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# Waiver of counsel in South African child justice: An autonomous exercise of rights

## Abstract

The *Child Justice Act* 75 of 2008 created many unique procedural mechanisms for the processing of children in conflict with the law. One such procedure relates to mandatory legal representation, and the appointment of such to assist the court in terms of regulation 48, where the child refuses to co-operate with the appointed representative. This submission is a theoretical evaluation of section 35(3)(f) of the *Constitution of the Republic of South Africa*, 1996, juxtaposed against section 83 of the *Child Justice Act* and its associated regulations. It posits that obligatory legal representation is an infringement of a child offender's constitutional right to choose to be represented, and to select a representative of choice. The submission concedes that the focus of the *Act* is the protection of child offenders. It, however, argues that the insertion of a legal hearing phase into the current preliminary inquiry stage of the child justice process would be an improved response to rights protection than mandatory representation. The author uses waiver processes applicable in selected American states to demonstrate the suggested alternative. The author concludes that waiver is an issue deserving of attention at the pre-trial stage and that therein a child offender is guaranteed both the protection of the best interest standard and the autonomy to exercise the constitutional right to choose to be represented at trial.

## Opsomming

Die *Child Justice Act* 75 van 2008 het verskeie meganismes in plek gestel om kinders wat met die geregtelike proses tydens die hofprosedure te akkommodeer. Een sodanige meganisme is verpligte regsverteenvoordinging en die aanstelling van 'n regsverteenvoordiger ingevolge regulasie 48 om die hof by te staan waar die kind weier om met die regsverteenvoordiger saam te werk. Hierdie voorlegging is 'n teoretiese evaluasie van artikel 35(3)(f) van die *Grondwet van Suid Afrika* 1996 toegepas op artikel 83 van die *Child Justice Act* en die regulasies wat ingevolge die *Wet* uitgevaardig is. Die uitgangspunt is dat verpligte regsverteenvoordinging 'n aantasting is van die reg van die kindbeskuldigde om te besluit of hy/sy 'n regsverteenvoordiger wil aanstel en verder tas dit ook sy/haar reg aan om 'n regsverteenvoordiger van eie keuse aan te stel. Alhoewel dit aanvaar word dat die fokus van die *Wet* die beskerming van die kindbeskuldigde is, sal dit geargumenteer word dat die invoeging van 'n regsverhoor tydens die voorlopige ondervragingsprosedure beter beskerming aan die kind sal bied as verpligte regsverteenvoordinging. In die bespreking word afstanddoening wat in verskeie Amerikaanse state van toepassing is as 'n meer effektiewe alternatief tot verpligte regsverteenvoordinging bespreek. Die outeur dui aan dat afstanddoening in teenstelling met verpligte regsverteenvoordinging nie alleen die beste belang van die kind beskerm nie maar ook die kind toelaat om sy/haar grondwetlike reg, om 'n keuse met betrekking tot die aanstelling van 'n regsverteenvoordiger uit te oefen, te beskerm.

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## 1. Introduction

Section 83 of the *Child Justice Act* 75 of 2008<sup>1</sup> mandates legal representation<sup>2</sup> for child offenders in any case before the child justice court. The right to representation cannot be waived,<sup>3</sup> and no plea may be entered until the child is legally represented.<sup>4</sup> Where a child offender refuses to give instructions to an appointed legal representative, or where the child declines representation, the court is entitled to appoint the representative, in terms of regulation 48,<sup>5</sup> to assist the court. Regulation 48 prescribes various duties to a court-appointed representative<sup>6</sup> which, in effect, amounts to what the court refers to in *S v Fortuin*<sup>7</sup> as “[t]he duties and rights of a legal representative appointed to assist the court, will, ... be the same as in the case of an own legal representative”. Three aspects of section 83 require clarification within the aims of the *Act*, read with the constitutional rights stipulated in section 35(3)(f) of the Bill of Rights.<sup>8</sup> These issues relate, it is submitted, to the following:

