  - (c) that the matter be transferred to a Children's Court for appropriate action;
  - (d) that the matter not be diverted and be referred to a prosecutor;
  - (e) that a child be released to a parent or guardian, or on his own recognisance;
  - (f) an appropriate placement, including placement in the care of a fit and proper person; or
  - (g) detention in a secure care facility or prison with due regard to the circumstances referred to under [section 116](#).

**Part XI – Police powers and duties**

*[Please note: numbering as in original. Two Parts XI in original.]*

**92. Meaning and purpose of arrest**

- (1) An arrest, for purposes of this Act, may be made by a police officer with or without warrant unless a child to be arrested submits to custody.
- (2) The purpose of arrest under this Act is to bring a child before a preliminary inquiry or for assessment under [section 87](#).
- (3) An arrest shall be made with due regard to the dignity and wellbeing of a child.
- (4) Subject to subsection (6), if it is clear that a child cannot be arrested without the use of minimum force, the police officer arresting the child may use such force as may be reasonably necessary and proportional in the circumstances, to overcome any resistance.
- (5) Where the use of minimum force is placed in dispute in civil matters, the onus of proving that the minimum force was used rests on the person so alleging.
- (6) A police officer arresting or attempting to arrest a child under this section is not justified in using deadly force that is intended or is likely to cause death or serious bodily harm to such child, except if he believes, on reasonable grounds—
  - (a) that the force is immediately necessary for the purposes of protecting himself, any person lawfully assisting him or any other person from eminent death or serious bodily harm;
  - (b) that there is a substantial risk that the suspect will cause eminent death or serious bodily harm if the arrest is delayed; or

- (c) that the offence for which the arrest is sought is in progress and is of a forcible and serious nature and involves the use of life-threatening violence or a strong likelihood that it will cause serious bodily harm.

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

- (1) A police officer may, subject to subsections (2) and (3), with out warrant, arrest a child—
  - (a) who commits or attempts to commit any offence in his presence;
  - (b) whom he reasonably suspects of having committed an offence, including the offence of escaping from lawful custody;
  - (c) who willfully obstructs him in the execution of his duty;
  - (d) who is reasonably suspected of having failed to observe any condition imposed in the passing of sentence or in postponing or suspending the operation of any sentence under this Act.
- (2) A police officer may arrest a child referred to in subsection (1) whose age is above the minimum age of prosecution referred to in [section 79](#) but below the age of eighteen years for the purposes of bringing the child for assessment by a probation officer as referred to under [section 82](#).
- (3) In deciding whether to effect an arrest, a police officer is obliged to consider whether an alternative method of securing the appearance of a child at an assessment as referred to under [section 94](#) can be used, or whether an informal caution referred to in [section 100](#) (1) can be used.

### **94. Alternatives to arrest**

- (1) Alternatives to arrest shall include the following:
  - (a) requesting a child in a language that the child understands to accompany the police officer to the place where assessment can be effected;
  - (b) written notification to a child and, if available, the parents, guardian or family of the child to appear for assessment on a specified date and at a specified place and time;
  - (c) granting of a written recognisance by a police officer at the place of arrest, informing a child to appear at an assessment on a specified date and at a specified place and time:

Provided that the police officer shall, as soon as is reasonably possible, inform the probation officer of the granting of such recognisance;
  - (d) accompanying a child to his home, where a written notice referred to in paragraph (b) can be given to the child and parents, guardian or family; and
  - (e) opening a docket for the purposes of consideration by the Director of Public Prosecutions as to whether the matter should be set down for the holding of a preliminary inquiry or whether a child should be charged.
- (2) Subject to the provisions of subsection (1), a child may be summoned to appear for assessment at a place and time and on a date specified in the summons, upon application by a prosecutor the clerk of a Children's Court.
- (3) Where an alternative to arrest as referred to under subsection (1) has been employed, a child shall be required to appear for assessment within 72 hours of such alternative being employed, or in the case of the issuing of a summons, within 72 hours of the summons being served on the child.

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

- (1) A private person may, without warrant, arrest a child whom he reasonably believes to be ten years of age and above as referred to under [section 79](#), and below the age of eighteen years—
  - (a) who commits or attempts to commit in his presence or whom he reasonably suspects of having committed an offence;
  - (b) whom he reasonably believes to have committed any offence and to be escaping from and being freshly pursued by a person whom such private person reasonably believes to have authority to arrest the child;
  - (c) whom he is by any law authorised to arrest without warrant in respect of any offence specified in that law.
- (2) Minimum force, where necessary, shall be used in effecting an arrest under this section.
- (3) The provisions of [section 92](#) relating to the use of force and deadly force, shall with the necessary changes in points of detail required by the context, apply to this section.
- (4) A private person who has effected an arrest as referred to in this section shall hand over a child to a chief, police or probation officer as soon as possible.

**96. Issue of warrant of arrest**

- (1) An inquiry magistrate or presiding officer in a Children's Court may issue a warrant for the arrest of any child presumed to be below the age of eighteen years and above the minimum age of prosecution as referred to in [section 79](#) upon the written application of the Director of Public Prosecutions or a police officer which—
  - (a) sets out the offence alleged to have been committed;
  - (b) alleges that such offence was committed within the area of jurisdiction of such a magistrate or where such offence was not committed within such area of jurisdiction, which alleges that the child in respect of whom the application is made, is known or is on reasonable grounds suspected to be within such area of jurisdiction; and
  - (c) states that from information taken upon oath, there is a reasonable suspicion that the child in respect of whom the warrant is applied has committed the alleged offence.
- (2) A warrant of arrest issued under this section shall direct that a person described in that warrant be arrested by a police officer in respect of the offence set out in the warrant and that he shall be brought before a probation officer for assessment as referred to under [section 88](#).
- (3) A warrant of arrest may be issued on any day and shall remain in force until it is cancelled by a presiding officer who issued it or, if the presiding officer is not available, by any person with like authority, or until it is executed.
- (4) A warrant of arrest may be suspended by any inquiry magistrate or presiding officer in a Children's Court, and the officer required to execute such warrant, may, instead of arresting a child, employ one of the alternatives to arrest as referred to under [section 94](#)

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

- (1) Where an arrest of a child above the minimum age of prosecution has taken place, a police officer shall—
  - (a) if the child is in detention in police custody, bring the child to a probation officer for assessment, but not later than 48 hours after arrest;
  - (b) inform the child, in a language that the child understands of the allegation against him; and



- (c) inform the child in a language that the child understands, of the following rights—
    - (i) the right to remain silent; and
    - (ii) the right to ask that his parent, guardian, chief or any appropriate adult be contacted.
- (2) A police officer shall, upon confession, admission, pointing out or identification parade by a child, ensure—
  - (a) the presence of a legal representative of the child's own choice and at the child's own cost;
  - (b) the presence of the child's parent or guardian;
  - (c) a chief of the area where a child resides; or
  - (d) any other appropriate adult.
- (3) Where an alternative to arrest as referred to in [section 94](#) has been used, a police officer shall explain the rights set out in paragraph (c) of subsection (1) to a child.
- (4) Where an arrest has been effected, an arresting officer shall provide an inquiry magistrate with a written report within 48 hours, giving reasons why alternatives to arrest as referred to under [section 94](#) could not be employed.

#### **98. Duty of police officer to inform probation officer**

- (1) A police officer shall inform a probation officer in whose area of jurisdiction the arrest of a person under the age of eighteen years has taken place, of such arrest within twelve hours.
- (2) If an alternative method of securing the attendance of a child for an assessment as referred to under [section 94](#) has been used, a probation officer concerned shall inform a police officer in whose area and assessment will take place as soon as possible and not later than 72 hours after the procedures referred to under [section 94](#) have been effected.

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

- (1) Where a child has been arrested, a police officer who has arrested the child, shall notify the child's parents, guardian or a family member of the arrest, and give the relevant person or persons a written notice requiring such person to attend an assessment at a specified time, place and on a specified date.
- (2) If one of the persons referred to in subsection (1) is not available, or cannot be traced, a police officer shall request a child to identify another appropriate adult, and if such adult is identified, the police officer shall request that person to attend an assessment at a specified time and place and on a specified date.
- (3) Where an alternative method to arrest as referred to under [section 94](#) has been effected, the person employing such alternative shall, as soon as possible thereafter, notify the child's parent, guardian or a member of the family of the use of the procedure referred to in [section 94](#), and give the relevant person notice requiring the person to attend an assessment at a specified time, place and on a specified date.
- (4) If one of the persons referred to under subsection (3) is not available, or cannot be traced, a person employing an alternative method to arrest shall request a child to identify another appropriate adult, and if such adult is identified, a police officer shall request the person to attend an assessment at a specified time and place and on a specified date.

**100. Duties of police upon request**

An arresting officer or another police officer may be required by a probation officer, as a matter of urgency, to—

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

**101. Cautioning by police**

- (1) A police officer may apply an informal caution instead of arresting a child.
- (2) A formal caution, where recommended by a probation officer, prosecutor or an inquiry magistrate, may be administered by a police officer to a child in the presence of the parent or guardian and victim of the child's unlawful conduct.
- (3) A formal caution shall be administered in private, whether in a police station or elsewhere, in the presence of a probation officer, if available, and the persons mentioned in subsection (2).
- (4) A police officer referred to in subsection (2) shall cause a record of the caution to be kept at the applicable police station and shall forward a record to the Commissioner of Police who shall cause a register of cautions to be kept.
- (5) A record of a formal caution referred to in subsection (4) shall be expunged after a period of two years from the date of which the caution was administered.
- (6) A register kept in terms of subsection (4) may be made available to—
  - (a) any member of the police;
  - (b) any probation officer;
  - (c) any inquiry magistrate;
  - (d) Director of Public Prosecutions; or
  - (e) any person for lawful research purposes with the permission of the Commissioner of Police.

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

- (1) No confession, admission or pointing out by a child may be admitted as evidence in a Children's Court, where such confession, admission or pointing out was made to a police officer or inquiry magistrate unless a legal representative, parent or guardian of the child was present at the time of the confession, admission or pointing out by the child.
- (2) No evidence obtained at an identification parade may be admitted as evidence in a Children's Court unless a legal representative, parent or guardian was present at the time of such procedure.
- (3) Fingerprinting of children shall be regarded as a measure which should not be resorted to before the finalisation of a preliminary inquiry:

Provided that the fingerprints of a child may be taken during the period after arrest and before appearance of the child before the preliminary inquiry if—

- (a) it is essential for the investigation of the case;

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

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

- (1) Detention of a child in police custody, whether in a police cell, police vehicle, lock-up or other place shall be used as a measure of last resort and for the shortest possible period of time.
- (2) A station commander of a police station shall cause a separate register to be kept, in which details regarding the detention in police cells of all persons under the age of eighteen years shall be recorded.
- (3) A register referred to in subsection (2) may be examined by a parent, guardian, legal representative, prosecutor, magistrate, social worker, probation officer, health worker or any other person authorised by the station commander to examine the register.
- (4) While in detention in police custody, a child shall—
  - (a) be held in conditions and treated in a manner that takes account of his age;
  - (b) be held separately from adults, and boys shall be held separately from girls;
  - (c) be held, as far as possible, in conditions which will minimise the risk of harm to that child, including the risk of harm from other children;
  - (d) have the right—
    - (i) to adequate food;
    - (ii) to medical treatment or services when required;
    - (iii) of access to reasonable visits by parents, guardians, legal representatives, registered social workers, probation officers, health workers and religious counsellors;
    - (iv) of access to reading material;
    - (v) to adequate exercise; and
    - (vi) of access to adequate clothing, including sufficient blankets and bedding.
- (5) No child may be held in detention in police custody for longer than forty-eight hours prior to appearing before an inquiry magistrate.
- (6) A child may only be remanded to detention in police custody for a period of 48 hours and for one further period of a maximum of 48 hours where no alternative action can be taken.
- (7) No police officer may admit or allow a child to remain in detention in the police custody after the expiry of the periods of time set out in subsections (5) and (6), and the police officer admitting or allowing the child to remain in police custody longer than the said periods of time, commits an offence and is liable on conviction to a fine not exceeding one thousand maloti or to imprisonment for a period not exceeding one month or both.
- (8) Where a child in police custody makes a complaint regarding injury sustained by the child during arrest or while in detention, a police officer to whom the complaint is made shall report the complaint to the station commander who shall, within a reasonable time, cause the child to be taken to the medical officer for examination and treatment and attach the report of the medical officer to the police docket relating to the child concerned.
- (9) A police officer or station commander who fails to comply with the provisions of subsection (8) commits an offence and is liable on conviction to a fine not exceeding one thousand maloti or to imprisonment for a period not exceeding one month or both.

- (10) A police officer shall not have an unlawful physical contact with a child in detention.
- (11) A child in detention shall not be searched by a police officer of a different sex.
- (12) A police officer who contravenes the provisions of subsection (10) and (11) commits an offence and is liable on conviction to a fine not exceeding one thousand maloti or to imprisonment for a period not exceeding one month or both.

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

- (1) In respect of a child accused of offences listed in schedules I and II consideration shall be given to the release of such child from detention in police custody pending a preliminary inquiry.
- (2) A child shall, unless there are substantial reasons not to do so, be released from detention in police custody by a police officer on own recognisances, or into the care of a parent or guardian on one or more conditions as set out under subsection (4).
- (3) Where a child is alleged to have committed an offence in respect of which the court has no jurisdiction, the child may be released from police custody by a police officer in consultation with the Director of Public Prosecutions on one or more conditions as set out under subsection (4).
- (4) Conditions of release of a child for the purposes of this section include the following:
  - (a) the obligation to appear at a specified time and place for assessment not later than 48 hours after the arrest;
  - (b) the obligation to report periodically to a specified person or at a specified place;
  - (c) the prohibition not to interfere with witnesses, to tamper with evidence or to associate with a person, persons or group of specified people; and
  - (d) the obligation that the child has to return to his home or to a specified address.
- (5) Where a child has not been released from detention in police custody prior to the holding of a preliminary inquiry, the arresting officer shall provide the relevant inquiry magistrate with a written report giving reasons why such child could not be released from detention in police custody.
- (6) The Commissioner of Police shall provide—
  - (a) transport costs or transport assistance in respect of a child who is released from police custody on own recognisances; and
  - (b) recovery of transport costs from a child to whom such costs had been provided if it appears that the child or his family is able to pay for such costs.

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

For the purposes of proceedings under this Act, a child shall not be charged until—

- (a) after the finalisation of the preliminary inquiry;
- (b) the prosecutor enters the matter on the roll of a Children's Court under the provisions of this Act; and
- (c) formally puts the charges to the child.

### **Part XII – Preliminary inquiry**

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

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

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

#### **107. Procedure in preliminary inquiry**

- (1) A preliminary inquiry shall be held—
  - (a) if a child has been arrested pursuant to [section 92](#), within 48 hours of such arrest; and
  - (b) if an alternative to arrest as referred to under [section 94](#) has been effected, within 72 hours of such alternative having been employed.
- (2) At a commencement of a preliminary inquiry, a prosecutor shall ensure that the inquiry magistrate is in possession of—
  - (a) the age assessment report, save where assessment has not been effected; and
  - (b) any further supporting documentation that the prosecutor deems relevant to the preliminary inquiry or that is required under this Act.
- (3) At the commencement of a preliminary inquiry, the inquiry magistrate shall inform the child in a language that the child understands of the following rights—
  - (a) the right to challenge evidence and the right to adduce evidence;
  - (b) the right to remain silent;
  - (c) the right to have the child's parents or guardian present at the preliminary inquiry;
  - (d) the right to choose and to be represented by a legal practitioner at his own cost.
- (4) No person other than the following are entitled to attend a preliminary inquiry—
  - (a) a child and the parents or guardian;
  - (b) a prosecutor;
  - (c) a probation officer;
  - (d) an arresting officer or other police officer;

- (e) a child's legal representative; and
  - (f) any other person served with a subpoena, requested or permitted to attend the preliminary inquiry as referred to in [section 109\(1\)\(a\)](#) or (b).
- (5) A preliminary inquiry may not be held in the absence of a child concerned.
  - (6) A preliminary inquiry may be held in a room, office, chamber, closed court but may not be held in an open court.
  - (7) Proceedings of a preliminary inquiry shall be conducted in an informal manner, and the inquiry magistrate is responsible for conducting the proceedings, asking the necessary questions, interviewing any person or persons attending the inquiry and eliciting any information that is required.
  - (8) Evidence of a previous diversion or previous charge proved may be elicited or adduced at a preliminary inquiry by any person.
  - (9) An inquiry magistrate shall keep a record of the proceedings of a preliminary inquiry or cause such a record to be kept.
  - (10) A decision of an inquiry magistrate presiding at a preliminary inquiry is not subject to appeal, save for a decision to remand a child in custody referred to in [section 115](#).

