

the probation officer must make an estimation of the child's age and must complete the prescribed form.

(2) In making the estimation, the probation officer must consider any available information, including the following:

- (a) A previous determination of age by a magistrate under this Act or under the Criminal Procedure Act or an estimation of age in terms of the Children's Act;
- (b) statements made by a parent, an appropriate adult, **the legal guardian** or any other person, including a religious or community leader, likely to have direct knowledge of the age of the child;
- (c) a statement made by the child concerned;
- (d) a school registration form, **[or]** school report, **[or]** other document of a similar nature or a baptismal or other similar religious certificate; or
- (e) an estimation of age by a medical practitioner.

(3) The probation officer must submit the estimation on the prescribed form, together with any relevant documentation to the inquiry magistrate before the child's appearance at a preliminary inquiry.

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

Age determination by inquiry magistrate or child justice court

14. (1) If, during a preliminary inquiry or during proceedings before a child justice court, the age of a child at the time of the commission of the alleged offence is uncertain, the presiding officer must determine the age of the child.

(2) **[For the purposes of a determination]** In order to determine the age of a child, a presiding officer may—

- (a) consider the form and any documentation submitted by the probation officer in terms of section 13(3);
- (b) require any relevant documentation, information or statement from any person;
- (c) subpoena any person to produce the documentation, information or statements referred to in paragraph (b); or
- (d) if necessary, refer the child to a medical practitioner, in the prescribed manner, for an estimation of age.

(3) (a) The presiding officer must enter the age determined in terms of subsection (1) into the record of the proceedings as the age of the child.

(b) **[until evidence]** Should evidence to the contrary emerge[s], **[in which case]** the presiding officer must alter the record to reflect the correct age.

Age determination by any other court

15. Where there is any uncertainty as to whether a person appearing before any other court was over or under the age of 18 years at the time of the commission of the alleged offence, the court must —

- (a) determine the age of that person in accordance with section 14; and
- (b) where necessary, alter the record to reflect the correct age of that person, in accordance with the provisions of section 16, which apply with the changes required by the context.

PART 1: RELEASE OR DETENTION

Approach to be followed when considering release or detention of child after arrest

21. (1) When considering the release or detention of a child who has been arrested, preference must be given to releasing the child, as set out in subsections (2) and (3).

(2) Prior to the child's first appearance at a preliminary inquiry –

- (a) a police official must, in respect of an offence referred to in Schedule 1, where appropriate, release a child on written notice into the care of a parent or an appropriate adult in terms of section 18, read with section 22; or
- (b) a prosecutor may, in respect of an offence referred to in Schedule 1 or 2, authorise the release of a child on bail in terms of section 25, read with section 59A of the Criminal Procedure Act, in which case the reference to Schedule 7 in section 59A of that Act is to be regarded as a reference to Schedule 2 of this Act.

(3) A presiding officer may, at a child's first appearance at a preliminary inquiry or thereafter at a child justice court–

- (a) in respect of any offence, release a child into the care of a parent or an appropriate adult in terms of section 24(2)(a);
- (b) in respect of an offence referred to in Schedule 1 or 2, release a child on his or her own recognisances in terms of section 24(2)(b); or
- (c) if a child is not released from detention in terms of paragraph (a) or (b), release the child on bail in terms of section 25.

Release of child on written notice into care of parent or appropriate adult before first appearance at preliminary inquiry

22. (1) A police official must release a child on written notice in terms of section 18 into the care of a parent or an appropriate adult if the child is in detention in police custody in respect of an offence referred to in Schedule 1, as soon as possible and before the child appears at the preliminary inquiry, unless—

- (a) the child's parent or an appropriate adult cannot be located or is not available and all reasonable efforts have been made to locate the parent or appropriate adult; or
- (b) there is a substantial risk that the child may be a danger to any other person or to himself or herself.

(2) Where a child has not been released in terms of subsection (1), the investigating police official must provide the inquiry magistrate with a written report in the prescribed manner, giving reasons why the child could not be released, with particular reference to the factors referred to in subsection (1)(a) or (b).

Duty of police official when releasing child into care of parent or appropriate adult

23. A police official who releases a child from detention in terms of section 22 and places the child in the care of a parent or an appropriate adult, must, at the

26. (1) If, after due consideration of the options for release of a child in terms of Part 1, a decision is made that the child is to be detained or is to remain in detention a police official or presiding officer must give preference to the least restrictive option possible in the circumstances, as set out in subsections (2) and (3), beginning with the least restrictive option.