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- 1 Hereinafter referred to as *Child Justice Act*.
  - 2 Where legal representative means a person with the right of appearance in the lower and superior criminal courts (*S v Mkhise* 1998 2 SA 868 (A); *S v Khan* 1993 2 SACR 118 (N); *S v Gwantshu* 1995 2 SACR 384 (E); *S v La Kay* 1998 1 SACR 91 (C)).
  - 3 Section 83(1) – No child appearing before a child justice court may waive his or her right to legal representation.
  - 4 Section 82(2) of the *Child Justice Act* 75/2008.
  - 5 Regulations relating to child justice GN R251 in GG 33067 of 31 March 2010. Hereinafter the regulation.
  - 6 Legal representative appointed to assist court:  
48(1) A legal representative appointed in terms of section 83 of the Act to assist the court must —
    - (a) attend all the court proceedings in respect of the case, unless excused by the court;
    - (b) address the court on any matter requested by the court;
    - (c) have access to the documents and statements in the docket to the extent permissible in criminal proceedings; and
    - (d) ensure that the best interests of the child are upheld at all times.
    - (2) A legal representative appointed to assist the court may —
      - (a) address the court on the merits and procedural aspects of the case;
      - (b) address the court on the sentence to be imposed;
      - (c) cross-examine a witness in relation to the evidence adduced by the witness;
      - (d) discredit the evidence of a witness;
      - (e) raise an objection to a question posed to the child or state witness;
      - (f) question the admissibility of evidence led by the state;
      - (g) present evidence that will be in the best interests of a child; or
      - (h) assist in any other manner as the court may request.
    - (3) A legal representative may attend the proceedings of a preliminary inquiry if so requested by the inquiry magistrate.
  - 7 (38/2011) [2011] ZANHC 28 (11 November 2011) at 49.
  - 8 As contained in the *Constitution of the Republic of South Africa*, 1996. Hereinafter the *Constitution*.

- Does section 83 of the *Child Justice Act* infringe on a child offender's fair trial right in terms of section 35(f) of the *Constitution* and, if so, to what degree is the limitation justified in terms of the limitation clause?
- Is the content of regulation 48<sup>9</sup> overly prescriptive to the extent that it disturbs the accepted definition of an attorney-client relationship?
- Should waiver of representation not be investigated with a higher degree of procedural certainty than currently permitted?

## 2. Section 83 as a limitation of the right to choose?

Section 35(3)(f) of the Bill of Rights stipulates that an accused has the right to “choose, and be represented by, a legal practitioner, and to be informed of this right promptly”. This right has two elements<sup>10</sup> pertinent to the author's submission, *viz.* the right to choose a legal representative and the right to be represented at trial.

The first element, *viz.* the right to choose, means, in essence, that an accused can select a legal practitioner of choice to effect a specific mandate. Any infringement of the right to choose is *prima facie* unconstitutional,<sup>11</sup> and forms part of the table of non-derogable rights.<sup>12</sup> Naturally, the right of choice is limited by the availability of the legal representative,<sup>13</sup> and the ability of the accused to financially secure the services of the chosen representative. No court can refuse to allow audience to a legal representative,<sup>14</sup> unless there is a lawful impediment to the right of appearance.

The second element, provided by section 35(3)(f), affords the scope within which an accused can choose to appear represented or unrepresented at trial. This aspect could be widened to include considerations of access, but these are irrelevant, in this instance, as it is posited that the right, at its core, means simply that the accused chooses to be represented.

In summary, section 35(3)(f) means that the accused, by right, is entitled to decide to appear at trial represented or unrepresented and that the accused can, by right, select a representative. The right to legal representation is

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9 Regulations relating to the *Child Justice Act*.

10 For the purpose of this submission, aspects relating to the element of prompt information are not considered.

11 Steytler 1998:304.

12 *In Mhleka v Head of the Western Tembuland Regional Authority and another; Feni v Head of the Western Tembuland Regional Authority and another 2000 (2) SACR 596 (TK)*, the court held, for example, that section s 7(1) of the *Regional Authority Courts Act*, which expressly provides that an accused person may not be represented by a legal representative and that a legal representative could not be present in that capacity in any proceedings before the courts, was inconsistent with the entrenched right to a fair trial.

13 See *Paweni v Acting Attorney-General 1985 3 SA 720 (ZS)*.

14 See *S v Memani 1993 2 SACR 680 (W)*.

confirmed in section 73<sup>15</sup> of the *Criminal Procedure Act* 51 of 1977.<sup>16</sup> This position is admittedly trite, until considered within the restrictions imposed by section 83(1) of the *Child Justice Act*.