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

- (1) If a child in respect of whom the holding of a preliminary inquiry is contemplated is co-accused of an alleged offence with an adult, the case of the adult concerned may with the directive of the Director of Public Prosecutions be separated from that of the child and will not be subject to the provisions of this Act.
- (2) If the child in respect of whom the holding of a preliminary inquiry is contemplated is co-accused with one or more other children, a joint preliminary inquiry may be held in respect of all children concerned, provided that the inquiry proceedings may be separated at any time where this is in the best interests of any of the children.

#### **109. General powers and duties of inquiry magistrate**

- (1) An inquiry magistrate may—
  - (a) cause a subpoena to be served on any person whose presence is necessary for the finalisation of a preliminary inquiry;
  - (b) request or permit the attendance of any person, who, in his opinion can contribute to the proceedings of a preliminary inquiry;
  - (c) request the production of any further documentation or may elicit any further information to supplement that referred to under [section 107\(2\)](#), which is relevant or necessary to the proceedings;
  - (d) make a determination of age referred to in [section 85](#);
  - (e) after consideration of the information contained in the assessment report, elicit any information from the persons attending an inquiry to supplement or clarify the information contained in the assessment report, and which is necessary in order to enable him to make the decision referred to under [section 110\(4\)](#); and
  - (f) take such steps as he deems necessary to establish the truth of any statement or submission that may be in dispute.
- (2) Where a social assessment has not been effected, an inquiry magistrate shall instruct a prosecutor to refer a child to a probation officer in order for an assessment to be effected:

Provided that the inquiry magistrate shall decide that assessment may be dispensed with if compelling reasons for doing so exist, and if it is in the best interests of the child.

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

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

- (1) In regard to all matters brought before a preliminary inquiry, an inquiry magistrate shall, before referring the matter to a prosecutor for the institution of charges in a Children's Court under subsection (4)(b), satisfy himself that diversion of the matter is not possible.
- (2) In order to establish whether or not diversion is possible, an inquiry magistrate shall have regard to —
- (a) an assessment report, unless the assessment of a child has been dispensed with under [section 109\(2\)](#);
  - (b) the views of any person present at the preliminary inquiry;
  - (c) any further information provided by any person present at the preliminary inquiry; and
  - (d) any further information requested by him in the cause of conducting the preliminary inquiry.

- (3) In taking a decision under subsection (4), an inquiry magistrate shall take account of the principle that a child has the right to participate in all decisions affecting him:

Provided that where a child does not acknowledge the responsibility of the offence, the child shall not be required to answer any question which may infringe upon his rights to be presumed innocent and to remain silent.

- (4) If after consideration of a social assessment report and submissions by a prosecutor, the assessment has not been dispensed with under [section 109\(2\)](#), a child, any other party to the inquiry or an inquiry magistrate may—
- (a) divert the matter in accordance with the standards and requirements set out in [section 127](#) and [section 128](#) and in terms of any of the options set out in [section 129](#); or
  - (b) refer the matter to a prosecutor for charges to be instituted in a Children's Court or any other court acting under the provisions of this Act.
- (5) After an inquiry magistrate has made a decision to divert the matter in terms of subsection (4) (a), and if formal programmes for diversion are not available, or are not appropriate to the circumstances of a child, his family or the alleged offence, the inquiry magistrate shall, as far as is possible, develop a diversion strategy which meets the standard and requirements of diversion set out under sections [127](#) and [128](#) and which is appropriate to the circumstances of a particular child, his family, community of origin and the alleged offence.
- (6) An inquiry magistrate shall—
- (a) if he has taken a decision that the matter should be referred to a Children's Court in terms of subsection (4) (b), record written reasons for such decision; and
  - (b) receive and consider the reports regarding arrest of a child and detention in police custody provided by an arresting police officer in sections [97\(3\)](#) and [104\(5\)](#) respectively, and if, in the opinion of the inquiry magistrate, an arrest or detention in a police cell, as the case may be, was necessary, he shall forward a copy of the record referred to in those sections to the parent, guardian or legal representative of the child.

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

- (1) An inquiry magistrate who intends to refer the matter to a prosecutor for charges to be instituted in a Children's Court or other court in terms of [section 110\(4\)\(b\)](#), shall satisfy himself that there is sufficient evidence to sustain the prosecution, and for this purpose he may request the prosecutor, investigating officer or any other relevant person to provide an oral report concerning the sufficiency of such evidence.
- (2) If an inquiry magistrate has substantial and compelling reasons to believe that there is insufficient evidence to support the institution of charges against a child, he shall close a preliminary inquiry and—
  - (a) order that the child, if in detention, be released; or
  - (b) order that the child be released with an order for appropriate intervention by a probation officer.
- (3) If at any stage of the preliminary inquiry it appears that a child concerned does not intend to accept responsibility for the alleged offence as referred to under 128(1)(a), an inquiry magistrate shall, subject to the provisions of subsection (1) regarding sufficiency of evidence, refer the matter to a prosecutor for charges to be instituted in a Children's Court or any other court acting in terms of the provisions of this Act.

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

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

- (a) shall warn the child in a language that the child understands to appear on a specified date at a specified place and time at a Children's Court inquiry; and
- (b) may extend or confirm any conditions of release that were in operation by virtue of the provisions of [section 104\(3\)](#) prior to the child's appearance at the preliminary inquiry.

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

- (1) Where a child who appears at a preliminary inquiry has been arrested, and has not been released previously from detention under [section 104](#), an inquiry magistrate, when—
  - (a) remanding the matter under [section 114\(1\)](#) or (2); or
  - (b) referring the matter to a Children's Court or other court for charges to be instituted in terms of [section 110\(4\)\(b\)](#),shall establish whether the child can be released from detention pending—
  - (i) finalisation of the preliminary inquiry; or
  - (ii) the institution of charges in a Children's Court or any other court.
- (2) An inquiry magistrate shall, in making the determination referred to in subsection (1), have regard to the recommendation of a probation officer in respect of release from detention contained in the social assessment report, as well as any further evidence which has been placed before him by a child or any other person.
- (3) Release of a child into the care of a parent or guardian on one or more of the conditions set out in subsection (5) shall be considered as a measure of first resort.
- (4) A child may be released on own recognisance with or without conditions as set out in subsection (5).



- (5) Conditions of release of a child for the purposes of this section include—
  - (a) the obligation to appear before a Children's Court or any other court acting in terms of the provisions of this Act at a specified place on a specified date and at a specified time;
  - (b) the obligation to report periodically to a specified person or place;
  - (c) the prohibition not to interfere with witnesses, to tamper with evidence or to associate with a person, persons, or group of specified people; and
  - (d) if the preliminary inquiry has been remanded under [section 114](#), the obligation to appear at further proceedings of the preliminary inquiry at a specified place on a specified date and at a specified time.
- (6) Where a decision is made at the preliminary inquiry to divert a child under the provisions of [section 110\(4\)\(a\)](#), the child shall be released from custody.

#### **114. Remanding a child for a preliminary inquiry**

- (1) An inquiry magistrate may remand a child for a preliminary inquiry for a period of 48 hours, if it is necessary for the purposes of—
  - (a) securing the attendance of a person necessary for the finalisation of the inquiry;
  - (b) obtaining information necessary for the finalisation of the inquiry;
  - (c) establishing the attitude of the victim to diversion;
  - (d) furthering the development of a diversion option; or
  - (e) finding alternatives to pre-trial residential detention.
- (2) A child may be remanded for a preliminary inquiry for a further period of forty-eight hours, after which the matter may be referred to a prosecutor for charges to be instituted in a Children's Court or any other court acting in terms of the provisions of this Act.
- (3) Where a child is remanded for a preliminary inquiry for purposes of noting of a confession, admission, pointing out or the holding of an identity parade, an inquiry magistrate shall inform the child of his right to have a parent, guardian or legal representative during such proceedings.
- (4) Where the matter has not been referred to a Children's Court or any other court as referred to in subsection (2), a preliminary inquiry shall be closed and—
  - (a) the child be released from custody; or
  - (b) the child be released and an alternative intervention by a probation officer be applied.
- (5) Where a child cannot be released into the care of a parent or guardian, the child may, subject to [section 113\(2\)](#), be remanded to a place of safety or a secure care facility, or if a place of safety or secure care facility is not available, and subject to the provisions of [section 103\(7\)](#), to a police cell, pending finalisation of a preliminary inquiry.

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

- (1) A child who is accused of having committed an offence may, after finalisation of a preliminary inquiry, be detained in a place of detention, secure care facility or prison pending plea and trial in a Children's Court or any other court acting in terms of the provisions of this Act, provided that—
  - (a) an inquiry magistrate shall consider the granting of bail to ensure that the deprivation of liberty of such child is a measure of last resort; and
  - (b) the child may not be detained in a police cell or lockup.

- (2) Where an inquiry magistrate has established that a child cannot be released from detention after the finalisation of a preliminary inquiry because—
- (a) it is not in the interests of justice;
  - (b) a remand in detention is required in order to locate the child's parent or guardian;
  - (c) there are compelling reasons to believe that the child will abscond or will fail to attend a trial;
  - (d) of the seriousness of the offence;
  - (e) of the likelihood that the child will interfere with the witnesses; or
  - (f) of the likelihood that the child will be exposed to threats or danger by any person,
- the child may be remanded to a place of safety, secure care facility or prison, pending the hearing of the matter before a Children's Court or any other court acting in terms of the provisions of this Act, subject to the provisions of subsections (3), (4), (5) and (6).
- (3) In making a determination as to whether the placement of a child shall be in a place of safety or a secure care facility as referred to in subsection (2), an inquiry magistrate shall have regard to the recommendations of a probation officer as contained in the officer's assessment report.
- (4) Where a child is fourteen years old but has not attained the age of eighteen years, and charged with murder, unlawful sexual act, indecent assault involving the infliction of grievous bodily harm, robbery with aggravated circumstances, or theft of stock, theft of motor vehicle, drug trafficking, counterfeit goods, counterfeit currency, laundering of money, offences relating to sale of liquor and gambling, and is alleged that, in respect of drug-trafficking, the value of the dependence-producing substance in question is more than M50 000, or any offence relating to the dealing in or smuggling of ammunition, firearms, explosives or armaments, and release or referral to a secure care facility is not possible because—
- (a) there is no such facility within a reasonable distance from the court in which the child is appearing;
  - (b) there is such a facility within a reasonable distance from the court, but written or oral evidence has been provided by a social worker that there is no vacancy at the time of making the decision; or
  - (c) the inquiry magistrate is satisfied, on evidence placed before him, that there is a substantial risk that the child may cause harm to other children in a place of safety or secure care facility,
- the child may be remanded to a prison, provided that such remand to a prison shall only be possible after finalisation of a preliminary inquiry, and the matter has been referred to a Children's Court or any other court for charges to be instituted.
- (5) In making an order that a child be remanded to prison as provided for under subsection (2), an inquiry magistrate shall enter the reasons for such remand on the record of the proceedings.
- (6) Where a child is remanded to a place of safety, secure care facility or prison in terms of subsection (2)—
- (a) the child shall appear every 14 days before a Children's Court or any other court acting in terms of the provisions of this Act, which court shall—
    - (i) inquire whether detention in a place of safety, secure care facility or prison remains necessary;
    - (ii) if ordering further detention of the child, enter the reason for such further detention on the record of the proceedings; and

- (iii) consider the reduction of any amount of bail that has been granted in respect of such child;
- (b) an officer presiding in a Children's Court shall satisfy himself that the child is being treated in a manner and kept in conditions that take account of the child's wellbeing; and
- (c) the plea and trial in a Children's Court or any other court acting in terms of the provisions of this Act shall be finalised as speedily as possible.

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

- (1) If a child above the minimum age of prosecution as referred to under [section 79](#) fails to appear at an assessment or breaches any conditions of release from detention in police custody, a probation officer in whose district the assessment was to have taken place, may request an inquiry magistrate to issue a warrant of arrest.
- (2) If a child fails to appear at a preliminary inquiry, a prosecutor may request an inquiry magistrate to issue a warrant of arrest.
- (3) If a child appears at an assessment or at a preliminary inquiry, as the case may be, after the execution of the warrant of arrest referred to in subsections (1) and (2), the matter shall, in the case of an assessment, forthwith be set down for the holding of a preliminary inquiry or, in the case of appearance at the preliminary inquiry, be proceeded with.
- (4) Where the preliminary inquiry referred to in subsection (3) takes place, an inquiry magistrate shall inquire into the reasons for the child's failure to appear at the assessment or at the preliminary inquiry.
- (5) Where an inquiry magistrate finds that the failure of the child to appear at an assessment or at a preliminary inquiry was due to fault on the part of the child, he may take that fact into account when making a decision under [section 110\(4\)](#).

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

- (1) Where a child has been diverted by a probation officer or prosecutor and fails to comply with a condition of diversion, or with any other order, or fails to attend a programme, the probation officer or the prosecutor concerned may request the inquiry magistrate to issue a warrant of arrest or written notice to appear in respect of such child.
- (2) If a child appears after the execution of a warrant of arrest or as a result of the issue of a written notice to appear as referred to under subsection (1), the matter shall be set down for holding of a preliminary inquiry where an inquiry magistrate shall inquire as to the circumstances surrounding the failure of the child to comply with the conditions of a diversion option.
- (3) Where a child has been diverted by an inquiry magistrate as referred to in [section 110\(4\)\(a\)](#) and fails to comply with the conditions of diversion, or with any other order, or fails to attend a specified programme, an inquiry magistrate concerned may issue a warrant of arrest or written notice to appear in respect of the child.
- (4) Where a child appears before an inquiry magistrate after a warrant of arrest or written notice to appear has been issued in terms of subsection (3) and the child, at the time of such appearance is still below the age of eighteen years, the inquiry magistrate shall inquire as to the circumstances surrounding the failure of the child to comply with the conditions of the diversion option.
- (5) An inquiry magistrate may, at the inquiry referred to in subsections (2) and (4), decide to—
  - (a) divert the matter;
  - (b) divert the matter to the same programme with altered conditions;

- (c) apply any other diversion option as described under [section 132](#);
  - (d) refer the matter to a prosecutor for charges to be instituted in a Children's Court or in any other court acting under the provisions of this Act; or
  - (e) make an appropriate order which will assist a child and his family to comply with the diversion initially applied.
- (6) The execution of a warrant of arrest referred to in this part may be suspended by an inquiry magistrate, and the officer required to execute the warrant, may, instead of arresting a child, employ one of the alternatives to arrest as referred to under [section 97](#).
- (7) Where a person who has been arrested on a warrant issued pursuant to subsections (1) and (3) is no longer below the age of eighteen years at the time of appearance, that person shall appear before an inquiry magistrate, who shall inquire as to the circumstances surrounding the failure of the person to comply with the conditions of the diversion option.
- (8) In circumstances referred to under subsection (7), an inquiry magistrate may take any of the steps referred to in subsection (5)(a), (b), (c), (d), or (e) or refer the matter to a court other than a Children's Court for prosecution on the original set of facts.