(2) Prior to the child's first appearance at a preliminary inquiry within 48 hours after arrest –

- (a) a police official must, depending on the age of the child and the alleged offence committed by the child, consider the placement of the child in a suitable child and youth care centre in accordance with section 27(a); or
- (b) if placement referred to in paragraph (a) is not appropriate or applicable, a police official must detain the child in a police cell or lock-up, in accordance with section 27(b).

(3) A presiding officer may, at a child's first or subsequent appearance at a preliminary inquiry or thereafter at a child justice court order the detention of a child in –

- (a) a child and youth care centre in accordance with section 29; or
- (b) prison in accordance with section 30, subject to the limitations set out in that section.

Placement options for child who has not been released before first appearance at preliminary inquiry

27. If, at any stage before a child's first appearance at a preliminary inquiry, the child has not been released from detention in police custody and is charged, in the case of a child who is–

- (a) (i) 10 years or older but under the age of 14 years, with any offence; or
- (ii) 14 years or older, with an offence referred to in Schedule 1 or 2, the police official must give consideration to the detention of the child in an appropriate child and youth care centre, if a centre is available and there is a vacancy, or if a centre or vacancy is not available, in a police cell or lock-up; or
- (b) 14 years or older, with an offence referred to in Schedule 3, the police official must cause the child to be detained in a police cell or lock-up.

Protection of children detained in police custody

- 28.** (1) A child who is in detention in police custody must be—
- (a) detained separately from adults, and boys must be held separately from girls;
 - (b) detained in conditions which will reduce the risk of harm to that child, including the risk of harm caused by other children;
 - (c) permitted visits by parents, appropriate adults, legal representatives, registered social workers, probation officers, health workers, religious counsellors and any other person who, in terms of any law, is entitled to visit; and
 - (d) cared for in a manner consistent with the special needs of children, including the provision of –
 - (i) immediate and appropriate health care in the event of any illness, injury or severe psychological trauma; and
 - (ii) adequate food, water, blankets and bedding.

(5) A probation officer may, where appropriate, elicit the views of the child in private regarding the presence of any person who is attending the assessment.

(6) (a) A probation officer must make every effort to locate a parent or an appropriate adult **[for purposes of concluding]** in order to conclude the assessment of a child and may request a police official to assist in the location of that person.

(b) A probation officer may conclude the assessment of a child in the absence of a parent or appropriate adult if all reasonable efforts to locate that person have failed or if that person has been notified of the assessment and has failed to attend.

Powers and duties of probation officer at assessment

39. (1) The probation officer must—

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

(2) The probation officer may, at any stage during the assessment of a child, consult with any person who may provide information necessary for the assessment, including a prosecutor, police official or diversion service provider.

(3) The probation officer may, at any stage during the assessment, consult privately with any person present.

(4) The probation officer may consult any person who is not at the assessment and who has any information relating to the assessment, but if additional information is obtained, the child must be informed accordingly.

(5) Where a child is accused with another child or other children, the probation officer may conduct the assessment of the children simultaneously if this will be in the best interests of all the children concerned.

(6) The probation officer must encourage the participation of the child during the assessment.

Assessment report of probation officer

40. (1) The probation officer must complete an assessment report in the prescribed manner with recommendations on the following issues, where applicable:

- (a) The possible referral of the matter to a children's court in terms of section 50 or 64;
- (b) the appropriateness of diversion, including a particular diversion service provider, or a particular diversion option or options, as provided for in section 53;
- (c) the possible release of the child into the care of a parent or an appropriate adult or on his or her own recognisances, in terms of section 24;
- (d) if it is likely that the child could be detained after the first appearance at the preliminary inquiry, the placement of the child in a specified child and youth care centre or prison in terms of section 29 or 30;

- (e) in the case of a child under the age of 10 years, establish what measures need to be taken in terms of section 9;
- (f) the possible criminal capacity of the child if the child is 10 years or older but under the age of 14 years, as provided for in section 10, as well as measures to be taken in order to prove criminal capacity; **[and]**
- (g) whether a further and more detailed assessment of the child is required **[for purposes of considering]** in order to consider the circumstances referred to in subsection (3); and
- (h) an estimation of the age of the child if this is uncertain, as provided for in section 13.