Section 83(1) of the *Child Justice Act* states: “No child appearing before a child justice court may waive his or her right to legal representation.” Section 83(1) essentially removes the constitutionally provided right to choose to appear with or without the aid of legal representation at trial. When viewed within the context of the Convention on the Rights of the Child,<sup>17</sup> and within the constitutional children’s rights clause, this limitation

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- 15 73 Accused entitled to assistance after arrest and at criminal proceedings
- (1) An accused who is arrested, whether with or without warrant, shall, subject to any law relating to the management of prisons, be entitled to the assistance of his legal adviser as from the time of his arrest.
- (2) An accused shall be entitled to be represented by his legal adviser at criminal proceedings, if such legal adviser is not in terms of any law prohibited from appearing at the proceedings in question.
- (2A) Every accused shall —
- (a) at the time of his or her arrest;
- (b) when he or she is served with a summons in terms of section 54;
- (c) when a written notice is handed to him or her in terms of section 56;
- (d) when an indictment is served on him or her in terms of section 144(4)(a);
- (e) at his or her first appearance in court,
- be informed of his or her right to be represented at his or her own expense by a legal adviser of his or her own choice and if he or she cannot afford legal representation, that he or she may apply for legal aid and of the institutions which he or she may approach for legal assistance.
- (2B) Every accused shall be given a reasonable opportunity to obtain legal assistance.
- (2C) If an accused refuses or fails to appoint a legal adviser of his or her own choice within a reasonable time and his or her failure to do so is due to his or her own fault, the court may, in addition to any order which it may make in terms of section 342A, order that the trial proceed without legal representation unless the court is of the opinion that that would result in substantial injustice, in which event the court may, subject to the Legal Aid Act, 1969 (Act 22 of 1969), order that a legal adviser be assigned to the accused at the expense of the State: Provided that the court may order that the costs of such representation be recovered from the accused: Provided further that the accused shall not be compelled to appoint a legal adviser if he or she prefers to conduct his or her own defence.
- (3) In addition to the provisions of sections 3(g), 38(2), 44(1) (b) and 65 of the *Child Justice Act*, 2008 (Act 75 of 2008), relating to the assistance of an accused who is under the age of eighteen years by his or her parent, an appropriate adult or a guardian at criminal proceedings, any accused who, in the opinion of the court, requires the assistance of another person at criminal proceedings, may, with the permission of the court, be so assisted at such proceedings.
- 16 Hereinafter the *Criminal Procedure Act*.
- 17 Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989. Entry into force 2 September 1990, in accordance with article 49. See specifically article 40(2)(b)(iii). See further, in this regard, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, United Nations GA Res 40/33 of 29 November 1985 at rules 7(1) and 15(1).

appears unremarkable within the best interest standard.<sup>18</sup> However, when considered in light of the limitation to a child's autonomy, it creates a concern of capacity. At this stage, the child offender, at least in some instances, has been adjudged to know the difference between right and wrong, and has been determined able to act in accordance with that appreciation<sup>19</sup> – the child offender has, in other words, passed the test for criminal capacity.<sup>20</sup> The child is thus deemed sufficiently mature to face criminal prosecution, but, in the same instance, too immature to decide whether to retain the services of legal representation. This, it is submitted, not only infringes on the right to *choose* to be represented, but also infantilises the child offender. The *Child Justice Act*, through section 83(1), entrenches the adversarial nature of criminal justice as opposed to an approach grounded in restorative and inquisitorial process.<sup>21</sup> This is in direct contrast to the overall aim of the *Act* to be restorative and therapeutic.

Ostensibly the legislature anticipated the possibility that child offenders would refuse to give instructions, or otherwise refuse to co-operate, with legal counsel appointed in terms of section 82(1)<sup>22</sup> of the *Act*.<sup>23</sup> To remedy this possibility, it included section 83(2) into the *Child Justice Act*. Section 83(2) allows the Legal Aid Board<sup>24</sup> to appoint a legal representative, refused by the child offender, to "... assist the court in the prescribed manner".<sup>25</sup>

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18 See section 28(2) of the *Constitution*.

19 Section 11(1) of the *Child Justice Act* sets the test for the capacity of child offenders.

20 See sections 4, 7 and 11 of the *Child Justice Act*. By the time a child offender goes to trial, issues of capacity have been decided by the court of preliminary inquiry where, for instance, the child is between certain age categories, or where referred to trial after failing to complete a diversion order.

21 See sections 2 and 3 of the *Child Justice Act*, which confirm the restorative nature of the process. See further sections 43(1) and 63(4), which extend an inquisitorial role to the courts of preliminary inquiry and child justice, respectively.

22 Section 82(1) mandates the appointment of legal representation through Legal Aid South Africa. This submission is based on child offenders who have legal representation appointed to them, because those who retain own counsel do not fall within the scope of the author's argument.

