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Preliminary Inquiries in Children in Conflict with the Law: Protection or Prejudice

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TABLE OF CONTENTS

ABSTRACT.....	page iii
1. INTRODUCTION.....	page 1
2. THE CHILD JUSTICE BILL.....	page 1
3. THE PRELIMINARY INQUIRY.....	page 2
4. THE DIVERSION OPTION.....	page 3
5. DIVERSION, A CENTRALISED OPTION IN THE CHILD JUSTICE ACT 75 OF 2008.....	page 4
6. OFFICERS OF THE COURT AND THE PRELIMINARY INQUIRY PROCESS.....	page 5
7. SECTION 45-(2) OF THE CHILD JUSTICE ACT 75 OF 2008.....	page 6
8. LEGAL REPRESENTATION AT THE PRELIMINARY INQUIRY STAGE.....	page 7
9. APPLICATION OF SECTION 35 OF THE CONSTITUTION AND SECTION 45-(2) OF THE ACT.....	page 8
10. THE ADVERSERIAL NATURE OF THE CRIMINAL JUSTICE SYSTEM.....	page 10
11. ISSUES WITH DIVERSION.....	page 12
12. CONCLUSION.....	page 13
BIBLIOGRAPHY.....	page 15

Abstract

Preliminary inquiries come under the guise of the protection of the best interests of the child in conflict with the law. This process could however be more prejudicial than protective. This paper will explore whether the child facing the inquiry is at a greater degree of prejudice than the supposed protection the legislation offers. The paper will further consider the absence of legal representation at the preliminary inquiry stage of proceedings and the harm this can potentially cause to the child in conflict with the law. The Child Justice Act is contrasted with the Criminal Justice Act and what is actually in the best interest of the child is considered.

1. Introduction

Prior to democracy, South Africa did not have a specific justice system to deal effectively with children who found themselves in conflict with the law. Once democracy was attained, as one of its changes, the South African government went about building a justice system suited to deal with the special needs of children. This included those children who found themselves in conflict with the law. This ultimately led to the advent of the Child Justice Act¹(hereinafter referred to as the Act).As a result thereof children's matters receive treatment more in line with their ages and more importantly in accordance with their maturity levels. There are many questions which arise with regard to the Act and its mechanisms. Are these mechanisms adequate and do they in fact effect a positive change in the life of the child in conflict with the law? This paper considers the concept of the preliminary inquiry and its ability to achieve its intent. In achieving this I will consider contributions by well-recognized authors, the application of the sections relevant to preliminary inquiry as found in a court of law, an analysis and critique of the processes and prescriptions regarding the preliminary inquiry process. I will draw all of these together to show that while the intent of the legislature is a noble one, the practicality of the process has vast potential to violate the rights of the child.

2. The Child Justice Bill

The process began in 1994 when an NGO² known as the Juvenile Justice Consultancy published a document containing a proposal for reform of the legislative system for juveniles in South Africa. This resulted in gaining momentum and an increased interest in the concept of child justice. This led to the request by the government at the time to address the issue.³

This request led to the Child Justice Bill (hereinafter referred to as the Bill). The concept of the preliminary inquiry was brought about in the Bill.

¹Act 75 of 2008.

²Non-Governmental Organisation is an organisation which is independent of government involvement and founded by citizens.

³A Skelton, "Restorative Justice as a framework for Juvenile Justice Reform: A South African perspective" *The British Journal of Criminology* 497.

It was common cause from the very proposal stages of the Bill that diversion⁴ would occur if the child in conflict with the law took responsibility for his actions. Diversion is the option available to courts and exercised by the prosecution, “if a child acknowledges responsibility for the wrong-doing thereby avoiding the stigmatizing and even brutalizing effects of the criminal justice system.”⁵

As will be argued the diversion option is not available to all children who find themselves in conflict with the law. The option is only available to those who take responsibility for their “wrong-doing”⁶ Diversion only finds application as result of the preliminary inquiry process.

3. The preliminary inquiry

Skelton and Tshehla state that the purpose of the preliminary inquiry was to act as a sieve. This was to be so in order to allow, “only serious cases where diversion is not an option to end up in the criminal courts.”⁷

This may have been the intended purpose but this is not in fact what is achieved at a practical level. This is to the detriment of the children who find themselves in conflict with the law. As will be argued what should have been included is a value judgement option which could have been exercised by officers of the court including counsel-in the form of legal representatives- and not be limited to prosecutors only.

The preliminary inquiry is of an inquisitorial nature as opposed to a criminal trial which is of an adversarial nature⁸ and the aspects looked into include the offence and the circumstances of the child in conflict with the law. The complainant and his circumstances are not even mentioned in the Act. Indeed, if we are to consider the nature of the fights and disagreements that transpire between children, one would easily

⁴Diversion is a process whereby the child is diverted away from the criminal justice system based on certain conditions that he attends certain programs and importantly that he admits his wrongdoing.