(2) A recommendation referred to in subsection (1)(d) relating to the placement of the child in a child and youth care centre must be supported by current and reliable information[, **as prescribed]** in a prescribed form, obtained by the probation officer from the functionary responsible for the management of the centre regarding –

- (a) the availability or otherwise of accommodation for the child in question; and
- (b) the level of security, amenities and features of the centre.

(3) A recommendation referred to in subsection (1)(g) may be made in one or more of the following circumstances:

- (a) The possibility that the child may be a danger to others or to himself or herself;
- (b) the fact that the child has a history of repeatedly committing offences or absconding;
- (c) where the social welfare history of the child warrants a further assessment; **[or] and**
- (d) the possibility that the child may be admitted to a sexual offenders' programme, substance abuse programme or other intensive treatment programme.

(4) The probation officer must indicate in the assessment report whether or not the child intends to acknowledge responsibility for the alleged offence.

(5) The report referred to in subsection (1) must be submitted to the prosecutor before the commencement of a preliminary inquiry with due regard to the time periods referred to in section 43(3)(b).

CHAPTER 6 DIVERSION BY PROSECUTOR IN RESPECT OF MINOR OFFENCES

Diversion by prosecutor before preliminary inquiry in respect of offences referred to in Schedule 1

41. (1) A prosecutor may divert a matter involving a child who is alleged to have committed an offence referred to in Schedule 1 and may, for this purpose, select any level one diversion option set out in section 53(3) or any combination thereof, if the prosecutor is satisfied –

- (a) that the factors referred to in section 52(1)(a) to (d) have been complied with; and
- (b) in the case of a child who is 10 years or older but under the age of 14 years, that criminal capacity is likely to be proved in terms of section 11.

(2) The diversion referred to in subsection (1) must take place –

- (a) in accordance with directives issued by the National Director of Public Prosecutions, as provided for in section 97(4)(a)(i)(bb);
- (b) subject to subsection (3), after an assessment of the child in accordance with Chapter 5; and
- (c) before a preliminary inquiry as provided for in Chapter 7.

(3) If the child has not been assessed, the prosecutor may dispense with the assessment if it is in the best interests of the child to do so: Provided that the reasons for dispensing with the assessment must be entered on the record of the proceedings by the magistrate in chambers referred to in section 42.

(4) If the prosecutor is of the opinion that the child is in need of care and protection as envisaged by section 150 of the Children's Act, he or she must not divert the matter but refer the matter to a preliminary inquiry for consideration of referring it to a children's court.

(5) In order to decide whether to divert the matter or not, the prosecutor must take into account whether the child has a record of previous diversions.

(6) If the prosecutor decides not to divert a matter in terms of this section, he or she must immediately make arrangements for the child to appear at a preliminary inquiry referred to in Chapter 7.

Diversion option to be made order of court

42. (1) If a matter is diverted in terms of section 41, the child and, where possible, his or her parent or appropriate adult must appear before a magistrate in chambers, **[for purposes of having]** in order to have the diversion option that has been selected by the prosecutor, made an order of court.

(2) The provisions of section 58 apply with the changes required by the context, to a child who fails to comply with any order referred to in subsection (1).

CHAPTER 7 PRELIMINARY INQUIRY

Nature and objectives of preliminary inquiry

- 43.** (1) A preliminary inquiry –
- (a) is an informal pre-trial procedure which is inquisitorial in nature; and
 - (b) may be held in a court or any other suitable place.
- (2) The objectives of a preliminary inquiry are to–
- (a) consider the assessment report of the probation officer, with particular reference to –
 - (i) the age estimation of the child, if the age is uncertain;
 - (ii) the view of the probation officer regarding the criminal capacity of the child if the child is 10 years or older but under the age of 14 years[, **establishment of criminal capacity**] **[for purpose of diversion]** **[or]** and a decision whether an evaluation of the criminal capacity of the child by a suitably qualified person referred to in section 11(3) is necessary; and
 - (iii) whether a further and more detailed assessment of the child is needed as referred to in section 40(1)(g);
 - (b) establish whether the matter can be diverted before plea;

Minimum standards applicable to diversion

55. (1) Diversion options, in keeping with the objectives of diversion must be structured in a way so as to strike a balance between the circumstances of the child, the nature of the offence and the interests of society, and—

- (a) may not be exploitative, harmful or hazardous to **[a]** the child's physical or mental health;
- (b) must be appropriate to the age and maturity of **[a]** the child;
- (c) may not interfere with a child's schooling;
- (d) may not be structured in a manner that completely excludes certain children due to a lack of resources, financial or otherwise; and
- (e) must be sensitive to the circumstances of the victim.