23 Section 82(1) fulfils the mandatory prescription of section 83(1), where the child offender is indigent and cannot afford legal representation.

24 "Legal Aid Board" is used in the *Act* and thus duplicated, in this instance, despite the fact that the institution is now known as Legal Aid South Africa.

25 The *Child Justice Act* relies on the provisions of the *Legal Aid Act 22/1969* for this provision, despite the fact that *Act 22/1969* has been repealed by the *Legal Aid South Africa Act 39/2014*. Section 83(2), in terms of the amendments by the latter *Act*, should read "(2) If a child referred to in subsection (1) does not wish to have a legal representative or declines to give instructions to an appointed legal representative, the court must enter this on the record of the proceedings and a legal representative must, subject to the provisions of the [Legal Aid Guide] Legal Aid Manual referred to in [section 3A of the Legal Aid Act, 1969 (Act No. 22 of 1969)] section 24(1) of the Legal Aid South Africa Act, 2014, be appointed by [the Legal Aid Board] Legal Aid South Africa to assist the court in the prescribed manner."

The “prescribed manner” is detailed in regulation 48 of the regulations relating to child justice.

### 3. Regulation 48 as a limitation of the right to choose?

Regulation 48 contains both prescriptive<sup>26</sup> and discretionary<sup>27</sup> content insofar as its depiction of the “assist[ance]” that is to be provided by a section 83(2) legal representative.<sup>28</sup> Holistically, regulation 48 amounts to the appointed legal representative acting on behalf of a child offender who has declined or otherwise refused to cooperate with representation appointed in terms of section 83(1) read with section 82(1). The court in *Fortuin*<sup>29</sup> confirmed this submission in its summation that:

The provisions of section 83 are somewhat difficult to follow. In subsection (1) it is provided that a child appearing before a child justice court may not waive the right to legal representation. Subsection (2), however, does envisage that the child may “not wish to have a legal representative” or may decline “to give instructions to an appointed legal representative”, and provides that in such a case the Legal Aid Board must appoint a legal representative “to assist the court in the prescribed manner”. The “prescribed manner” can be found in regulation 48 ... [W]hen regard is had to these provisions [of regulation 48] it is indeed clear that, ..., a child appearing before a child justice court will in effect never be without legal representation. The duties and rights of the legal representative appointed to assist the court will, for all practical purposes, be the same as in the case of an own legal representative.<sup>30</sup>

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- 26 48(1) A legal representative appointed in terms of section 83 of the Act to assist the court must —
- (a) attend all the court proceedings in respect of the case, unless excused by the court;
  - (b) address the court on any matter requested by the court;
  - (c) have access to the documents and statements in the docket to the extent permissible in criminal proceedings; and
  - (d) ensure that the best interests of the child are upheld at all times.
- 27 48(2) A legal representative appointed to assist the court may —
- (a) address the court on the merits and procedural aspects of the case;
  - (b) address the court on the sentence to be imposed;
  - (c) cross-examine a witness in relation to the evidence adduced by the witness;
  - (d) discredit the evidence of a witness;
  - (e) raise an objection to a question posed to the child or state witness;
  - (f) question the admissibility of evidence led by the state;
  - (g) present evidence that will be in the best interests of a child; or
  - (h) assist in any other manner as the court may request.
- (3) A legal representative may attend the proceedings of a preliminary inquiry if so requested by the inquiry magistrate.
- 28 A section 83(2) legal representative is one appointed to assist the court where the child offender has refused the services of the representative, or otherwise refuses to co-operate.
- 29 (38/2011) [2011] ZANHC 28 (11 November 2011) at 49.
- 30 *Fortuin* at 47-49.

Considering the court's position, is the right to select a legal representative infringed through the overly prescriptive regulation 48? The list of prescriptive and descriptive duties in regulation 48<sup>31</sup> indicates that the appointed legal representative will have access to the docket and other information pertaining to the child, and yet the child is not protected by attorney-client privilege, for example. Further, if regulation 48 is accepted as a justifiable limitation of the right to select, what is the nature of the relationship between client and legal representative? It is submitted that the result is not a relationship of trust between the child offender and the legal representative – the relationship is rather between the legal representative and the court. In addition, the child offender's right to confidentiality is restricted by the interference of a representative appointed to assist the court, where regulation 48 is left unchecked. It can be argued that the mandatory appointment of legal representation, for a resistant child offender who has indicated a desire to appear unrepresented, infringes the child's section 35(3)(f) right to select a representative, in a similar manner to the infringement posed by section 83(1) to the right to appear at trial with or without representation.