### 118. Procedure upon referral of matter to be instituted

- (1) Upon finalisation of a preliminary inquiry, if diversion has not taken place, and if an inquiry magistrate has found that there is sufficient evidence to sustain a prosecution of a child as provided under [section 111](#), the inquiry magistrate shall—
- (a) refer the matter to a prosecutor for charges to be instituted in a Children's Court or any other court acting under the provisions of this Act as referred to in [section 105](#);
  - (b) warn a parent or guardian of the child to attend the proceedings referred to in paragraph (a) at a specified place and time and on a specified date; and
  - (c) ensure the provision of legal representation for the child in terms of the provisions of [section 148](#).
- (2) Where a child concerned is not in detention after finalisation of the preliminary inquiry, an inquiry magistrate may—
- (a) alter or extend any condition imposed under [section 104](#) or [section 113](#);
  - (b) alter or extend any order made under [section 113](#)(3) and shall warn any parent or guardian in whose care the child has been released to appear in a Children's Court or any other court acting under the provisions of this Act at a specified place and time and on a specified date; and
  - (c) warn the child, his parent or guardian to appear in a Children's Court or any other court acting under the provisions of this Act at a specified place and time and on a specified date.
- (3) An inquiry magistrate shall recuse himself and may not preside in a Children's Court in relation to that matter if the magistrate has, during the course of a preliminary inquiry, heard any information prejudicial to the impartial determination of the matter.

### 119. Application for release from detention

- (1) Nothing contained in this Act shall be construed as precluding a child who is in detention in respect of an offence from applying for release from detention at any stage prior to the passing of the sentence in respect of that offence.
- (2) A court, in hearing an application referred to in subsection (1), shall have regard to the circumstances referred to in [section 115](#)(3).

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

## **Part XIII – Restorative justice and diversion**

### **120. Restorative justice**

The purposes of restorative justice in terms of this Act are to—

- (a) provide an opportunity to the person or persons or community affected by the harm caused to express their views regarding the impact of such harm;
- (b) encourage restitution of a specified object or symbolic restitution;
- (c) promote reconciliation between a child and the person or community affected by the harm caused; and
- (d) empower communities to address problems of children who are at risk of offending without resorting to criminal justice.

### **121. Establishment of Village Child Justice Committee**

- (1) There shall be established a committee for a village that shall be known as the Village Child Justice Committee.
- (2) A Village Child Justice Committee shall be responsible for handling all restorative justice processes at village level.
- (3) A Village Child Justice Committee shall comprise of a village chief and six other members elected by the community.
- (4) A Village Child Justice Committee shall elect a chairperson from among its members.
- (5) Four members of A Village Child Justice Committee shall form a quorum at any meeting of the Village Child Justice Committee.
- (6) Subject to this Act, A Village Child Justice Committee shall determine its own procedure.
- (7) A Village Child Justice Committee shall meet as and when it is necessary or there is a case to be dealt with.

### **122. Restorative justice processes**

A restorative justice process involves—

- (a) families;
- (b) a family group conference;
- (c) an open child justice forum; and
- (d) a victim-offender mediation.

### **123. Family group conference**

- (1) A family group conference shall be convened by a Chairperson of a Village Child Justice Committee in consultation with families of children concerned.
- (2) A Chairperson of a Village Child Justice Committee who convenes a family group conference shall notify all persons who are entitled to attend the conference of the date, the time and the place at which the conference is to be held.

- (3) No notice is required to be given pursuant to subsection (1) to any person whose whereabouts cannot, after reasonable enquiries, be ascertained.
- (4) A notice required under subsection (2) shall be given within a reasonable time before the conference is to be held.
- (5) Failure to notify any person in accordance with the provisions of this section shall not affect the validity of the proceedings of a family group conference unless it is shown that the failure is likely to have materially affected the outcome of that conference.
- (6) The following persons are entitled to attend a family group conference—
  - (a) children in respect of whom the conference is held;
  - (b) parent(s) or guardians of such children;
  - (c) members of the families of the children concerned;
  - (d) a probation officer, where the conference has been convened on the basis of a report from a probation officer;
  - (e) any relevant body or organisation which the families of children may consider relevant; or
  - (f) any person, body or organisation whose attendance at the conference is recommended by the Chairperson of the Village Child Justice Committee working in consultation with the concerned families.
- (7) The Chairperson of the Village Child Justice Committee who convenes a family group conference shall take all reasonable steps to ensure that all information and advice required by the conference to carry out its functions are made available to the conference.
- (8) Where it is appropriate and with the permission of the conference, any person may attend a family group conference for the purpose of conveying to that conference any information or advice required by that conference to carry out its functions.
- (9) A family group conference shall regulate its own procedure in such manner as it thinks fit.
- (10) A Chairperson of the Village Child Justice Committee shall provide such administrative services as may be necessary to enable a family group conference to discharge its functions.
- (11) The functions of a family group conference are the following:
  - (a) to consider in relation to a child in respect of whom the conference was convened such matters relating to the care and protection of the child as the conference thinks fit;
  - (b) where the conference considers that a child in respect of whom the conference was convened is in need of care or protection, to make such decisions or recommendations and to formulate such plans as the conference considers necessary in the best interests of the child; and
  - (c) to review the decisions and recommendations made and the plans formulated by that conference and their implementation.
- (12) A Chairperson of a Village Child Justice Committee who convenes a family group conference shall cause to be made a written record of the details of the decisions and recommendations made and the plans formulated by the conference pursuant to this section.
- (13) A Chairperson of a Village Child Justice Committee who has convened a family group conference shall communicate the decisions, recommendations and plans made by the family group conference to every person that will be directly involved in the implementation of such decisions, recommendations or plans and seek their agreement.
- (14) Where a Chairperson of a Village Child Justice Committee is unable to secure an agreement to decisions, recommendations or plans referred to under subsection (13), the Chairperson of the

Village Child Justice Committee may, for the purpose of enabling the conference to reconsider the decisions, recommendations or plans, reconvene that conference.

- (15) A family group conference reconvened under subsection (14) may confirm, rescind or modify its previous decisions, recommendations or plans.
- (16) A decision, recommendation or plan confirmed or modified under subsection (15), and any new decision, recommendation or plan made or formulated under that subsection, shall be deemed to have been made in the previous conference.
- (17) The Chairperson of the Village Child Justice Committee who convenes a family group conference shall ensure that copies of the proceedings of the conference, where the proceedings were recorded, are given to all persons present at the conference.
- (18) Information, statement or admission made or disclosed in the course of a family conference shall not be admissible in any court.
- (19) No person shall publish any report of the proceedings of a family group conference.
- (20) Nothing under subsection (19) applies to the publication of statistical information relating to family conferences or research done in good faith, relating to family group conferences.

#### **124. Open Village Healing Forum**

- (1) An Open Village Healing Forum shall be convened by a Chairperson of a Village Child Justice Committee in consultation with families of the victim and offender.
- (2) An Open Village Healing Forum shall operate where a delinquent's act includes:
  - (a) two or more acts of anti-social behaviour;
  - (b) acts such as burning of grass or any other act of vandalism, which impacts almost equally on all members of a community;
  - (c) two or more children are involved;
  - (d) group related conflict such as that between two villages; and
  - (e) a high probability that the anti-social behaviour or offence will be replicated.
- (3) The following groups of people are entitled to attend an Open Village Healing Forum:
  - (a) the children concerned and their families;
  - (b) a Probation Officer where the Open Village Healing Forum is convened on the basis of a recommendation of the Probation Officer;
  - (c) representation of children of the concerned village;
  - (d) any relevant body or organisation including Youth Organisations, whose attendance at the forum is recommended by a Village Child Justice Committee in consultation with the concerned parties; and
  - (e) a representation of the concerned village.
- (4) The Village Child Justice Committee shall determine the size of the representatives in 3(c), (d) and (e).
- (5) A Village Child Justice Committee shall make necessary arrangements to ensure safety and security as well as orderly procedures for an Open Village Healing Forum.

#### **125. Victim-offender mediation**

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

- (2) A victim and an offender shall meet in a safe and structured setting with the assistance of a trained mediator or Chairperson of the Village Child Justice Committee.
- (3) The functions of the victim-offender mediation are to—
  - (a) enable the victim and offender to talk about the crime, express their feelings and concerns;
  - (b) enable the victim and an offender to participate directly in developing options for trying to make things right; and
  - (c) afford an offender an opportunity to make apologies, provide information and develop reparative plans and gain insight for personal growth.
- (4) A Chairperson of a Village Child Justice Committee who convened a victim-offender mediation shall cause to be made a written record of the details of the decisions and recommendations made and the plans formulated in the victim-offender mediation.
- (5) A Chairperson of a Village Child Justice Committee who has convened a victim-offender mediation shall communicate decisions, recommendations and the plans made by the victim-offender mediation to every person that will be directly involved in the implementation of the decisions, recommendations or plans and seek their agreement.

## 126. Referral to restorative justice process

- (1) Referral to restorative justice process may be made by—
  - (a) a child or his parent, guardian or any appropriate adult;
  - (b) a chief;
  - (c) a police office;
  - (d) a prosecutor; and
  - (e) a Children's Court.
- (2) Where the case is referred to restorative justice process by a Children's Court, police or probation officer, and the victim and offender do not agree on the decision to be made at such a forum, the case shall go back to the Children's Court, the police or probation officer for further action.
- (3) A child who persists in engaging in anti-social behaviour that renders him at risk of offending may be referred to any restorative justice process by—
  - (a) his parent, guardian or any appropriate adult;
  - (b) a chief who is concerned with anti-social behaviour of the child residing in his village, the parents of whom are considered unable to control;
  - (c) a police officer acting under [section 94](#);
  - (d) a prosecutor;
  - (e) a Probation Officer acting under [section 91\(3\)\(c\)](#); or
  - (f) an inquiry magistrate acting under [section 110\(1\)](#) and (4)(a).

## 127. Diversion

- (1) The purposes of diversion in terms of this Act are to—
  - (a) encourage a child to be accountable for the harm caused by him;
  - (b) promote an individualised response to the harm caused which is appropriate to the child's circumstances and proportionate to the circumstances surrounding the harm caused;



- (c) promote the reintegration of a child into the family and community;
- (d) prevent stigmatisation of a child which may occur through contact with the criminal justice system.
- (2) Where possible and appropriate, diversion shall include restorative justice elements which aim at healing relationships, including the relationships of victims and offenders.
- (3) In making a decision whether or not to divert a child, consideration shall be given as to whether this would be in the best interests of the child.
- (4) No child may be unfairly discriminated against on the basis of race, gender, sex, ethnic or social origin, colour, sexual orientation, religion, conscience, belief, culture, language, birth or socio-economic status in the selection of a diversion programme, process or option and all children shall have equal access to diversion options.
- (5) Corporal punishment and public humiliation shall not be elements of diversion.
- (6) A child under the age of thirteen years must not be required or permitted to perform community service or other work as an element of diversion.
- (7) Diversion programmes shall—
  - (a) promote the dignity and well-being of a child, and the development of his sense of self-worth and ability to contribute to society;
  - (b) not be exploitative, harmful or hazardous to a child's physical or mental health;
  - (c) be appropriate to the age and maturity of a child;
  - (d) not interfere with a child's schooling;
  - (e) where possible and appropriate, impart useful skills;
  - (f) where possible and appropriate, include an element which seeks to ensure that a child understands the impact of his behaviour on others, including the victims of the offence, and may include compensation or restitution; and
  - (g) where possible and appropriate, be presented in a location reasonably accessible to children.
- (8) A child shall not be required to pay for admission to a diversion programme.

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

- (1) A child suspected of having committed an offence may only be referred for diversion by a probation officer, prosecutor, an inquiry magistrate or officer presiding in a Children's Court as referred to in this Act, if—
  - (a) such child acknowledges responsibility for the alleged offence and consents to diversion;
  - (b) there are reasons to believe that there is sufficient evidence for the matter to proceed to trial;
  - (c) there is no risk of infringement of the child's procedural rights; and
  - (d) the child has a fixed address.
- (2) Where circumstances as referred to in subsection (1) exist, diversion shall be considered as a matter of first resort.

## 129. Diversion options

- (1) A probation officer, prosecutor, an inquiry magistrate or officer presiding in a Children's Court, in selecting a diversion under this section, shall ensure that—
  - (a) due regard is given to a child's cultural, religious and linguistic context, the child's community of origin and the child's age;
  - (b) the option recommended or selected is proportionate to the circumstances of a child, the nature of the offence and the interests of the society; and
  - (c) due regard is had to the various levels of diversion options.
- (2) Diversion options that may be applied in respect of a child in the first instance are not limited to but may include—
  - (a) an oral or written apology to a specified person or persons or institution;
  - (b) referral to a commissioned officer of the police for purposes of the administration of a police caution without conditions;
  - (c) placement under a supervision and guidance order for a period not exceeding three months or as determined by the circumstances of the case;
  - (d) placement under a reporting order for a period not exceeding three months;
  - (e) issuing of a compulsory school attendance for a period not exceeding three months;
  - (f) issuing of a family time order for a period not exceeding three months;
  - (g) issuing of a positive peer association order in respect of a specified person or persons or specified place for a period not exceeding three months;
  - (h) issuing of a good behaviour order with conditions;
  - (i) issuing of an order prohibiting the child from visiting, frequenting or appearing at a specified place;
  - (j) compulsory attendance at a specified centre or place for a specified vocational or educational purpose and for a period not exceeding 5 hours each week, for a maximum of eight weeks;
  - (k) symbolic restitution in respect of a specified object to a person, persons, group or institutions; and
  - (l) restitution of a specified object to a specified victim or victims of the alleged offence where the object concerned can be returned or restored.
- (3) Diversion options that may be applied in respect of a child in the second instance are not limited to but may include—
  - (a) placement under a supervision and guidance order for a period longer than three months but not exceeding six months;
  - (b) placement under reporting order for a period longer than three months but not exceeding six months;
  - (c) issuing of compulsory school attendance order for a period longer than three months but not exceeding six months;
  - (d) issuing of a family time order for a period longer than three months but not exceeding six months;
  - (e) issuing of a positive peer association order in respect of a specified person or persons or a specified place for a period longer than three months but not exceeding six months;

- (f) compulsory attendance at a specified centre or place for a specified vocational or educational purpose for a period not exceeding 5 hours each week, for a maximum of twelve weeks;
  - (g) performance without remuneration of some service for the benefit of the community under the supervision or control of an organisation or institution, or a specified person or group identified by a probation officer when effecting an assessment for a maximum period of 25 hours, and to be completed within a maximum period of three months;
  - (h) restitution of a specified object to a specified victim or victims of an alleged offence where the object concerned can be returned or restored or payment of compensation to a maximum of M5000.00 to a specified person, persons, group or institution where a child or his family is able to afford this;
  - (i) referral to appear at a victim-offender mediation, a family group conference or other restorative justice process at a specified time, on a specified date and at a specified place; and
  - (j) one or more of the options set out in paragraphs (a) to (i) of this subsection or in paragraphs (a), (i) or (l) of subsection (2) used in combination, with due regard to the age of the child concerned, the circumstances of the child and his family, and the nature of the offence.
- (4) Diversion options that may be applied in respect of a child in the third instance are not limited to but may include—
- (a) placement under a supervision and guidance order for a period longer than six months but not exceeding one year in duration;
  - (b) compulsory attendance at a specified centre or a place for a specified vocational or educational purpose for a period of not more than 20 hours each week for a maximum of six months;
  - (c) performance without remuneration of some service for the benefit of the community under the supervision and control of an organisation or institution, or a specified person or group identified by a probation officer when effecting an assessment for a period exceeding 25 hours but not exceeding 100 hours to be completed within a maximum period of six months;
  - (d) referral to appear at a victim-offender mediation, a family group conference or other restorative justice processes at a specified place and time and on a specified date;
  - (e) restitution of a specified object to a victim or victims of the alleged offence where the object concerned can be returned or restored or payment of compensation to a maximum of M10,000.00 to a specified person, persons, group or institution where the child or his family is able to afford this;
  - (f) referral to a programme with a residential element, where the duration of the programme does not exceed three months; or
  - (g) one or more of the above options used in combination, or combined with one or more of the orders referred to in paragraphs (b), (c), (d), or (e) of subsection (3) or in paragraph (a) of subsection (3) or in paragraph (a) of subsection (2).
- (5) Diversion options that may be applied in respect of a child over the age of fourteen years in the fourth instance, which shall be imposed only by an inquiry magistrate or other officer presiding in proceedings in terms of the provisions of this Act if he has reason to believe that the Children's Court, in relation to the circumstances of the child and the offence, would impose a term of imprisonment exceeding six months or a reform school sentence, are not limited to but may include —
- (a) referral to a programme with a residential element, where the duration of the programme does not exceed six months;
  - (b) performance without remuneration of some services for the benefit of the community under the supervision and control of an organisation or institution, or a specified person or group

identified by a probation officer effecting the assessment for a maximum period of 250 hours, to be completed within a maximum period of twelve months;

- (c) where a child is over the age of compulsory school attendance, and is no longer attending formal schooling, compulsory attendance at a specified centre or place for a specified vocational or educational purpose for a maximum period of not more than 35 hours per week, to be completed within a maximum period of six months; and
  - (d) any of the options referred to in paragraphs (a), (d), (e) and (g) of subsection (4) in combination with any of the options referred to in this subsection.
- (6) A victim-offender mediation, family group conference or other restorative justice process referred to in subsections (3)(i) and (4)(d) may apply any option referred to under subsections (2), (3) or (4) to a child referred to such mediation, conference or process, or reach another resolution appropriate to the child, his family and to local circumstances, provided that such mediation, conference or process may not, in the case of another resolution, contravene any applicable principle under this Act.