(2) Diversion programmes must, where reasonably possible—

- (a) impart useful skills;
- (b) include a restorative justice element which aims at healing relationships, including the relationship with the victim;
- (c) include an element which seeks to ensure that the child understands the impact of his or her behaviour on others, including the victims of the offence, and may include compensation or restitution;
- (d) be presented in a location reasonably accessible to the child;
- (e) be structured in a way that they are suitable to be used in a variety of circumstances and for a variety of offences;
- (f) be structured in a way that their effectiveness **[may]** can be measured;
- (g) be promoted and developed with **[the]** a view to equal application and access throughout the country, bearing in mind the special needs and circumstances of children in rural areas and vulnerable groups; and
- (h) involve parents or appropriate adults, if applicable.

Provision and accreditation of diversion programmes and diversion service providers

56. (1) Subject to section 98(2), a prosecutor, an inquiry magistrate or a child justice court may only refer a matter for diversion to a diversion programme and diversion service provider that has been accredited in terms of this section and has a valid certificate of accreditation, referred to in subsection (2)(e).

(2) (a) The Cabinet member responsible for social development, in consultation with the Cabinet members responsible for the administration of justice, education, correctional services, **[and]** safety and security and health must-

- (i) create a policy framework to develop the capacity within all levels of Government and the non-governmental sector to establish, maintain and develop programmes for diversion;
- (ii) establish and maintain a system for accreditation, as prescribed, of programmes for diversion and diversion service providers; and
- (iii) ensure the availability of resources to implement diversions programmes, as prescribed.

(b) The system for accreditation referred to in paragraph (a)(ii) must contain -

- (i) criteria for the evaluation of diversion programmes to ensure that they comply with the minimum standards referred to in section 55;

- (ii) criteria for the evaluation of the content of the diversion programmes to ensure that they reflect a meaningful and adequate response to the harm caused by offences committed by children, **[as part of [the process of] achieving]** to achieve the objectives of diversion **[/ without derogating/detracting from the objectives of diversion];**
- (iii) mechanisms to monitor diversion programmes and diversion service providers in respect of **[the] their** ability to render quality service in achieving the objectives of diversion and **[the] their** ability to promote compliance with diversion orders;
- (iv) measures for the removal of diversion programmes and diversion service providers from the system, where appropriate.

(c) The Cabinet member responsible for social development must -

- (i) before the commencement of this Act, table the policy framework and system for accreditation referred to in paragraph (a)(i) and (ii) in Parliament;
- (ii) **[within]** three months after tabling the policy framework and system for accreditation in Parliament, publish a notice in the *Gazette*, inviting applications for the accreditation of diversion programmes and diversion service providers, as provided for in the policy framework and system for accreditation referred to in subparagraph (i), which applications must be submitted within four months from the publication of the notice;
- (iii) within four months of the closing date for applications referred to in subparagraph (ii), ensure that all applications received are considered and decided on, with preference being given to the finalisation of applications in respect of diversion programmes and diversion service providers which existed at the time of commencement of this Act.

(d) After the expiry of the time limits referred to in paragraph (c), all applications for accreditation must be dealt with in the manner and within the time limits determined in the policy framework and system for accreditation.

(e) The Cabinet member responsible for social development must issue a prescribed certificate of accreditation to each diversion programme and diversion service provider that is accredited in terms of this section.

(f) A certificate of accreditation referred to in paragraph (e) is valid for a maximum period of four years from the date of accreditation.

(g) A quality assurance process must be conducted in the prescribed manner in respect of each accredited diversion programme and diversion service provider.

(3) (a) The Cabinet member responsible for social development must publish the particulars of each diversion programme and diversion service provider that is accredited or removed from the system in terms of this section in the *Gazette* within 30 days of accreditation or removal.