It is submitted that section 83(1) limits the right to choose to appear represented or unrepresented. It is further argued that regulation 48 limits the right to choose who acts as legal representative at trial, especially when viewed in light of the court's assertion in *Fortuin* that, essentially, court-assisting counsel is "*own legal representation*".

It is submitted further that section 83(1) and regulation 48 do not constitute a valid limitation of rights in line with the limitation clause.<sup>32</sup> Section 83(1) has attempted to limit section 35(3)(f) rights in a manner, which does not fulfil the requirements for valid limitation, especially insofar as it has not considered less restrictive means as required by section 36(1)(e). Consequently, section 83(1) and regulation 48 are an infringement of section 36(2) of the limitation clause. In keeping with the aforementioned argument, the author posits that there is a less restrictive means available to protect the best interest of the child offender in a child justice court that is in line with the holistically humanising aim of the *Child Justice Act*. The author proposes incorporating aspects of the American waiver hearing process into the South African pre-trial child justice process.

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31 See footnotes 27 and 28.

32 Section 36. Limitation of rights

1. The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including —

- a. the nature of the right;
- b. the importance of the purpose of the limitation;
- c. the nature and extent of the limitation;
- d. the relation between the limitation and its purpose; and
- e. less restrictive means to achieve the purpose.

2. Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

#### 4. Waiver of the right to counsel – A synoptic overview of practices in selected American states

The right to legal counsel<sup>33</sup> in criminal proceedings in America is entrenched in the Sixth Amendment. It was further confirmed at state level in 1963, in *Gideon v Wainwright*.<sup>34</sup> The decision in *In re Gault*<sup>35</sup> extended the provision of counsel to juvenile defendants.<sup>36</sup> More pertinent, within the content of this submission, the court in both *Gault* and *Johnson v Zerbst*<sup>37</sup> confirmed that the right to counsel implies the correlative right to refuse counsel. In essence, a juvenile defendant is permitted to waive counsel where the implications and consequences of such waiver are made clear, and the waiver is voluntary, knowing and explicit.<sup>38</sup> In order to ensure that a juvenile defendant's choice to appear unrepresented is made of intelligent and sound reasoning, states make use of various procedures for waiver depending on the jurisdiction and the requirements of specific criminal codes.<sup>39</sup>

A review of relevant literature indicates that waiver proceedings can be grouped into broad categories,<sup>40</sup> to wit:

- Attorney consultation<sup>41</sup> – This approach requires a juvenile defendant to consult with an attorney before waiving the right to counsel. In Florida, Rule 8.165 of the Rules for Juvenile Procedure states that waiver can only be accepted after “the child has had a meaningful opportunity to confer with counsel regarding the child's right to counsel, the consequences

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33 Counsel, in the American framework, is equivalent to legal representative in South Africa.

34 372 U.S. 335 (1963). For a discussion of this case, see Israel 1963:211-272. See also Abel 2005:527; Wheeler & Wheeler 1980:319-332.

35 387 U.S. 1 (1967). For a discussion of the right to counsel and extolled in *Gault*, see Feld 1988:393-424. See also Dorsen & Reznick 1967:1-46; Lefstein 1967:811-814.

36 The correlative term for child offender, in the American juvenile system, is juvenile defendant or juvenile delinquent.

37 304 U.S. 458 (1938) at 468-469. On this point, see Miller & Kaplan 1992:395-406. See also Pearson 1984:697-719; Bennett 1962:662; Brunetti 1975:689; Rieder 1985:130-154.

38 This is not the case in every state but in the majority, as is demonstrated in the discussion hereunder.

39 In this regard, see Caeti *et al.* 1995:611 and onwards. See also Feld 1987:471-533. For an overview of the state approach to waiver, see National Juvenile Defender Centre at <http://njdc.info/practice-policy-resources/state-profiles/> (accessed on 4 March 2015).

40 See, for example, Juvenile Justice: Geography, Policy, Practice and Statistics at <http://www.jjgps.org/juvenile-defense> (accessed on 4 March 2015). See also Jones 2004 at <https://www.ncjrs.gov/pdffiles1/ojdp/204063.pdf> (accessed on 4 March 2015).