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

- (1) Subject to the provisions of [section 90](#)(1) and (2), where a probation officer, in relation to a child above the minimum age of prosecution, has recommended that—
  - (a) the child be diverted to a specified process, programme or appropriate alternative order mentioned under [section 91](#)(3)(a);
  - (b) the matter involving the child be transferred to a Children's Court in terms of [section 91](#)(3)(c);
  - (c) no further action be taken in terms of [section 91](#)(3)(b); or
  - (d) the matter involving the child should not be diverted,the matter shall be submitted to a prosecutor.
- (2) Upon consideration of the recommendations of a probation officer as referred to in subsection (1) (a), (b) and (c), a prosecutor may—
  - (a) concur with the recommendations of the probation officer and divert the matter, arrange for the transfer of the matter to a Children's Court, or decline to charge the child concerned; or
  - (b) disagree and state reasons why he disagrees with the recommendations of the probation officer, and arrange for the opening of a preliminary inquiry.
- (3) Upon consideration of the recommendations of a probation officer as referred to in subsection (1) (d), a prosecutor may—
  - (a) disagree with the recommendations of the probation officer and divert the matter, arrange for the transfer of the matter to a Children's Court inquiry as referred to under subsection (2) (a), or decline to charge the child concerned; or
  - (b) concur with the recommendations of the probation officer, and arrange for the opening of a preliminary inquiry.
- (4) Where a prosecutor takes one of the steps outlined in subsection (2)(a) or (3)(a), no charges against a child shall be instituted in accordance with [section 105](#), provided that where the child fails to comply with a condition of diversion, the provisions of [section 117](#) shall apply.
- (5) Where an assessment has not been effected, a prosecutor to whom notice of a case involving a child under the age of eighteen years has been brought, shall arrange that assessment be effected, or, if this is not possible, arrange for the opening of a preliminary inquiry.

## Part XIV – Bail and detention pending trial

### 131. Bail

- (1) Where a child appears before a Children's Court charged with an offence, a magistrate or presiding officer shall inquire into the case and unless there is a serious danger to the child, release the child on bail—
  - (a) on a court bond on his own recognisance; or
  - (b) with sureties, preferably, the child's parents, guardian, family member or responsible person on a court bond.
- (2) If bail is not granted, a Children's Court shall record the reasons for refusal and inform the child of his right of appeal or review to the High Court.

### 132. Remand

- (1) Where a child is not released on bail, a Children's Court may make an order remanding or committing him in a remand home.
- (2) If there is no remand home within a reasonable distance from a Children's Court, the Children's Court shall make an order as to the detention of a child in a place of safe custody as it deems fit.
- (3) For the purposes of this section, a place of safe custody shall be a place which a Children's Court considers suitable to ensure that a child shall be brought before it when required and shall not associate with any adult detainee.
- (4) Remand in custody shall be for the shortest period possible and shall not exceed three months.
- (5) No child shall be remanded in custody with an adult.
- (6) A child who escapes from a remand home or other place of safe custody in which he is detained may be arrested with or without warrant and be returned to that place.
- (7) Pending the establishment of a remand home, the Minister may declare, by notice in the *Gazette*, any establishment as a remand home.
- (8) Notwithstanding anything to the contrary herein contained, a Children's Court shall consider alternatives to remand, such as close supervision or placement with a fit and proper person determined by it on the recommendation of a probation officer.

## Part XV – Children's court

### 133. Jurisdiction of Children's Court

- (1) Every Subordinate Court shall be a Children's Court within its area of jurisdiction and shall have jurisdiction to hear and determine cases of children in need of care, protection and rehabilitation and charges as appear in Schedules I and II.
- (2) A presiding officer in proceedings in a Children's Court shall be designated by the Chief Justice and the Children's Court shall, as far as possible, be staffed by specially trained personnel.
- (3) A court room, where practicable, shall be located and designed in a way which is conducive to the dignity and protection of children and the proceedings shall be informal, child-friendly and allow the active participation of all persons who need to be involved in the proceedings.

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

- (1) A court, other than a Children's Court, has jurisdiction to try the case of an accused child where such child is charged with murder, treason or sedition or where he is charged with any other offence and—
  - (a) the likely sentence will exceed the jurisdiction of the Children's Court;
  - (b) there are multiple charges in respect of the child concerned and any other court other than a Children's Court has jurisdiction in respect of one or more of those charges; or
  - (c) a decision has been made under [section 140](#) that there will be a joinder of trials.
- (2) Where the Director of Public Prosecutions is satisfied that the circumstances referred to under subsection (1)(a) or (b) exist in respect of the matter involving a particular child, he may, prior to the commencement of the trial, refer the matter to the appropriate court for plea and trial.
- (3) A Subordinate Court and a Children's Court have concurrent jurisdiction in respect of matters in which a child is charged together with an adult and a successful application for joinder of the trials has been made under [section 140](#).
- (4) A court hearing the matter under this section must conduct the proceedings in accordance with the provisions of this Act and with due regard to the best interests of a child.
- (5) Where a Children's Court has found that a child is in conflict with the law and it is of the view that exceptional circumstances exist which indicate that the appropriate sentence may exceed its sentencing jurisdiction, it may refer the matter to a Subordinate Court if it has more penal powers or the High Court for sentencing, and cause a copy of the record of the proceedings to be made available to the Children's Court.

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

- (1) At the commencement of proceedings in a Children's Court, a presiding officer shall inform a child appearing before such court in a language that the child understands of the following rights—
  - (a) the right to challenge testimony of witnesses;
  - (b) the right to remain silent;
  - (c) the right to have the child's parents or guardian present at the proceedings; or
  - (d) the right to choose and to be represented by a legal representative at his own cost.
- (2) A child who is under the age of eighteen years shall be assisted by his parent or guardian at criminal proceedings, and this requirement may be dispensed with where—
  - (a) all efforts to locate such person have been exhausted and any further delay would be prejudicial to the best interests of the child; or
  - (b) the child is charged with an offence under Schedule 1 and the sentence referred to under [section 156\(1\)](#) is likely to be imposed.

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

- (1) A parent or guardian of a child who has been warned by an inquiry magistrate to attend proceedings involving such child under [section 118\(1\)\(b\)](#) shall attend such proceedings unless exempted from the obligation to do so under subsection (3).
- (2) If a person referred to under subsection (1) has not been warned to attend the relevant proceedings, a court before which the proceedings are pending may at any time during the proceedings direct any person to warn the person referred to under subsection (1) to attend such proceedings.

- (3) A person who has been warned in terms of subsection (1) or (2), may apply to an officer presiding in a court in which a child is to appear for exemption from the obligation to attend the proceedings in question, and if such presiding officer exempts such person, he shall do so in writing.
- (4) A person who has been warned under subsection (1) or (2) and who has not been exempted from the obligation to attend the relevant proceedings under subsection (3), and a person who is present at proceedings and who is warned by the court to remain in attendance, shall remain in attendance at the relevant proceedings, whether in that court or any other court, unless excused by the court before which such proceedings are pending.
- (5) A person who has been warned in terms of subsection (1) or (2) and who fails to attend the proceedings in question or who fails to remain in attendance at such proceedings in accordance with the provisions of subsection (4), commits an offence and is liable on conviction to a fine not exceeding one thousand Maloti or to imprisonment for a period not exceeding one month.

### 137. Charge sheet and withdrawal of charge

- (1) Allegations contained in any charge sheet shall be formulated in a language that a child can read and understand.
- (2) A legal representative, parent or guardian of a child offender shall be provided with a copy of the charge sheet at the beginning of the criminal proceedings.
- (3) Nothing contained in this Act shall be construed as precluding the prosecuting authority from exercising the discretion to withdraw a charge at any stage of the criminal proceedings.

### 138. Conduct of proceedings in Children's Court

- (1) An officer presiding in a Children's Court may, if it would be in the best interests of the child, actively participate in eliciting evidence from any person involved in the proceedings.
- (2) All proceedings conducted in a Children's Court shall be held *in camera* and the privacy of a child concerned and other child witnesses, subject to the provisions of [section 149](#), shall be protected at all times.
- (3) The proceedings of a Children's Court shall, with regard to a child's procedural rights, be conducted in an informal manner to encourage the maximum participation of a child, his parent or guardian and other child witnesses.
- (4) Where the presence of a parent, guardian or any other person who is not an officer of a Children's Court is likely to discourage the maximum participation of a child, the Children's Court shall order that person to recuse himself from the proceedings.
- (5) A child shall be permitted to speak in his own language with the assistance, where necessary, of an interpreter and the presiding officer shall ensure that they are addressed in a language that they understand.
- (6) In the case of a child with speech or hearing impairment, a Children's Court shall order that a person with expertise in sign language be engaged to assist the child and the court.
- (7) A presiding officer shall ensure that the conduct of all proceedings and the conduct of all court personnel are conducive to the protection of all the children participating in the proceedings.
- (8) In cases involving children in conflict with the law, no handcuffs, leg-irons or other restraints may be used when a child appears in a Children's Court, unless an imminent danger exists that the safety of any person may be endangered if such restraints are not used.
- (9) A child held in a lock-up, cell or at the court on suspicion of having committed an offence or who is being transported to court shall be kept separately from adults and be treated in a manner and kept in conditions which take account of his age.



- (10) Subject to the provisions of subsection (7), a female child offender shall be kept separately from any male child offender.
- (11) The proceedings of a Children's Court may, at the discretion of a presiding officer, be held at a place other than that of the Children's Court.
- (12) A presiding officer shall protect a child offender and other child witnesses from hostile or intimidating cross-examination where such cross-examination is regarded by the presiding officer as being prejudicial to the well-being of the child or the fairness of the proceedings.

### **139. Evidence in cases involving child offenders**

- (1) Evidence of admissions, confessions and pointing out made under coercive circumstances or in the absence of a child's parent, guardian or legal representative is inadmissible in proceedings in a Children's Court or any other court hearing a matter in respect of which a child is an accused person.
- (2) No evidence of an admission, confession or pointing out made by a child during an assessment or during the course of a preliminary inquiry is admissible in proceedings in a Children's Court.

### **140. Separation and joinder of trials involving children and adults**

- (1) If a child appearing in a Children's Court is co-accused with an adult, the case of the adult concerned shall be separated from that of the child and is not subject to the provisions of this Act unless any person involved in the proceedings, including the child, his parent, such child's legal representative and the prosecutor, before the commencement of the trial, may make an application to the court in which the adult is due to appear for a joinder of the trials concerned.
- (2) A person making an application for joinder of trials to the court in which the adult concerned is to appear shall give notice to all parties concerned.
- (3) The rules of the court to which an application as referred to in subsection (1) is made, relating to applications, time periods for applications and opposition of applications, apply to the provisions of this section.
- (4) If a person making an application under this section has shown, on a balance of probabilities, that a miscarriage of justice or prejudice to the victim or victims of the alleged offence would otherwise occur, the court to which the application is directed, may order a joinder of the trial of a child and adult concerned, provided that the best interests of the child are duly considered.
- (5) If a court makes a finding under subsection (4), the matter before a Children's Court shall be transferred to the court in which the adult is to appear.
- (6) A court to which the matter has been transferred under subsection (5), shall act in accordance with the provisions of this Act in relation to the proceedings involving a child.

### **141. Separation and joinder of trials involving children only**

- (1) A prosecutor may join the trial of a child offender with that of any other accused child in the same proceedings at any time before evidence has been led in respect of the charge in question.
- (2) Where two or more children are charged jointly, whether with the same offence or different offences, a Children's Court may at any time during the trial, upon the application of the prosecutor or by or on behalf of any of the children, direct that the trial of any one or more of the children shall be held separately from the trial of the other children, and the Children's Court may abstain from giving judgement in respect of any such children.



**142. Adjournment of proceedings**

- (1) A Children's Court or any other court hearing a matter in respect of which a child is an accused person shall finalise all trials of accused children as speedily as possible and shall ensure that remands are limited in number and in period between remands.
- (2) A court other than a Children's Court hearing a matter in respect of which a child is an accused person shall ensure that trials of accused children receive priority on the roll of such court.
- (3) Where a child has been remanded to custody, a presiding officer shall ensure that the requirements set out under [section 116\(6\)](#) regarding remands to places of safety or prison are complied with.
- (4) Where a child has been remanded in custody pending trial in a Children's Court or any other court hearing a matter in respect of which the child is an accused person, the plea and trial of such child shall be finalised within a period not exceeding three months, after which period the child shall be released from detention.

**143. Powers of officer presiding in a Children's Court**

- (1) If, at any time before conviction, or after conviction and before sentence, a child accepts responsibility for an offence and a Children's Court in which the child appears is of the opinion that the matter be diverted, the court may refer the child to any diversion option referred to under [section 129](#), provided that any finding of guilt shall be considered not to have been made.
- (2) If, at any time before conviction, or after conviction and before sentence, a Children's Court is of the opinion that substantial grounds exist that an alternative dispute resolution mechanism may be appropriate to the resolution of the matter before the court, the court may stop the proceedings and order that the matter be referred to a victim-offender mediation, a family group conference or other restorative dispute resolution process or make any other order as it may deem necessary to resolve the matter.
- (3) Where the matter is referred to a victim-offender mediation, family group conference or other restorative dispute resolution process, written recommendations emanating from such mediation, conference or process shall be re-submitted to a Children's Court within fourteen days if a child is not in custody.
- (4) Where a child is in custody, written recommendations emanating from such mediation, conference or process shall be re-submitted to a Children's Court within five days after referral of the matter upon which such court may—
  - (a) confirm the recommendations by making such recommendations an order of the court;
  - (b) substitute or amend the recommendations and make an appropriate order; or
  - (c) reject the recommendations and proceed with the trial.
- (5) Where a Children's Court acts under the provisions of subsection (4)(a) or (b), any finding of guilt made in relation to the matter before the Children's Court shall be considered not to have been made.

**144. Failure to attend court proceedings**

- (1) Where a child fails to appear at any proceedings in a Children's Court or any other court hearing a matter in respect of which the child is an accused person, a prosecutor may request a presiding officer in such proceedings to issue a warrant of arrest in respect of such child.
- (2) Where a presiding officer, upon the appearance of a child in a Children's Court or any other court hearing a matter in respect of which the child is an accused person, after the execution of a warrant of arrest, finds that the failure of the child to appear at the proceedings concerned was due to fault

on the part of the child, he may take that factor into account when making a decision as to how the matter should proceed.