(b) The Director-General: Social Development must, immediately after any publication referred to in paragraph (a), provide a copy of the publication to -

- (i) the relevant role-players falling under his or her jurisdiction; and
- (ii) the Director-General: Justice and Constitutional Development, who must distribute the publication to all relevant role-players who are involved in the administration of this Act.

Monitoring of compliance with diversion order

(3) Access to the register must be limited, as prescribed, to persons or organisations requiring the information for the purposes set out in subsection (2).

Family group conference

61. (1) (a) A family group conference is an informal procedure which is intended to bring a child who is alleged to have committed an offence and the victim together, supported by their families and other appropriate persons and, attended by persons referred to in subsection (3)(b), at which a plan is developed on how the child will redress the effects of the offence.

(b) A family group conference may only take place if both the victim and the child consent.

(2) If a child has been **[referred]** ordered to appear at a family group conference, a probation officer **[or an accredited diversion service provider]** appointed by the magistrate referred to in section 42, an inquiry magistrate or a child justice court must, within 21 days after **[referral]** the order, convene the conference **[or cause the conference to be convened]** by—

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

(3) (a) The family group conference must be facilitated by a family group conference facilitator, who may be a probation officer or a diversion service provider referred to in section 56(1).

(b) A family group conference may be attended by the following persons:

- (i) The child and his or her parent or an appropriate adult;
- (ii) any person requested by the child;
- (iii) the victim of the alleged offence, his or her parent or an appropriate adult, where applicable, and any other support person of the victim's choice;
- (iv) the probation officer, if he or she is not the family group conference facilitator;
- (v) the prosecutor;
- (vi) any police official;
- (vii) a member of the community in which the child normally resides as determined by the family group conference facilitator; and
- (viii) any person authorised by the family group conference facilitator to attend the conference.

(4) If a family group conference fails to take place on the date and at the time and place set for the conference, the probation officer must convene another conference **[or cause that conference to be convened]**, as provided for in this section within 21 days from the date on which it was to take place.

(5) Participants in a family group conference must follow the procedure agreed on by them and may agree to a plan in respect of the child in accordance with subsection (6).

(6) A plan referred to in subsection (5)—

- (a) may include—
 - (i) the application of any option contained in section 53(3); or
 - (ii) any other action appropriate to the child, his or her family and local circumstances, which is consistent with the principles contained in this Act; and
- (b) must—

- (i) specify the objectives for the child and the period within which they are to be achieved;
- (ii) contain details of the services and assistance to be provided to the child and a parent or an appropriate adult;
- (iii) specify the persons or organisations to provide the required services and assistance;
- (iv) state the responsibilities of the child and of the child's parent or an appropriate adult;
- (v) state personal objectives for the child and for the child's parent or an appropriate adult;
- (vi) include any other matters relating to the education, employment, recreation and welfare of the child as are relevant; and
- (vii) include a mechanism to monitor the plan.

(7) (a) The family group conference facilitator must record the details of and reasons for any plan agreed to at the family group conference and must furnish a copy of the record to the child and to the probation officer or person referred to in section 57(1).

(b) In the event of the conference not taking place or the child failing to comply with the plan agreed to at the family group conference, the probation officer or person must notify the magistrate, inquiry magistrate or child justice court in writing of the failure, in which case section 58 applies.

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

(9) No information furnished by the child at a family group conference may be used in any subsequent criminal proceedings arising from the same facts.

Victim-offender mediation

62. (1) (a) Victim-offender mediation means an informal procedure which is intended to bring a child who is alleged to have committed an offence and the victim together at which a plan is developed on how the child will redress the effects of the offence.

(b) A victim-offender mediation may only take place if both the victim and the child consent.

(2) If a child has been [**referred**] ordered to appear at a victim-offender mediation, section 61(2), (4), (5), (6), (7), (8) and (9) applies with the changes required by the context.

(3) A probation officer appointed by a magistrate referred to in section 42, an inquiry magistrate or a child justice court must convene the victim-offender mediation [**or cause the mediation to be convened**].

(4) The victim-offender mediation must be mediated by a probation officer or a diversion service provider referred to in section 56(1), who or which may regulate the procedure to be followed at the mediation.

CHAPTER 9 TRIAL IN CHILD JUSTICE COURT