41 See, for example, Juvenile Justice: Geography, Policy, Practice and Statistics at <http://www.jjgps.org/juvenile-defense/louisiana> (Accessed on 4 March 2015). See also Shepherd at [http://www.americanbar.org/publications/criminal\\_justice\\_magazine\\_home/crimjust\\_juvjus\\_131jwr.html](http://www.americanbar.org/publications/criminal_justice_magazine_home/crimjust_juvjus_131jwr.html).



of waiving counsel, and any other factors that would assist the child in making the decision to waive counsel. This waiver shall be in writing". In terms of part 51.09 of the Texas Family Code, the juvenile defendant can waive the right to counsel if the waiver is made "by the child and the attorney ... [and] the child and the attorney waiving the right are informed of and understand the right and the possible consequences of waiving it ...".<sup>42</sup>

- Judicial colloquy<sup>43</sup> – This approach requires a judge to warn the juvenile defendant of the dangers of waiving the right to counsel. This is practised, for example, in Delaware, where section 44(a) of the Family Court Criminal Code makes provision for waiver if it is made in court and forms part of the record. In Idaho, Rule 9(b) of the Juvenile Court Rules indicates that the juvenile may waive if such waiver is intelligently made in court.<sup>44</sup> In some states, such as Alabama and California, the judicial colloquy requirement is not codified, but is nonetheless a requirement of any waiver of counsel made by a juvenile defendant.
- Parental consultation<sup>45</sup> – This approach requires a parent, or other such caregiver to be present at judicial colloquy in order to confirm that the juvenile defendant understands the implications of waiving counsel. In Colorado, the parental consultation requirement is codified in Rule 3.9 of the Colorado Rules of Juvenile Procedure, which requires the court to place on record the fact that the parent is aware of the waiver. In Utah, section 26(e) of the Rules of Juvenile Procedure, indicates that:

a minor 14 years of age and older is presumed capable of intelligently comprehending and waiving the minor's right to counsel as above and may do so where the court finds such waiver to be knowing and voluntary, whether the minor's parent, guardian or custodian is present. A child under 14 years of age may not waive such rights outside of the presence of the child's parent, guardian or custodian.<sup>46</sup>
- Formal hearing<sup>47</sup> – In this process, there is a general presumption of incompetence to waive counsel (which is equivalent to the South African section 83(1)), but the presumption can be rebutted at a formal hearing where the juvenile is represented. This practice is followed in

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42 Attorney consultation in waiver is similarly required in Indiana, Maryland, South Carolina, Vermont, and West Virginia.

43 See Feld & Bishop 2011:675 and onwards. See also Tonry 2000:519; Church *et al.* 2014:181 and onwards.

44 A similar position is found in Kansas, Minnesota, Missouri, Nebraska, Nevada, New Mexico, Ohio, Oklahoma, Utah, Washington, Wisconsin, and Wyoming.

45 See Federle 2012:324.

46 Alaska, Arizona, Arkansas, Michigan, Montana, New Hampshire, North Dakota, Pennsylvania, Vermont, Virginia, Indiana, Louisiana, New Jersey, and Tennessee have some sort of parental consultation requirement for waiver of counsel.

47 In this regard, see Harris at <http://familylaw.uoregon.edu/files/2011/12/waiverofcounsel.pdf> (accessed on 4 March 2015). See also <http://jjie.org/hub/juvenile-indigent-defense/reform-trends/> (accessed on 4 March 2015); Feld 1989:1185-1346.

terms of Kentucky's Rules of Criminal Procedure (610.060(b)) which stipulate that a juvenile defendant may waive if the court "(1) conducts a hearing about the child's waiver of counsel and (2) makes specific findings of fact that the child knowingly, intelligently and voluntarily waived his right to counsel". A juvenile defendant charged with a felony or sex offence cannot waive.<sup>48</sup> In New York, a juvenile delinquent can waive in terms of the New York Family Court Act (specifically section 249-a) if a court hearing is held in which the juvenile is represented, and the court finds the waiver in the best interest of the juvenile, taking into consideration the juvenile's maturity, intelligence and understanding of the charges.