#### 145. Privacy and confidentiality

- (1) Where a child appears before a Children's Court or any other court hearing a matter in respect of which the child is an accused person, no person other than the persons referred to under sections 80(3) and 107(4) may be present unless such person's presence is necessary in connection with such proceedings or is authorised by the court on good cause shown.
- (2) No person, institution or organisation may publish in any manner whatsoever any information which reveals or may reveal the identity of a child appearing at an assessment, a preliminary inquiry or before a Children's Court or any other court hearing a matter in respect of which the child is an accused person, or of a witness under the age of eighteen years appearing at any proceedings referred to in this Act.
- (3) Subject to the provisions of subsection (4), no prohibition or direction under this section may prevent—
  - (a) any person, institution or organisation from gaining access to information pertaining to a child or children if such access would be in the interests, safety or welfare of any such child or of children in general;
  - (b) a publication, in the form of a law report made in good faith of—
    - (i) information for the purpose of reporting any question of law relating to the proceedings in question; or
    - (ii) any decision or ruling given by any court on such question, and
  - (c) a publication, in the form of a report made in good faith of a professional or technical nature, on research results and statistical data pertaining to a child if such publication would be in the interests, safety or welfare of the child in general.
- (4) The reports referred to under subsection (3)(b) and (c) shall not mention the name of a child charged or against whom or in connection with whom the offence in question was alleged to have been committed or of any child witness at such proceedings, and may not mention the name of a person accused with the child or place where the offence in question was alleged to have been committed if the child's name may be revealed.
- (5) Nothing under this section prevents publication of information or making of reports that expose the identity and names of persons, institutions and organisations that are involved in the commission or aiding and abetting the commission of offences involving children.
- (6) Any person who publishes any information in contravention of this section or contrary to any direction or authority under this section or who in any manner reveals the identity of a child witness in contravention of a direction under this section, commits an offence and on conviction is liable to a fine not exceeding fifteen thousand maloti or to imprisonment for a period not exceeding fifteen months or both.

#### 146. Evidence through intermediaries

- (1) Where proceedings involving children are pending before any court and it appears to such court that it would expose any witness under the age of eighteen years to undue mental stress or suffering if he testifies at such proceedings, the court may, subject to subsection (5), appoint a competent person as an intermediary in order to enable such witness to give evidence through an intermediary.
- (2) Except for examination by the court, any examination, crossexamination or re-examination of any witness in respect of whom a court has appointed an intermediary under subsection (1), shall be done in any manner other than through the intermediary.

- (3) An appointed intermediary may, unless the court directs otherwise, convey the general purport of any question to the relevant witness.
- (4) If a court appoints an intermediary under subsection (1), the court may direct that the relevant witness may give his evidence at any place—
  - (a) which is formally arranged to set that witness at ease;
  - (b) which is so situated that any person whose presence may upset that witness, is outside the sight and hearing of that witness; and
  - (c) which enables the court and any person whose presence is necessary at the relevant proceedings to see and hear, either directly or through the medium of any electronic or other devices, that intermediary as well as that witness during his testimony.
- (5) The Minister may by notice in the *Gazette* determine the persons or the category or class of persons who are competent to be appointed as intermediaries.
- (6) An intermediary who is not in the full-time employment of the State shall be paid such travelling and subsistence and other allowances in respect of the services rendered by him as the Minister, in consultation with the Minister of Finance, may determine.
- (7) No oath, affirmation or admonition which has been administered through an intermediary shall be invalid and no evidence which has been presented through an intermediary shall be inadmissible solely on account of the fact that such intermediary was not competent to be appointed as an intermediary under subsection (5), at the time when such oath, affirmation or admonition was administered or such evidence was presented.
- (8) If at any proceedings it appears to a court that an oath, affirmation or admonition was administered or that evidence has been presented through an intermediary who was appointed in good faith but, at the time of such appointment was not qualified to be appointed as an intermediary under subsection (5), the court shall make a finding as to the validity of that oath, affirmation or admonition or the admissibility of that evidence, as the case may be, with due regard to -
  - (a) the reason why the intermediary concerned was not qualified to be appointed as an intermediary, and the likelihood that the reason concerned will affect the reliability of the evidence so presented adversely;
  - (b) the mental stress or suffering which the witness, in respect of whom that intermediary was appointed, will be subjected to if that evidence is to be presented a new, whether by the witness in person or through another intermediary; and
  - (c) the likelihood that real and substantial justice will be impaired if that evidence is admitted.
- (9) Nothing under this section prevents the prosecution from presenting a new any evidence which was presented through an intermediary referred to under subsection (7).
- (10) The provisions of subsection (7) shall also be applicable in respect of cases where an intermediary referred to in that subsection has been appointed, and in respect of which, at the time of the commencement of that subsection, the trial court or the court considering an appeal or review, has not delivered judgement.

## Part XVI – Legal representation

### 147. Principles relating to legal representation

- (1) A child has a right to legal representation of his own choice and at his own cost in any legal proceedings.

- (2) A legal representative appearing on behalf a child under this Act shall—
- (a) allow the child to give independent instruction on the manner in which the case is to be conducted;
  - (b) clearly explain the child's rights and responsibilities in relation to any proceedings under this Act, in a language which he can understand;
  - (c) encourage informed decision-making by explaining possible options and the consequences of decisions;
  - (d) promote diversion where appropriate whilst ensuring that the child is not unduly influenced to acknowledge guilt;
  - (e) ensure that all time periods or delays throughout the case are kept to the minimum and that remands are limited in number and period of time between each remand;
  - (f) ensure that the child is able to communicate in his language, and in cases where the legal representative does not speak the same language as the child, ensure that an interpreter is used who should also be apprised of these principles; and
  - (g) become acquainted with the local options for diversion and alternative sentencing.

#### **148. Appointment of a legal representative**

- (1) A child may have legal representation of his own choice and at his own cost at any stage of proceedings under this Act.
- (2) A child shall be advised by a social worker, police officer, a probation officer, an inquiry magistrate and an officer presiding in a Children's Court that he has the right to legal representation.

### **Part XVII – Sentencing**

#### **149. Power to impose sentence after a charge is proved**

A children's court or any other court hearing a matter in respect of which a child is an accused person may, after proof of a charge against the child, impose a sentence in accordance with the provisions of this part.

#### **150. Pre-sentence report**

- (1) A Children's Court or any other court imposing a sentence Under the provisions of this Act shall require the preparation and placement of a pre-sentence report before it, whether written or verbal, by a probation officer, prior to the imposition of sentence or the court may dispense with the presentence report where the charge relates to an offence listed in Schedule 1 or where requiring such a report would cause undue delay in the finalisation of the case, and which delay would be prejudicial to the best interests of the child.
- (2) A Children's Court or any other court sentencing a person under the age of eighteen years, shall not impose a sentence with a residential element, unless a pre-sentence report has been placed before such court.
- (3) A Children's Court or any other court hearing a matter in respect of which a child is an accused person, which imposes any sentence involving detention in any residential facility, shall certify on the warrant of detention that such pre-sentence report has been placed before the court prior to the imposition of the sentence.
- (4) Where the certification referred to under subsection (3) does not appear on a warrant of detention issued under the provisions of this Act, a person admitting a child to a residential facility shall remit the matter back to the court.

- (5) No person may admit a child under the age of eighteen years to any residential facility under this Act unless a warrant of detention contains the certification referred to under subsection (3), and a person who admits the child without the necessary certification commits an offence and on conviction is liable to a fine not exceeding two thousand Maloti or to imprisonment for a period not exceeding two months or both.

### **151. Evidence of previous diversion and other evidence relevant to sentence**

- (1) Evidence that a child has been previously diverted and has attended programme or completed community service or other diversion option may be adduced after conviction and before the imposition of sentence, provided that such evidence of previous diversion may not be considered in aggravation of the sentence.
- (2) The evidence of the previous diversion referred to under subsection (1) may be considered relevant to the selection of a particular programme, community service option or other sentence option referred to under sections [153](#), [154](#), [155](#), [156](#) or [157](#).
- (3) A Children's Court shall request a child and his parents or guardian to address the court on sentence, and, where a pre-sentence report has been submitted, shall allow the child and his parents or guardian an opportunity to place in dispute any finding or recommendation made in such report.
- (4) The prosecution may, after conviction, prove any previous convictions against a child, and the court shall establish whether the child admits or denies any such previous convictions:
- Provided that the prosecution may lead evidence to prove any convictions denied by the child.
- (5) For the purposes of subsection (4), a document relating to finger prints of a child which emanates from the office of the Commissioner of Police is admissible as preliminary proof of the facts contained therein.

### **152. Nature of sentences**

A presiding officer imposing a sentence under this Act may impose any one of the options referred to under [section 129](#)(2), (3), (4) or (5), or any of the sanctions referred to in sections [153](#), [154](#), [155](#) and [156](#).

### **153. Sentences involving residential and non-residential element**

A sentence not involving a residential element which is available as a sentence for the purposes of this Act includes—

- (a) restitution of a specified object to a specified victim or victims of an offence where the object concerned can be returned or restored, or payment of compensation to a specified person, persons, group or institution in an amount which a child or his family is able to afford;
- (b) in a matter where there is no identifiable person or persons to whom compensation or reparation could be paid, payment of a sum of money or restitution of specified goods to a community, organisation, charity or welfare organisation concerned with activities which benefit children, identified by the child who is to be sentenced;
- (c) any form of symbolic restitution;
- (d) an oral or written apology to a specified person or institution;
- (e) a correctional reprimand;
- (f) placement under a good behaviour order for a period not exceeding six months;
- (g) placement under a family time order for a period not exceeding six months;
- (h) placement under a compulsory school attendance order;

- (i) placement under a positive peer association order for a period not exceeding six months;
- (j) that a child and members of his family attend guidance or counselling with a specified provider of such services, for a period not exceeding twelve months;
- (k) placement under the care and control of an appropriate adult specified by the court;
- (l) placement under a supervision and guidance order for a period not exceeding twelve months;
- (m) compulsory attendance at a specified centre or place for a specified programme, vocational or educational purpose, for a period not exceeding 20 hours each week, for a maximum of six months:

Provided that where a child is over the age of compulsory school attendance and is no longer attending formal schooling, compulsory attendance at a specified centre or place for a specified educational or vocational purpose for a maximum period of not more than 35 hours per week to be completed within a maximum period of twelve months may be imposed; or

- (n) performance without remuneration of some service for the benefit of the community under the supervision or control of an organisation or an institution, or a specified person or group identified by a presiding officer, or probation officer of the district in which a Children's Court is situated for a maximum period of 250 hours and to be completed within twelve months:

Provided that this sentence may not be—

- (i) imposed upon a child under the age of thirteen years; or
- (ii) harmful to a child's health or development and may not prejudice school attendance.

#### 154. Postponement or suspension of sentence

- (1) The passing of any sentence may be postponed, with or without one or more of the conditions referred to under subsection (2), for a period not exceeding three years.
- (2) The conditions of postponement referred to under subsection (1) may include—
  - (a) restitution, compensation or symbolic restitution;
  - (b) an apology;
  - (c) the obligation not to re-offend;
  - (d) being of good behaviour;
  - (e) school attendance;
  - (f) attendance at a victim-offender mediation, a family group conference or other restorative dispute resolution process;
  - (g) the attendance of guidance or counselling with a specified provider of such services for a specified period by the child and members of his family;
  - (h) submitting to supervision and guidance for a specified period; or
  - (i) any other condition appropriate to the circumstances of the child and in keeping with the principles of this Act, which promotes the children's reintegration into society.
- (3) The whole or any part of a sentence referred to under [section 153](#) may be suspended, without conditions, or with one or more of the conditions referred to under subsection (4).
- (4) The conditions of suspension referred to under subsection (3) include—
  - (a) the obligation not to re-offend;
  - (b) restitution, compensation or symbolic restitution; and

- (c) any other measure, including a sanction referred to under [section 153](#) if such sanction has not been imposed as the sentence to be suspended, which is appropriate to the circumstances of the child and in keeping with the principles of this Act, and which promotes the children's reintegration into society.
- (5) Where a Children's Court has postponed the passing of sentence under subsection (1) for a specified period and the Children's Court is, after expiry of the period, satisfied that any conditions imposed have been fulfilled, the Children's Court may decline to impose a sentence and may discharge the child:

Provided that the conviction may be recorded as a previous conviction or a presiding officer may act in accordance with the provisions of [section 143\(1\)](#).

### 155. Sentences with restorative justice element

- (1) A sentence involving a restorative justice element which is available as a sentence for the purposes of this Act includes—
  - (a) referral of a child concerned to appear at a victimoffender mediation;
  - (b) family group conference; or
  - (c) other restorative justice processes,at a specified place and time and on a specified date.
- (2) The decisions or agreements reached at the processes shall be referred back to a Children's Court or any other court hearing a matter pursuant to this Act—
  - (a) within fourteen days if the child concerned is in detention; or
  - (b) within twenty one days if the child concerned is not in detention,and shall be taken into account in the consideration of an appropriate sentence.
- (3) Where a presiding officer in a Children's Court or any other court passing sentence under this Act does not agree with the terms of the decision or agreement reached at the process referred to under subsection (1), and imposes a sentence which differs in a material respect from that agreed to or decided upon, he shall note the reasons for deviating from the agreement or decision on the record of the proceedings.
- (4) Where an agreement or a decision is not reached at a process referred to under subsection (1), the matter shall be referred back to a presiding officer in a Children's Court or any other court hearing a matter pursuant to this Act for imposition of a sentence.

### 156. Sentences involving imprisonment

- (1) Imprisonment for a maximum period of three years may be imposed as a sentence for the purposes of this Act provided that this sentence may not be imposed on a child below the age of fourteen years.
- (2) The whole or any part of a sentence referred to under subsection (1) may be postponed or suspended with or without conditions as referred to under [section 154\(2\)](#), on condition that a child performs a service for the benefit of the community or on condition that the child attends a specified centre for a specified purpose as referred to under [section 153\(k\)](#).

### 157. Sentences involving residential element

- (1) No sentence involving a residential element may be imposed upon a child unless a presiding officer is satisfied that—
  - (a) the seriousness of the offence justifies such a sentence;



- (b) the protection of the community justifies such a sentence;
  - (c) the severity of the impact of the offence upon the victim was of such magnitude that such a sentence is justified; and
  - (d) the child has failed to respond previously to non-residential alternatives.
- (2) A presiding officer imposing any sentence involving a residential element on a child shall note the reasons for handing down such sentence on the record of the proceedings and communicate such reasons to the child in a language that he can understand.
- (3) A sentence involving a residential element which is available as sentence for the purposes of this Act includes—
- (a) referral to a programme with a periodic residential requirement where the duration of the programme does not exceed twelve months, and no portion of the residence requirement exceeds twenty one nights, with a maximum of sixty nights for the duration of the programme; and
  - (b) referral to a facility, and subject to the conditions set out under [section 158](#).

### 158. Contribution order

- (1) Where an order has been made by a Children's Court placing a child in the custody of some other person or sending the child to an approved school, the Children's Court may—
- (a) order the parent or guardian of the child to make contributions towards the maintenance of the child;
  - (b) order the child if he has attained the age of sixteen years and is engaged in remunerative work to make contributions towards his maintenance; or
  - (c) from time to time vary or revoke an order made under paragraph (a) or (b).
- (2) A contribution order may be made on the application of the person in whose custody a child is placed or who is named in the approved school order.
- (3) A contribution order shall remain in force so long as the committal order or approved school order is in force.
- (4) A person on whom a contribution order is made shall, if he changes his address, forthwith give notice thereof to the person who was, immediately before the change, entitled to receive the contributions.
- (5) A person who fails to give notice under subsection (4) commits an offence and is liable on conviction to a fine not exceeding one thousand Maloti or to imprisonment for a period not exceeding one month.

### 159. Referral to residential facility

- (1) Where a sentence referred to under [section 156](#) is a referral to an approved school, such sentence may be imposed for a period of not less than six months and, subject to subsection (2), a period not exceeding two years.
- (2) A sentence to an approved school for longer than two years may be imposed where a child is below the age of 16 years and would otherwise have been sentenced to imprisonment, and where the offence is so serious as to warrant such sentence.
- (3) A child referred to under subsection (2) who, at the time of the sentence is below the age of sixteen years, may not be permitted to reside in an approved school beyond the age of eighteen years.