- Complete prohibition of waiver – This has not been implemented in totality in any state. However, certain states prohibit waiver of counsel where the juvenile is charged with a particular crime, or where the juvenile is below a certain age, or where the procedure has progressed past a certain stage of proceedings. In Arizona, for example, a juvenile may not waive when there is "a conflict of interest between the juvenile and the parent, guardian or custodian [in which case] the court shall impose such safeguards on the waiver of counsel as appear in the best interest of the juvenile".<sup>49</sup> Similarly, in Arkansas, waiver will not be accepted where "the parent, guardian, or custodian has filed a petition against the juvenile, initiated the filing of a petition against the juvenile, or requested the removal of the juvenile from the home", or "in any case in which counsel was appointed due to the likelihood of the juvenile's commitment to an institution ...", or "when a juvenile is in the custody of the Department of Human Services, including the Division of Youth Services".<sup>50</sup> In Montana, a juvenile cannot waive if there is any possibility of detention on conviction, for six months or longer.<sup>51</sup>

The above procedures range from the least restrictive, in the case of judicial colloquy, to the most restrictive, such as is the case with complete prohibition, which is similar to the South African approach in section 83(1) of the *Child Justice Act*.

All of the above practices recognise that the constitutional right to counsel has a correlative opposite right to refuse counsel. In a similar fashion to the requirements for consent to medical treatment by children, a court cannot force a child to be treated for an illness, even when that illness will cause death, against the child's informed refusal – to suggest otherwise is tantamount to assault. Why should the same not hold true for legal representation? It is argued hereunder, that insofar as legal representation is concerned, the South African *Child Justice Act* presents an unjustified limitation to section 35(3)(f) of the Bill of Rights. It is further

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48 Kentucky Rules of Criminal Procedure 610.060(2)(a).

49 Arizona Rules of Procedure for the Juvenile Court 10(D).

50 See sections 9-27-317(d), 9-27-317(e) and 9-27-317(d) of the Rule of Criminal Procedure, respectively.

51 Montana Rules of Criminal Procedure 41-5-1413.

suggested that this unjustified limitation can, however, be remedied by the incorporation of a waiver hearing at the preliminary inquiry stage of the current child justice process.

## 5. Incorporating waiver hearings into the South African child justice process

Rather than restricting a child offender's right to choose to be represented, section 83(1) should be amended; it is posited, to allow for waiver of legal representation.<sup>52</sup> Formalised hearing grants a child offender the forum to exercise the constitutional right to representation, and conversely to refuse legal representation.

### 5.1 Forum of hearing

It is suggested that waiver should be dealt with at the pre-trial stage as part of the preliminary inquiry, in order to prevent both backlogs at trial and unnecessary delays during trial. This suggestion, however, faces a limitation presented by the *Child Justice Act*. Presently, preliminary inquiry is considered a first-appearance<sup>53</sup> for purposes of section 50 of the *Criminal Procedure Act* 51 of 1977, and therefore occurs relatively quickly, depending on the method used to secure attendance.<sup>54</sup> It is, however, plausible if one considers that, presently, assessment also occurs within a relatively short time frame, for presentation at preliminary inquiry.

Prior to the preliminary inquiry, the child offender is assessed by a probation officer who prepares an assessment report on a variety of diverse issues,<sup>55</sup> including whether the child intends acknowledging responsibility for the offence, which is a requirement of diversion, which is a main theme of the

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52 The discussion hereunder is based on child offenders who have not retained private legal representation, as logically a child offender who has retained private counsel will not be subjected to section 82 or section 83 of the *Child Justice Act*.

53 See section 43(3)(c) of the *Child Justice Act*.

54 Within 5 days of issuing a written notice to appear, within 14 days if attendance is secured by summons, and within 48 hours where the child is arrested and detained to appear at a preliminary inquiry. In this regard, see sections 18-20 of the *Child Justice Act* read with the National Instruction for Children in Conflict with the Law 2 of 2010.

55 40 Assessment report of probation officer:

(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, an appropriate adult or guardian or on his or her own recognisance, in terms of section 24;

preliminary inquiry.<sup>56</sup> Where the child refuses to acknowledge responsibility, the matter is referred for trial in terms of sections 47(2)(b)(i) and 47(9)(c). It is suggested that, at this stage, where the child refuses to acknowledge responsibility, an indication should be made to the prosecutor that legal representation should be dealt with before the close of the preliminary inquiry. In extension, where diversion is not an option, either because the child does not fulfil the requirements, or because the prosecution will not recommend it, the matter should, it is argued, proceed to a hearing on legal representation, at which any waiver of the right to representation can be examined.

## 5.2 Considerations at hearing

At this stage of the process, in the context of the author's earlier suggestion, the child has either been considered for diversion, which for whatever reason was not recommended, or has refused to acknowledge responsibility, and

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- (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;
  - (g) whether a further and more detailed assessment of the child is required 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 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; 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).

56 In this regard, see Sloth-Nielsen & Gallinetti 2011:63-90; Badenhorst 2010:1-3.

has thus been referred for trial in a child justice court. This presents an ideal opportunity for the preliminary inquiry court to hear the child offender on the exercise of the right to be represented, and to select legal representation of choice. This form of legal hearing has the benefit of the probation assessment report, which gives the hearing court some insight into the cognitive and emotional capacity of the child concerned. At this point, it is suggested, the court should explain the right to legal representation, in a child-friendly manner, as well as the potential consequences of waiving. The child should be required to indicate an intention to appear at trial with or without the aid of legal representation. Where the child indicates a desire to be represented at trial, section 82(1) of the *Child Justice Act* becomes operational, with changes as required by the inclusion of the hearing pre-trial, where the child cannot afford the services of private representation. In effect, the question of representation, and the appointment of legal aid, where necessary, is resolved before trial.

Where the child offender indicates, during the hearing, a decision to appear unrepresented, the hearing court must consider the waiver.

### 5.3 Waiver at hearing

Where a child offender, at a preliminary inquiry, waives the right to legal representation, the court should hear the child offender's reason(s) for waiving. It is suggested that the child must convince the court that the waiver is made knowingly, voluntarily, intelligently and with full appreciation of the potential consequences. In order to allow the child offender a fair hearing, it is further suggested that a legal representative be available to consult with the child offender on the decision to waive in isolation from the merits of the case. This allows the hearing court the benefit of knowing that its warning is interpreted properly, and that the child offender understands the seriousness of the charge(s). Where the child is unable to convince the court that the waiver is informed, voluntary and intelligent, the court may then proceed to order representation be appointed to the child. This, however, again raises concerns of mandate, which are discussed at 5.3.1 hereunder. The author, however, doubts whether a child offender can be considered to possess the prerequisites for criminal capacity, and yet be considered incapable of waiving based on an inability to appreciate the potential consequences of such action.

The researcher is essentially suggesting a formal hearing, which includes elements of the American judicial colloquy and waiver after legal consultation.

#### 5.3.1 Consequences of waiver

If the court of preliminary inquiry is convinced that the waiver of counsel is informed and comprehensive, it will permit the child to proceed to trial unrepresented. This decision is not a permanent stay of the right to be represented, and, if submitted, the waiver can be withdrawn at any stage.

Withdrawal of waiver is an ordinary and permissible occurrence within criminal procedure in South Africa, and does not unduly compromise the court process. At trial, the child justice court is required to re-inform the child offender of the right to representation and to explain that waiver can be withdrawn at any stage of the process.

In the above scenario, there is no need for regulation 48, since the child has not refused mandated representation, but rather taken an autonomous decision, confirmed by the court of preliminary inquiry as valid, to appear unrepresented.

Where the child offender was unable to convince the pre-trial court of the informed, voluntary and knowing nature of waiver, legal representation will be appointed to the offender. In this instance, it is submitted, regulation 48 still remains invalid. In the alternative to regulation 48, where the child refuses to give instructions to the legal representative appointed as a result of the court's finding that waiver was incomplete, section 63(6) of the *Act* should be widened to allow the legal representative to be appointed as an independent observer and not as an assistant to the court. This voids any concerns over confidentiality and mandatory representation, and forces the court, in its inquisitorial role in terms of section 63(3) and (4), to assist the child as an unrepresented accused. The legal representative, as an independent observer, is thus merely an accountability and oversight mechanism, who may have some influence if the matter results in an appeal or review. In the alternative, where a child refuses to cooperate, the court should be mandated to appoint an assessor to observe and protect the child's trial rights.

## 6. Conclusion

Legal representation is an important aspect of fair trial in a due process system of criminal justice. Although the author is mindful of the fact that a child offender warrants added protection during a trial process, owing to vulnerability, she questions an approach that limits fundamental rights, as is currently the case within section 83(1) of the *Child Justice Act*. In essence, the author submits that section 83(1) limits the right to choose to be represented at trial, and regulation 48 unfairly infringes the right to select legal representation of choice. The limitation cannot be justified within the bounds of the limitation clause, especially in consideration of the fact that less restrictive means to achieve the purpose of the limitation are available in the form of pre-trial legal hearings. It is submitted that the South African child justice process would better serve the needs of a child offender before a child justice court, by clarifying legal representation as part of the pre-trial phase, and making better use of independent observers as opposed to mandatory representation.

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