- (4) A child referred to under subsection (2) who is sixteen years or older at the time of sentence may be permitted to reside in an approved school until expiry of his sentence.
- (5) A sentence to an approved school may not be extended by administrative action and any application for the extension of the duration of the sentence should be considered by the court which imposed the original sentence.
- (6) Where a sentence referred to under [section 156](#) is that of imprisonment, such sentence may not be imposed unless—
  - (a) a child is sixteen years of age or above; and
  - (b) substantial and compelling reasons exist for imposing a sentence of imprisonment.
- (7) No sentence of imprisonment may be imposed on a child in respect of an offence listed in Schedule 1.
- (8) Where a sentence referred to under [section 156](#) is that of imprisonment, the whole or any part of that sentence may be suspended on one of the conditions referred to under [section 157\(2\)](#), on condition that a child perform service for the benefit of the community as referred to under [section 153\(l\)](#), or on condition that the child attend a specified centre for a specified purpose referred to under [section 153\(k\)](#), or on condition that the child is sent to prison as referred to under [section 156](#).
- (9) Where a child fails to comply with any condition imposed in relation to any other sentence, such child may be brought before a Children's Court for reimposition of an appropriate sentence, which may include a sentence of imprisonment.
- (10) Any period of time that a child has spent in prison while awaiting trial shall be deducted by a presiding officer from any period of imprisonment imposed as a sentence.

## 160. Monetary penalties

No monetary penalty payable to the state may be imposed as a sentence by a children's court or any other court acting under the provisions of this Act.

## 161. Prohibition of certain forms of punishment

- (1) No sentence of life imprisonment or death may be imposed on a child or any person who was below eighteen years at the time the offence was committed.
- (2) No sentence of corporal punishment or any form of punishment that is cruel, inhumane or degrading may be imposed on a child.
- (3) A child who has been sentenced to attend an approved school may not be detained in prison whilst awaiting designation of the place where the sentence is to be served.

## Part XVIII – Probation order

### 162. Probation order

- (1) If a Children's Court before which a child appears is of the opinion that having regard to the circumstances of the case, including the nature of the offence and the character of the child, it is appropriate to do so, it may make a probation order.
- (2) A Children's Court, before making a probation order under subsection (1), shall explain to a child in a language that the child understands—
  - (a) the effect of the order; and

- (b) that if he—
  - (i) fails to comply with the probation order; or
  - (ii) commits another offence,he shall be liable to be dealt with according to the original offence as well as the other offence.
- (3) A probation order shall have effect for such period of not more than one year from the date of the order as may be specified in the probation order.
- (4) For the purposes of securing the good conduct and supervision of a probationer or preventing a repetition by him of the same offence or the commission of other offences, a probation order shall—
  - (a) require the probationer to comply, during that period, with the supervision of a probation officer;
  - (b) specify that the probationer is not to commit any offence during the term of probation order; and
  - (c) contain such other requirements, as a Children's Court, having regard to the circumstances of the case, considers necessary, including any one or more of the following:
    - (i) that the probationer shall reside at the probation hostel, at the home of his parent or guardian or relative or at some other place;
    - (ii) that the probationer shall attend an educational institution to be recommended by the probation officer;
    - (iii) that the probationer shall remain indoors at his place of residence, be it at the probation hostel or at a home, during hours to be specified.
- (5) Without prejudice to the powers of a Children's Court to make orders, the payment of moneys by way of damages for injury or compensation for loss shall not be included amongst the requirements of a probation order.
- (6) A Children's Court, before making a probation order containing requirements as to residence—
  - (a) shall consider the home environment of a child; and
  - (b) if the order requires a child to reside in a probation hostel, shall specify in the order the period for which he is so required to reside, but that period shall not extend beyond twelve months from the date of the order.
- (7) A Children's Court which makes a probation order shall—
  - (a) immediately give a copy of the order—
    - (i) to a probationer;
    - (ii) to a probation officer or another person under whose supervision the probationer is placed; and
    - (iii) to a person in charge of the probation hostel or other place in which the probationer is required by the order to reside; and
  - (b) send to the Children's Court for the district or area named in the order in which the probationer is required to reside during the probation period a copy of the order together with such documents and information relating to the case as it considers likely to be of assistance to the court.
- (8) A Children's Court in making a probation order may, if it thinks it is expedient for the reformation of a probationer, place the probationer in charge of any person who consents to accept the probationer, on that person giving security for the good behaviour of the probationer.

**163. Failure to comply with probation order**

- (1) If at any time during the probation period it appears to a Children's Court that a probationer has failed to comply with any of the requirements of the probation order, the Children's Court may issue—
  - (a) a summons requiring the probationer to appear at the place and time specified in the summons; or
  - (b) a warrant of his arrest.
- (2) A warrant under subsection (1) shall not be issued except on information in writing and on oath submitted by a probation officer.
- (3) A summons or warrant issued under this section shall direct a probationer to appear or be brought before a Children's Court.
- (4) A probationer when arrested under subsection (1) may, if not brought immediately before a Children's Court under subsection (3)—
  - (a) be placed under detention; or
  - (b) be released on bail, with or without sureties,until such time as he can be brought before the Children's Court.
- (5) If it is proved to the satisfaction of a Children's Court that a probationer has failed to comply with any of the requirements of a probation order under [section 162\(4\)\(a\)](#) or (c), the Children's Court may, without prejudice to the continuance of the probation order, deal with the probationer for the offence in respect of which the probation order was made, in any manner in which the Children's Court could deal with him if it had just found him guilty of that offence.

**164. Effects of probation order**

- (1) The finding of the children's court that a child is in conflict with the law for an offence for which an order was made under this Part placing a child on probation, shall be deemed not to be a proved conflict with the law for any purpose other than for the purposes of—
  - (a) the proceedings in which the order was made; and
  - (b) any subsequent proceedings which may be taken against a child under this Part.The provisions of subsection (1) shall not affect the right of any such child—
  - (a) to appeal against the finding of guilt; or
  - (b) to rely on a finding as if the order was of any subsequent proceedings for the same offence.

**165. Variation of probation order**

- (1) If a Children's Court is satisfied that a probationer proposes to change or has changed his residence from the district or area named in a probation order to another district or area, the Children's Court may, and if an application is made by a probation officer, by order, vary the probation order by substituting for the district or area named therein the district or area where the probationer proposes to reside or is residing.
- (2) If a probation order contains requirements which, in the opinion of a Children's Court, cannot be complied with unless a probationer continues to reside in the district or area named in the order, the Children's Court shall not vary the order except in accordance with subsection (4).
- (3) If a probation order is varied under subsection (1), a Children's Court shall send to the other Children's Court for the new district or area named in the order a copy of the order together with

such documents and information relating to the case as it considers likely to be of assistance to such other Children's Court.

- (4) Without prejudice to subsections (1) and (3), a Children's Court may, on the application made by a probation officer or by a probationer, vary the probation order by—
  - (a) revoking any of the requirements in the probation order; or
  - (b) inserting in the probation order, either in addition to or in substitution for any such requirement, any requirement which could be included in the order as if the order was made by the Children's Court in accordance with [section 163](#).
- (5) A Children's Court shall not vary a probation order under subsection (4) by—
  - (a) reducing the probation order; or
  - (b) extending that period such that the probation period becomes more than three years.

#### **166. Discharge of probation order**

- (1) A Children's Court may, on an application made by a probation officer, a parent or guardian of a probationer discharge the probation order.
- (2) A Children's Court shall not deal with an application under subsection (1) without summoning a probationer unless the application is made by a probation officer.
- (3) Where—
  - (a) a Children's Court discharges a probation order under subsection (1); or
  - (b) a probationer is dealt with under [section 163](#) for the offence for which he was placed on probation,the probation order shall cease to have effect.

#### **167. Children's Court to give copies of varying or discharging order to probation officer**

On the making of an order varying or discharging a probation order under [section 165](#) or [166](#) respectively —

- (a) a Children's Court shall forthwith give sufficient copies of the varying or discharging order to a probation officer;
- (b) a probation officer shall give a copy of the varying or discharging order to—
  - (i) a probationer; or
  - (ii) a person in charge of the probation hostel or place in which the probationer is or was required by the order to reside.

### **Part XIX – Appeal and review**

#### **168. Appeal by child against whom a charge has been proved**

A child against whom a charge has been proved by a children's court or any other court acting under the provisions of this Act has the right to appeal.

#### **169. Automatic review in certain cases**

- (1) A sentence which involves a residential element imposed on a child under [sections 157](#) and [159](#) and any sentence involving imprisonment imposed on the child under [section 155](#), shall be subjected in the ordinary course to review.

- (2) Any sentence involving a residential element imposed under the provisions of this Act, which is wholly or partially suspended, is subject to review under subsection (1).
- (3) The review procedure referred to under subsection (1) or (2) shall be deferred where a child has appealed against a proven charge or sentence and has not abandoned the appeal, and shall cease to apply with reference to such an accused when judgement is given.
- (4) Each sentence on a separate charge shall be regarded as a separate sentence for the purposes of rendering a sentence subject to the provisions of this section.
- (5) Proceedings which fall within the ambit of this section for the purposes of review shall be reviewed whether or not the accused was legally represented at any stage of the proceedings.
- (6) A judicial officer conducting a review under this section has the power to—
  - (a) confirm, alter or quash the proven charge;
  - (b) confirm, alter or set aside the sentence or any other order of the lower court;
  - (c) set aside or correct the proceedings of the lower court;
  - (d) generally give such judgement or impose such sentence or make such order as the lower court ought to have given, imposed or made on any matter which was before it at the trial of the case in question; or
  - (e) increase the sentence imposed by the lower court or impose any form of sentence.
- (7) A judicial officer exercising powers under this section may receive any evidence or cause a subpoena to be served on any person to appear for the purposes of giving evidence.

#### **170. Review in other instances**

- (1) Nothing contained in this Act shall be construed as depriving the High Court of its inherent right to review irregularities in proceedings of lower courts or other bodies as the law may permit.
- (2) If, in any case of a child in conflict with the law in which a Children's Court or any other court acting under the provisions of this Act has imposed a sentence which is not subject to automatic review in the ordinary course, it is brought to the notice of the High Court that the proceedings in which the sentence was imposed were not conducted in accordance with justice, such court has the same powers as if the matter has been laid before that court concerned under [section 168](#).

#### **171. Review of proceedings after proving a charge but before sentence**

- (1) If the presiding officer, after a conflict with the law has been proven, but before sentence, is of the opinion that the proceedings have not been conducted in accordance with justice, he may, without sentencing the accused, record reasons for this opinion and transmit them, together with the record of the proceedings, to the registrar of the High Court, who shall cause the matter to be set down for review.
- (2) The review referred to under subsection (1) shall be conducted in the same way as automatic review under [section 169](#).

#### **172. Suspension of execution of sentence**

- (1) The execution of any sentence may not be suspended by the noting of an appeal against a proven conflict with the law or sentence or pending review unless the court which imposed the sentence releases a child concerned on conditions referred to under [section 113](#)(3), (4) and (5) or, in the case of a sentence not involving a residential element, suspends the operation of the sentence pending the finalisation of the appeal or review.

- (2) Where execution of a sentence has been suspended in terms of subsection (1), it may be a further condition, where appropriate, that a child against whom a conflict with law has been proven shall report at a specified place and time and in the manner prescribed by the rules of court.

## **Part XX – Children at risk of offending**

### **173. Children at risk of offending**

- (1) If a parent or guardian of a child requests a Children's Court orally or in writing to detain the child in an approved school or probation hostel on the grounds that the parent or guardian is unable to exercise proper control over the child, the Children's Court—
- (a) shall immediately inquire into the circumstances of the parent or guardian's request;
  - (b) shall direct a probation officer to submit a social inquiry report to it for the court to determine whether an order under subsection (2) may be made in respect of the child; and
  - (c) may, after hearing the child, order the child to be temporarily detained in an approved school or probation hostel, if it deems it necessary to do so.
- (2) If after considering a report referred to in subsection (1)(b), and the comments of a child thereon, a Children's Court is satisfied that—
- (a) it is expedient so to deal with the child; and
  - (b) the parent or guardian understands the results which will follow from, and consents to the making of the order,

it may, on the recommendation of a probation officer, order that the child—

- (i) be sent to an approved school or probation hostel, as may be appropriate; or
- (ii) be placed for such period not exceeding three years under the supervision of—
  - (aa) a probation officer; or
  - (bb) some other person appointed for the purpose by it,

and any such order may require the child to reside for a period not exceeding twelve months in a probation hostel, approved school or other appropriate institution.

### **174. Supervision by probation officer**

- (1) If a Children's Court makes an order of placing a child under the supervision of a probation officer or some other person pursuant to [section 173\(2\)\(b\)\(ii\)](#), that officer or other person—
- (a) shall, while the order remains in force, visit, guide and counsel the child; and
  - (b) may, if it appears necessary to do so, at any time while the order remains in force, bring the child before the Children's Court.
- (2) A Children's Court before whom a child is brought under subsection (1) (b) may, if it deems it expedient to do so, amend the order made under [section 173](#) and—
- (a) send the child, subject to the consent of the child's parent or guardian, to an approved school, place of safety or centre, which ever is appropriate; or
  - (b) place the child in the care of a fit and proper person, whether a relative or not, who is willing to undertake the care of the child, for the unexpired period of the order.

## Part XXI – Institutions

### 175. Places of safety for children in need of welfare

- (1) The Minister may, by notice in the gazette, designate, establish or appoint any place or institution to be a place of safety for the care and protection of children.
- (2) The Minister shall determine conditions and requirements to be met by all places of safety and shall not register any place of safety unless and until it has met those conditions and requirements.
- (3) The Department of Social Welfare shall—
  - (a) maintain a directory of all registered places of safety; and
  - (b) be responsible for monitoring and supervision of the places of safety.
- (4) The Director of Social Welfare shall advise the Minister on the designation, establishment or appointment of any place or institution to be a place of safety for the care and protection of children.
- (5) The Minister shall have powers to appoint a commission of enquiry on any place of safety should a need arise.
- (6) The Minister shall have the power to revoke a gazette mentioned in subsection (1) if the person who runs a place of safety does not comply with the provisions of subsection (2).

### 176. Escape or removal of child from place of safety

- (1) A child who escapes or is removed from a place of safety without lawful authority—
  - (a) may be apprehended by a social worker, police officer, chief or member of the community and shall be brought to the place of safety; and
  - (b) shall be kept for such period which is equal to the remaining term of his stay under the order originally made by a Children's Court.
- (2) A social worker or police officer, chief or member of the community who apprehended a child shall investigate the case so as to find out why the child escaped.

### 177. Removing or helping a child to escape from place of safety

A person who—

- (a) removes a child from a place of safety without lawful authority;
- (b) assists or induces, directly or indirectly, a child to escape from a place of safety; or

harbours or conceals a child who has so escaped, or prevents him from returning to the place of safety, commits an offence and is liable on conviction to a fine not exceeding four thousand maloti or to imprisonment for a period not exceeding four months or both.

### 178. Places of detention or custody for children in conflict with the law

- (1) The Minister may, by notice in the *Gazette*, designate, establish or appoint such places of detention as may be required for the purposes of this Act.
- (2) The Minister shall determine conditions and requirements to be met by all places of detention or custody for children in conflict with the law and shall not register any institution unless and until it has met those conditions and requirements.

- (3) The Probation Unit shall—
  - (a) maintain a directory of all places of detention and custody for children in conflict with the law; and
  - (b) be responsible for monitoring and supervision of places referred to under paragraph (a).
- (4) The Director of Probation Unit shall advise the Minister on the designation, establishment or appointment of any place, institution or centre to be a place of detention or custody for the care and protection of children in conflict with the law.
- (5) The Minister shall have powers to appoint a commission of inquiry on any place of detention or custody should a need arise.
- (6) The Minister shall have the power to revoke a gazette mentioned in subsection (1) if the person, institution or organisation which runs a place of detention or custody does not comply with the provisions of subsection (2).

### **179. Remanding children to places of detention or custody**

- (1) A child shall ordinarily be remanded in custody in a place of detention designated, established or appointed under this Act and situated in the same area as a Children's Court by which the child is remanded.
- (2) The order or judgement in pursuance of which a child is committed in custody in a place of detention shall be—
  - (a) delivered with the child to the person who is in charge of the place of detention; and
  - (b) an authority for his detention in the place of detention in accordance with the terms of the order or judgement.
- (3) A child, while being detained and while being conveyed to and from the place of detention, shall be deemed to be in lawful custody.
- (4) The Minister—
  - (a) shall cause places of detention or custody to be inspected; and
  - (b) may make regulations—
    - (i) as to the classification, treatment, employment and control of children detained in such places of detention or custody; and
    - (ii) to provide for the appointment of fit and proper persons to visit periodically children detained in such places of detention.

### **180. Escape or removal from place of detention or custody**

- (1) A child who escapes or is removed from a place of detention or custody without lawful authority—
  - (a) may be arrested without a warrant by a probation officer or a police officer and be brought back to the place of detention; and
  - (b) shall be kept in a place of detention or custody for the remaining term of his detention under the order issued by a Children's Court.
- (2) A probation officer or police officer who apprehended a child shall investigate the case so as to find out why the child escaped.



**181. Removing or helping a child to escape from place of detention or custody**

A person who—

- (a) removes a child from a place of detention or custody without lawful authority;
- (b) assists or induces, directly or indirectly, a child to escape from a place of detention or custody; or
- (c) harbours or conceals a child who has so escaped, or prevents him from returning to the place of detention or custody,

commits an offence and is liable on conviction to a fine of not exceeding four thousand maloti or to imprisonment for a period not exceeding four months or both.

**182. Probation Hostel**

The Minister may, by notice in the *Gazette*, designate, establish or appoint such probation hostels as may be required for the purposes of this Act.

**183. Child under thirteen years not to be sent to probation hostel**

A child under the age of thirteen years shall not be sent to a probation hostel.

**184. Child who escapes or is removed from probation hostel**

A child who escapes or is removed from a probation hostel without lawful authority—

- (a) may be arrested without warrant by any probation officer or police officer; and
- (b) may be brought back to the hostel or before a Children's Court,

and the Children's Court may deal with him for the offence for which he was sent to the probation hostel in the same manner in which the Children's Court could deal with him if it had just proved a charge against him.

**185. Removing or helping a child to escape from probation hostel**

Any person who—

- (a) removes a child from a probation hostel without lawful authority;
- (b) assists or induces, directly or indirectly, a child to escape from a probation hostel; or
- (c) harbours or conceals a child who has so escaped, or prevents him from returning to the probation hostel,

commits an offence and is liable on conviction to a fine not exceeding four thousand maloti or to imprisonment for a period not exceeding four months or both.

**186. Approved school**

- (1) The Minister may, by notice in the *Gazette*, designate, establish or appoint such approved schools as may be required for the education, training and detention of children to be sent there in pursuance of this Act.
- (2) The Minister may classify such approved schools—
  - (a) according to the ages of the persons for whom they are intended; and
  - (b) in such other ways as he may think fit so as to ensure that a child sent to an approved school is sent to a school appropriate for his case.

**187. Child under thirteen years not to be sent to an approved school**

A child under thirteen years shall not be sent to an approved school.

**188. When child can be sent to approved school**

- (1) If—
  - (a) a child is found guilty of an offence;
  - (b) a probation report submitted to a Children's Court shows that—
    - (i) a parent or guardian of a child can no longer exercise or is incapable of exercising any proper control over him; and
    - (ii) a child is in need of institutional rehabilitation; and
  - (c) it appears to a Children's Court that although the offence committed is not serious in nature but it is expedient that a child be subjected to detention for such term and under instruction and discipline as appears most conducive for his reformation,

the Children's Court shall, on the recommendation of a probation officer, send the child to an approved school.
- (2) If a Children's Court orders a child to be sent to an approved school, the order shall be an authority for his placement in that approved school for a period of three years from the date of the order.
- (3) Notwithstanding subsection (2), the management of an approved school to which a child is sent may, in their discretion—
  - (a) shorten the period of detention for reasons which appear to them to be sufficient;
  - (b) permit any such child to be released for such period and upon such conditions as they may deem fit to impose;
  - (c) report to the Probation Unit on the action taken; or
  - (d) where the Probation Unit is not in agreement with the action taken, the matter shall be referred to a Children's Court for determination.
- (4) A child shall not be permitted to be released under subsection (3)(b) during the first twelve months of the period of detention without the written consent of the Minister.

**189. Approved school order**

- (1) A Children's Court which makes an approved school order shall cause the order to be delivered to the person who is in charge of the approved school.
- (2) A Children's Court which makes an approved school order shall cause all such information in its possession to be transmitted to the person who is in charge of the approved school.
- (3) If a child has been ordered to be sent to an approved school, any person who harbours or conceals him when the time has come for him to go to the approved school, commits an offence and is liable on conviction to a fine not exceeding one thousand Maloti or to imprisonment for a period not exceeding one month or both.
- (4) If a person authorised to take a child to an approved school is, when the time has come for him to go to the approved school, unable to—
  - (a) find the child; or

- (b) obtain possession of the child,

a Children's Court may, if satisfied by information on oath or affirmation that there are reasonable grounds for believing that some person named in the information can produce the child, issue a summons requiring the person so named to appear at the court on such day as may be specified in the summons and produce the child.

- (5) If a person referred to under subsection (4) fails to comply with the requirements under subsection (4) without reasonable excuse, he shall, in addition to any other liability to which he may be subject to under this Act, on conviction, be liable to a fine not exceeding one thousand Maloti or to imprisonment for a period not exceeding one month or both.

#### **190. Further placement in approved school**

If a person who is in charge of an approved school is satisfied that a child—

- (a) whose period of placement in the approved school is about to expire needs further care or training; and
- (b) cannot be placed in suitable employment without such further care and training,

he shall, if the management of the approved school consent, make an application to a children's court for placement of child for a further period of six months but any such period shall not extend beyond the date the child attains the age of eighteen years.

#### **191. After-care of child released from approved school**

If a child is sent to an approved school, a children's court making an order shall, at the same time, make the order that after the expiration of the period of his placement he shall, for a period not exceeding one year, be under the supervision of—

- (a) a probation officer; or
- (b) such other person as the Children's Court may appoint.

#### **192. Escape from approved school or failure to return to approved school after expiry of leave**

- (1) Any child who—

- (a) escapes from an approved school in which he is placed, or from any hospital, home or place in which he is receiving medical attention;
- (b) being absent from an approved school on temporary leave of absence or with permission—
  - (i) runs away from the person in whose charge he is; or
  - (ii) fails to return to the approved school upon the expiration of his leave, or upon the revocation of such permission; or
- (c) being absent from an approved school under supervision, fails to return to the approved school upon being recalled,

may be arrested without warrant and be brought before a Children's Court where the child is found or the approved school is situated.

- (2) If a child brought before a Children's Court under subsection (1) is under the age of fourteen years, the Children's Court shall order the child to be brought back to the approved school or to be sent to another approved school for—
  - (a) a period which is equal to the period during which he was unlawfully at large; or

- (b) the remainder of his period of placement; and
  - (c) such period not exceeding six months as the Children's Court may direct, in addition to the periods mentioned in subsection (2)(a) and (b).
- (3) If a child brought before a Children's Court under subsection (1) has attained the age of fourteen years, the Children's Court may order the child to be brought back to the approved school or to be sent to another approved school for—
  - (a) a period equal to the period during which he was unlawfully at large; or
  - (b) the remainder of the period of his placement; and
  - (c) such further period not exceeding six months as the Court may direct.

### **193. Supervision of approved school**

Every approved school shall be under the supervision of the director of probation unit.

### **194. Removing or helping a child to escape from approved school**

A person who—

- (a) removes a child from an approved school without lawful authority;
- (b) assists or induces, directly or indirectly, a child to escape from an approved school; or
- (c) harbours or conceals a child who has so escaped, or prevents him from returning to an approved school,

commits an offence and is liable on conviction to a fine not exceeding two thousand maloti or to imprisonment for a period not exceeding two months or both.

### **195. Other facilities for children in conflict with the law**

- (1) The Minister may, by notice in the *Gazette*, establish or appoint other facilities as may be required for temporary accommodation or day-training without institutionalising children in conflict with the law pursuant to this Act.
- (2) A child placed in a facility referred to under subsection (1), shall be under the supervision of a probation officer.
- (3) The Director of Probation Unit may grant leave of absence to any child who is in temporary accommodation at the facility referred to under subsection (1), for such periods and on such conditions as he may prescribe.
- (4) Where it is deemed appropriate, the Director of Probation Unit may transfer a child to any other suitable facility.
- (5) A child who is placed at a specific facility and who absconds shall be arrested with or without warrant and be brought before a Children's Court in the area in which he is found.
- (6) A Children's Court shall enquire into the absconding and make an appropriate decision basing itself on the best interests of the child.

### **196. Standards for monitoring and supervision of children's institutions established under this Act**

- (1) The Department of Social Welfare and the Probation Unit shall facilitate the setting of standards for monitoring and supervision of all children's institutions established under this Act.
- (2) There shall be established under the Department of Social Welfare and the Probation Unit a body to monitor and supervise all institutions providing care and protection to children under this Act.

## Part XXII – Parentage, custody and guardianship

### 197. Parentage

- (1) The following persons may apply to a Children's Court for an order to confirm the parentage of a child—
  - (a) the child;
  - (b) a parent of the child;
  - (c) a guardian of the child;
  - (d) a probation officer;
  - (e) a social worker; or
  - (f) any other interested person as the Children's Court may deem fit.
- (2) An application for parentage may be made—
  - (a) before a child is born;
  - (b) after the death of a father or mother of a child; or
  - (c) before a child is eighteen years of age or after the child has attained that age with special leave of a Children's Court.

### 198. Evidence of parentage

The following shall be considered by a children's court as evidence of parentage—

- (a) the name of a parent entered in the register of births;
- (b) public knowledge of parentage; and
- (c) any other matter that it may consider relevant.

### 199. Medical test

A children's court may order a parent referred to in [section 198](#) to submit medical test, results and the children's court shall, on the basis of the evidence before it, make such order as it considers appropriate.

### 200. Custody and access

- (1) A parent, family member or any other person may apply to a Children's Court for custody of a child.
- (2) A parent, family member or any other person may apply to a Children's Court for periodic access to the child.
- (3) A Children's Court shall consider the best interests of a child when making an order for custody or access.
- (4) A Children's Court shall, when making an order under subsection (3), also consider—
  - (a) the age of a child;
  - (b) that it is preferable for a child to be with his parents except if his rights are persistently being abused by his parents;
  - (c) the views of a child;
  - (d) that it is desirable to keep siblings together;

- (e) the need for continuity in the care and control of a child; and
- (f) any other matter that it may consider relevant.

### **201. Non-custodial parent to have access to a child**

A non-custodial parent in respect of whom an application is made to a children's court for an order of parentage or custody under this part, shall have access to a child who is the subject of the order.

### **202. Removal of a child from lawful custody**

- (1) No person shall remove a child from a person who has lawful custody of the child.
- (2) A person who unlawfully removes a child from a person who has lawful custody of the child commits an offence and is liable on conviction to a fine not exceeding two thousand Maloti or to imprisonment for a period not exceeding two months or both.

### **203. Appointment of guardian**

- (1) For purposes of this section "guardian" means a person appointed to assume parental responsibility over a child by—
  - (a) a will made by a parent of the child;
  - (b) an order of a Children's Court;
  - (c) by a family; or
  - (d) the Master of the High Court.
- (2) A guardian may be appointed by any of the parties referred to under subsection (1) acting alone or in conjunction with the surviving parent of a child where one of the parents is deceased, or the father of the child born out of wedlock who has acquired parental responsibility for the child, or one of the parents where parents of the child are no longer living together.
- (3) A guardian may be appointed in respect of any child who is resident in Lesotho whether or not the child was born in Lesotho or is a citizen of Lesotho.
- (4) A guardian appointed under this Act need not be a Lesotho citizen or resident in Lesotho.
- (5) A guardian may be appointed in respect of a person or estate of a child or both.
- (6) Where a guardian is appointed only in respect of an estate of a child, he need not have actual custody of the child but shall, with the authority of the Master of the High Court, have—
  - (a) the power and responsibility to administer the estate of the child and in particular to receive and recover and invest the property of the child in his own name for the benefit of the child;
  - (b) the duty to take all reasonable steps to safeguard the estate of the child from loss or damage;
  - (c) the duty to produce and avail accounts in respect of the child's estate to the parent or custodian of the child or to such other person as a Children's Court may direct, or to the Children's Court, as the case may be, on every anniversary of the date of his appointment; and
  - (d) to produce any account or inventory in respect of the child's estate when required to do so by a Children's Court.

### **204. Rights of surviving parent to guardianship**

- (1) On the death of the father of a child, the mother, if surviving, shall, subject to the provisions of this Act, be the guardian of the child.

- (2) On the death of the mother of a child, the father, if surviving, shall, subject to the provisions of this Act, be the guardian of the child.

## **205. Appointment of testamentary guardian**

- (1) A parent of a child may, by will, appoint any person to be a guardian of the child after the parent's death.
- (2) A guardian of a child may, by will or deed, appoint another Individual to take his place as the guardian of the child in the event of his death.
- (3) An appointment made under subsection (1) or (2) shall not have effect unless the will or deed is dated and is signed by a person making the appointment.
- (4) A guardian so appointed shall act as such after the death of a surviving parent unless the surviving parent has requested otherwise.
- (5) If a child, member of a family or guardian appointed considers that a parent is unfit to have legal custody of the child, he may apply to a Children's Court which may—
  - (a) refuse to make any order in which case the parent shall remain the only guardian; or
  - (b) make an order that the guardian shall act jointly with the parent;
  - (c) make an order appointing a relative of the child or a person who is willing to act, a guardian of the child, to act jointly with the parent or guardian or both of them; or
  - (d) make an order that the guardian shall be the only guardian of the child, in which case the Children's Court may order the parent to pay the guardian a financial provision towards the maintenance of the child having regard to the means of the parent, as the Children's Court may consider reasonable:

Provided that the Children's Court shall not appoint the guardian, if the guardian is not a relative of the child, unless the circumstances are such that it is prudent to do so.

- (6) Where guardians are appointed by both parents, the guardians so appointed shall, after the death of a surviving parent, act jointly.
- (7) Subject to subsection (5), a guardian who has been appointed to act jointly with a surviving parent, shall continue to act as the guardian after the death of the parent, but if the surviving parent has appointed the guardian, the guardian appointed by a Children's Court shall act jointly with the guardian appointed by the parent.

## **206. Appointment of guardian by a Children's Court**

A children's court may appoint a guardian on the application made by any person where a child's parents are no longer living or cannot be found and the child has no guardian and there is no other person having parental responsibility for him or where the parents of the child are no longer living together.

## **207. Guardianship revocation**

An appointment made under [section 206](#) revokes an earlier appointment made by the same person in respect of the same child, unless it is clear that the purpose of the latter appointment is to appoint an additional guardian.

## **208. Extension of guardianship beyond a child's eighteenth birthday**

- (1) An appointment of a guardian shall be terminated upon a child attaining the age of eighteen years, unless exceptional circumstances exist that would require a Children's Court to make an order that the appointment be extended.

- (2) Where an order is made under subsection (1), it shall be made prior to a child's eighteenth birthday.
- (3) A Children's Court making an order under this section may attach such conditions as to the duration of the order and containing directions as to how it shall be carried out, imposing such other conditions that shall be complied with and with such incidental, supplemental or consequential provisions as the Children's Court thinks fit.
- (4) A Children's Court shall have power to vary, modify or revoke any order made under this section on a child's eighteenth birthday on the application made by the child, the parent or guardian of the child, a relative of the child or the Director of Social Welfare or where the child marries on his eighteenth birthday, his spouse.

## **209. Disputes between guardians**

Where two or more persons act as joint guardians to a child, or where a surviving parent and guardian act jointly and are unable to agree on any question affecting the welfare of the child, either party may apply to a children's court for its direction, and the children's court may make such order as it may consider proper.

## **210. Neglect or misapplication of assets by the guardian of the estate of the child**

Where a guardian of the estate of a child, whether or not the guardian is also the guardian of the child, neglects to recover or safeguard, or misplaces any asset forming part of the estate of the child, or subjects the estate to loss or damage, he commits an offence and is liable on conviction to a fine not exceeding ten thousand maloti or to imprisonment for a period not exceeding ten months or both.

## **211. Duties of guardian in relation to the estate of a child**

- (1) No guardian of an estate of a child shall—
  - (a) neglect to receive and safeguard any assets forming part of the estate or misapplies any such assets to loss, waste or damage;
  - (b) fail to produce to a Children's Court or the parent or guardian of the child any account or inventory required by the Children's Court; or
  - (c) produce any such inventory or account which is false.
- (2) A person who contravenes subsection (1) commits an offence and is liable on conviction to a fine not exceeding five thousand Maloti or to imprisonment for a period not exceeding five months or both.

# **Part XXIII – Maintenance of children**

## **212. Duty to maintain a child**

- (1) A parent or any other person who is legally liable to maintain a child or contribute towards the maintenance of the child is under a duty to supply food, clothing, health, life, basic education, reasonable shelter or any other thing that may be necessary for the well-being of the child.
- (2) For purposes of this section, basic education means primary up to secondary education or its equivalent.
- (3) A person who contravenes subsection (1) commits an offence and is liable on conviction to a fine not exceeding one thousand Maloti or to imprisonment for a period not exceeding one month or both.



**213. Application for maintenance order**

- (1) The following persons may apply to a Children's Court for maintenance order of a child—
  - (a) the child;
  - (b) the parent of the child;
  - (c) the guardian of the child;
  - (d) a relative of the child;
  - (e) a social worker; or
  - (f) any other person.
- (2) An application for maintenance may be made against any person who is liable to maintain a child or contribute towards his maintenance.

**214. Consideration for maintenance orders**

A children's court shall consider the following when making a maintenance order—

- (a) a source of income and wealth of both parents of a child or of a person legally liable to maintain the child;
- (b) any impairment of the earning capacity of the person with a duty to maintain the child;
- (c) financial responsibility of a person;
- (d) the cost of living in the area where a child resides;
- (e) rights of a child under this Act; and
- (f) any other matter which it considers relevant.

**215. Request for social inquiry report**

A children's court may request that a social worker prepares a social inquiry report on the issue of maintenance and submit it to it for consideration before a maintenance order.

**216. Maintenance order**

- (1) A Children's Court may award maintenance to a child whether the parents are married or not and the maintenance order shall include the following—
  - (a) medical expenses for the child;
  - (b) a periodic allowance for the maintenance of the child; and
  - (c) the payment of a reasonable sum to be determined by the Children's Court for the education of the child.
- (2) A Children's Court may order a periodic payment or lump sum payment for the maintenance of a child and the earnings, salary or property of the person liable may be attached.
- (3) An attachment order shall be applicable in all cases of failure to pay maintenance.
- (4) A maintenance order may be directed to the employer to deduct the sum of maintenance money every time payment of the salary or other earnings is made.
- (5) When considering an application for maintenance, a Children's Court may make a maintenance order which it considers reasonable for any child in the household.

- (6) A Children's Court may make an order for arrears of maintenance against any person liable to pay maintenance.

#### **217. Persons entitled to maintenance order**

- (1) A person who has custody of a child who is the subject of a maintenance order is entitled to receive and administer on behalf of the child the maintenance order made by a Children's Court.
- (2) If a parent, guardian or whoever has custody of the child ceases to be a fit person, a Children's Court of the area where the child is resident may appoint another person to have custody of the child and administer the maintenance order and that person shall act as if originally appointed by the Children's Court.

#### **218. Duration of order**

- (1) A maintenance order issued by a Children's Court shall expire when the child attains the age of eighteen years or dies before that age.
- (2) A maintenance order shall lapse before a child attains the age of eighteen years if before that age the child is gainfully employed as referred to under [section 228](#) (1).

#### **219. Continuation of maintenance orders**

- (1) Notwithstanding the provisions of [section 218](#), a Children's Court may continue a maintenance order after a child has attained eighteen years if the child is engaged in a course of secondary education or training after that age.
- (2) An application made under this section may be brought by a parent of a child, any person who has custody of the child or the child himself.

#### **220. Variation or discharge of orders**

A children's court may, if satisfied, vary or discharge a maintenance order on the application of a parent or guardian, or the person who has custody of a child or any other person legally liable to maintain the child.

#### **221. Enforcement of maintenance orders**

A maintenance order shall be enforced after thirty days of the making of the order.

#### **222. Non-custodial parent to have access to child**

A non-custodial parent in respect of whom an application is made to a children's court for an order of maintenance under this part, shall have access to the child who is the subject of the order.

#### **223. Joint maintenance of child**

Unless a children's court otherwise directs, and subject to any financial contribution ordered to be made by any other person, the following presumptions shall apply with regard to the maintenance of a child—

- (a) where parents of a child were married to each other at the time of the birth of the child and are both living, the duty to maintain the child shall be their joint responsibility;
- (b) where two or more guardians of a child have been appointed, the duty to maintain the child shall be the joint responsibility of all guardians, whether acting in conjunction with the parents or not;
- (c) where two or more custodians have been appointed in respect of the child it shall be the joint responsibility of all custodians to maintain the child; and

- (d) where the mother and father of the child were not married to each other at the time of the birth of the child and have not subsequently married, but the father of the child has acquired the parental responsibility of the child, it shall be the joint responsibility of the mother and father of the child to maintain that child.

#### **224. Maintenance during matrimonial proceedings**

A children's court shall have power to make a maintenance order, whether or not proceedings for nullity, judicial separation, divorce or any other matrimonial proceedings have been filed by a parent of a child or during proceedings or after a final decree is made in such proceedings.

#### **225. Payment of maintenance monies to persons other than the applicant**

Where a maintenance order is made under this section, a children's court may, at the time of making the order, on being satisfied that the person in whose favour the order is made—

- (a) is not a fit or proper person to receive any maintenance monies specified in the order in respect of a child; or
- (b) has left the jurisdiction of the Children's Court for an indefinite period, or is dead, or is incapacitated or has become of unsound mind, or has been imprisoned or has been declared insolvent; or
- (c) has misappropriated, misapplied or mismanaged any maintenance monies paid to him for the benefit of a child,

appoint any other person it considers fit and responsible to receive and administer any maintenance monies required to be paid under a maintenance order, or order the person required to make a payment of the maintenance monies under this section to secure the whole or any part of it by vesting the sums or any other property in trust for the child.

### **Part XXIV – Employment of children**

#### **226. Exploitative child labour**

- (1) No person shall employ a child in exploitative labour.
- (2) For purposes of this Act, labour is exploitative if it deprives or hinders a child access to health, education or development.

#### **227. Prohibition of child labour at night and in industrial undertakings**

- (1) No person shall employ a child in night work or work in industrial undertakings.
- (2) For purposes of this Act, night work constitutes work between the hours of six o'clock in the evening to six o'clock in the morning.
- (3) A person who contravenes this section commits an offence and is—
  - (a) on first conviction, liable to a fine not exceeding twenty thousand Maloti or to imprisonment for a period not exceeding twenty months or both; or
  - (b) on second or subsequent conviction, liable to imprisonment for a minimum period of two years without the option of a fine.

#### **228. Minimum age for child labour**

- (1) The minimum age for admission of a child to employment shall be fifteen years.

- (2) No person shall employ a child below the minimum age of fifteen years.
- (3) A person who contravenes this section commits an offence and is—
  - (a) on first conviction, liable to a fine not exceeding twenty thousand Maloti or to imprisonment for a period not exceeding twenty months or both;
  - (b) on second or subsequent conviction, liable to imprisonment for a minimum period of two years without the option of a fine.

## **229. Engagement in light work**

- (1) Notwithstanding [section 228](#), a child who is thirteen years or above may be engaged in light work.
- (2) For the purposes of this Act, light work constitutes work which is not likely to be harmful to the health or development of a child and does not affect the child's attendance at school or the capacity of the child to benefit from school.

## **230. Minimum age for hazardous employment**

- (1) No child below the age of eighteen years shall be employed in any form of hazardous work.
- (2) Work is hazardous when it poses a danger to the health, development safety or morals of a person.
- (3) Hazardous work includes—
  - (a) mining and quarrying;
  - (b) portorage of heavy loads;
  - (c) manufacturing industries where chemicals are produced or used;
  - (d) work in places where dangerous machines are used;
  - (e) work in places such as bars, hotels and places of entertainment where a person may be exposed to immoral behaviour;
  - (f) herding animals at the cattle posts;
  - (g) commercial sexual work; or
  - (h) tobacco production and trafficking.
- (4) A person who contravenes this section commits an offence and is—
  - (a) on first conviction, liable to a fine not exceeding twenty thousand Maloti or to imprisonment for a period not exceeding twenty months or both;
  - (b) on second or subsequent conviction, liable to imprisonment for a minimum period of two years without the option of a fine.

## **231. Non-employment of children and young persons in industrial undertakings**

- (1) No employer shall, in an industrial undertaking, employ a child in employment without satisfactory proof of the child's age.
- (2) An employer in an industrial undertaking shall keep a register of the children and young persons employed by him and of the dates of their births.
- (3) An industrial undertaking is an undertaking other than one in commerce or agriculture and includes—
  - (a) mines, quarries and other works of the extraction of minerals from the earth; or

- (b) undertakings in which articles are manufactured, altered, cleaned, repaired, ornamented, finished, adopted for sale, broken up or demolished, or in the generation, transformation or transmission of electricity or motive power of any kind.
- (4) A person who or organisation which has a reasonable suspicion that a child is employed in an industrial undertaking shall report to the Ministry responsible for labour and employment affairs.
- (5) The Ministry responsible for labour and employment affairs shall investigate cases of children employed in industrial undertakings and take appropriate action.
- (6) The Ministry responsible for labour and employment affairs shall in the investigation of cases referred to under subsection (5), request medical officers, social workers and other professionals to provide any expert information necessary.
- (7) A person who contravenes this section commits an offence and is—
  - (a) on first conviction, liable to a fine not exceeding twenty thousand Maloti or to imprisonment for a period not exceeding twenty months or both;
  - (b) on second or subsequent conviction, liable to imprisonment for a minimum period of two years without the option of a fine.

## **Part XXV – Protective measures relating to the health of children**

### **232. Consent to medical treatment or surgical operation**

- (1) A child may be subjected to medical treatment only if he consents to such treatment in terms of subsection (2) or (3).
- (2) A child may consent to medical treatment provided the child is—
  - (a) at least twelve years of age; and
  - (b) of sufficient maturity and has the mental capacity to understand the benefits, risks, social and other implications of the treatment or operation.
- (3) A child may not consent to a surgical operation without the assistance of—
  - (a) a parent or guardian of the child; or
  - (b) a care-giver of the child.
- (4) A parent, guardian or care-giver of a child may consent to the medical treatment or surgical operation of the child if the child is—
  - (a) under the age of twelve years; or
  - (b) over that age but is of insufficient maturity or does not have the mental capacity to understand the benefits, risks and social implications of the treatment or operation.
- (5) A superintendent of a hospital or a person in charge of a hospital in the absence of the superintendent shall consent to the medical treatment or surgical operation on a child if—
  - (a) the treatment is necessary to preserve the life of the child or to save the child from serious or lasting physical injury or disability; and
  - (b) the need of the treatment or operation is so urgent that it cannot be deferred for the purposes of obtaining consent that would otherwise have been required.
- (5) A Children's court may consent to the medical treatment or surgical operation on a child if—
  - (a) the child has been abandoned; or

- (b) a parent, guardian or care-giver of the child—
  - (i) unreasonably refuses to give consent or to assist the child in giving consent;
  - (ii) is physically or mentally incapable of giving consent or assisting the child in giving consent;
  - (iii) is deceased; or
  - (iv) cannot readily be traced.

*[Please note: numbering as in original.]*

- (7) No parent, guardian or care-giver of a child may refuse to assist a child under subsection (2)(b) or withhold consent under subsection (3) by reason only of religious, cultural or other beliefs, unless the parent, guardian or care-giver of the child is able to show that there is medically acceptable alternative to the medical treatment or surgical operation.

### **233. HIV Testing**

- (1) No child may be tested for HIV except when this is in the best interests of the child and consent has been given under subsection (2).
- (2) Consent for HIV test on a child may be given by—
  - (a) the child, if the child is twelve years or older;
  - (b) a parent, guardian or care-giver of the child, if the child is under the age of twelve years or is not of sufficient maturity or does not have the mental capacity to understand the benefits, risks and social implications of such a test;
  - (c) a social worker arranging the placement of the child, if the child is under the age of twelve years or is not of sufficient maturity or does not have mental capacity to understand the benefits, risks and social implications of such a test;
  - (d) a person in charge of a hospital, if—
    - (i) the child is under the age of twelve years or is not of sufficient maturity or does not have the mental capacity to understand the benefits, risks and social implications of such a test;
    - (ii) the child has no parent or guardian and there is no designated child protection organisation arranging the placement of the child; or
  - (e) A Children's Court, if—
    - (i) consent under paragraph (a), (b), (c) or (d) is unreasonably withheld; or
    - (ii) the child or a parent or guardian of the child is incapable of giving consent.

### **234. Access to legal, medical and health assistance**

- (1) A child who is a survivor of sexual abuse and exploitation shall, as soon as possible, be provided with emergency legal, medical or health assistance.
- (2) No person may refuse to provide reproductive health information to a child who has been a subject of any form of abuse.

## Part XXVII – Miscellaneous

*[Please note numbering as in original. No Part XXVI]*

### 235. Powers of the courts

Notwithstanding any penalty imposed under this Act, a court may, where circumstances warrant, impose any penalty higher than that provided for in the Act.

### 236. Regulations

The Minister may, by notice published in the *Gazette*, make regulations generally for giving effect to the provisions of this Act.

### 237. Repeals

- (1) Children's Protection Act, 1980<sup>1</sup> is repealed.
- (2) Adoption of Children Proclamation, 1952<sup>2</sup> is repealed.

### 238. Amendment of Labour Code, 1992

Section 78 of the labour code, 1992 is amended by—

- (a) inserting “(1)” immediately before “after”;
- (b) deleting a full stop at the end of the section and substituting a semi colon;
- (c) inserting the following subsection:

“(2) subsection (1) does not apply where an estate of a deceased employee involves minor children.”.

## Schedule I

Assault where grievous bodily harm has not been inflicted.

Malicious injury to property where the damage does not exceed M1000.00.

Any offence under any law relating to the illicit possession of dependence producing drugs where the quantity involved does not exceed 25 grams.

Theft, where the value of the property involved does not exceed M100.00.

Any statutory offence where the maximum penalty determined by that statute is a fine of less than M300.00 or three months imprisonment.

Conspiracy, incitement or attempt to commit any offence referred to in this schedule.

## Schedule II

Public violence.

1

(Act No. 1 of 1980)

2

(Proclamation No. 1 of 1952)

Culpable homicide.

Assault, including assault involving the infliction of grievous bodily harm.

Arson.

House breaking, whether under common law or a statutory provision, with intent to commit an offence, if the amount involved in the offence does not exceed M20,000.00.

Robbery, other than robbery with aggravating circumstances, if the amount involved in the offence does not exceed M20,000.00.

Theft where the amount involved does not exceed M20,000.00.

Any other offence under any law relating to the illicit possession of dependence producing drugs.

Forgery, uttering or fraud, where the amount concerned does not exceed M20,000.00.

Any conspiracy, incitement or attempt to commit any offence referred to under this schedule.