⁵A Skelton and B Tshehla, “Child Justice in South Africa”, 2008 *Institute for Security Studies Monograph 150* at 52 and 53.

⁶Supra Note 4.

⁷Supra Note 4 at 51.

⁸Supra Note 4 at 51.

see that not all of these are of a sufficiently serious nature so as to warrant a full criminal trial. The process of the preliminary inquiry is somewhat flawed and this is further seen in its nature of being insufficiently inquisitorial. This leads to courts finding themselves running full-scale criminal trials for matters of such trivial natures. In some instances, the child in conflict with the law may not even be the instigator of the matter and may have not had criminal intent.

4. The diversion option

In instances of lesser offences the Act brings into being the option of diversion. This presents an opportunity to allow the child an alternative to the rigorous and taxing court procedures and a chance to avoid a possible criminal record. This option gives the child in conflict with the law the time to reconsider his life choices and rehabilitate his actions so that he will live a crime-free life, while being equipped to do so by the programmes he will be required to attend as a consequence of the diversion agreement. Diversion is the option entered into after a social worker has investigated the circumstances of the child in conflict with the law and found his social circumstances to be conducive to the diversion option.⁹ The difficulty now becomes evident. If the child finds himself in an environment where diversion will not be an option due to circumstances not of his making, he will be the one to face the consequences and a possible criminal record impinging on his future. Such circumstances may be the physical dwelling that he resides in or the presence or absence of his parents, as well as the maturity level of his parent in terms of the parent's ability to be responsible. The socio-economic status of the parent, or guardian if a parent is unavailable, the life circumstances of these caregivers of the child in conflict with the law, will be considered in deciding the child's available options, such as diversion or transfer of his matter to a child justice court.¹⁰ The child's diversion option is then dependent on the quality of the investigative skills of the social worker supplying the report. Of further significance is that legal representatives of the child in conflict with the law are not even made aware of the informal court process

⁹These are circumstances such as the child's living arrangements, the parental presence his upbringing has and other such social circumstances.

¹⁰Supra Note 2 at page 504.

where the option for the diversion of the child is being considered. The process is referred to as an informal court process as it occurs in the presiding officers chambers and thus not in an open court room. The assessment of the child by the social worker is completed before the child's first appearance before any presiding officer. The report is completed immediately upon the child being approached and detained by police officers. Consideration for diversion occurs in a presiding officers chambers and with the social workers report available. Surely if the objectives and purport of the Act¹¹ are considered as detailed in the preamble of said Act, legal practitioners should be informed of the impending process and allowed consultation with the child. Ideally this should take place before the preliminary inquiry is held. This will enable the child to be in a better position to understand the consequence of his action as well as assisting him through the process, making him less afraid and apprehensive. This will also enable a more just decision to be reached.

5. Diversion: A centralized option in the Child Justice Act 75 of 2008

Sloth-Nielsen and Gallinetti describe the use of restorative justice in matters involving children. The authors find that diversion has been centralized in the Act as an option for children in conflict with the law.¹² This is also in accordance with South Africa's International obligations. Of importance and worth considering is that one of the international instruments specifically the United Nations Convention on the Rights of the Child,¹³ has particularly influenced section 28 of the South African Constitution.¹⁴ Section 28 of the Constitution prescribes the best interests of the child as being paramount. The concept of diversion attempts to fulfil the obligation to uphold the best interests of the child. It is worth noting that the actual phrase, "the best interests of the child", is

¹¹Supra Note 1. The preamble recognizes that, "some children as a result of circumstances in which find themselves, have come into conflict with the law...South Africa's obligations in terms of International and Regional instruments require ensuring that the individual needs and circumstances of children in conflict with the law are assessed."

¹²J Sloth-Nielsen and J Gallinetti, "Just say sorry? Ubuntu, Africanisation and the Child Justice System in the Child Justice Act 75 of 2008" 2011 *Potchefstroom Electronic Law Journal* at 64.

¹³The United Nations Convention on the Rights of the Child is a human rights treaty which sets out civil, political, economic, social, health and cultural rights of children.

¹⁴Constitution of South Africa, 1996.

nowhere to be found in the Act. Be that as it may, the Act is governed by the Constitution¹⁵ and as such the Act is required to be in line with Constitutional values. Courts are considered as the upper guardian of all children and this should have the effect of the best interests of the child being protected by courts. The question which then arises is, are courts and the flesh and bone behind the word court, meaning officers of court, working to achieve what will be in the best interests of the child in conflict with the law?

6. Officers of the court and the preliminary inquiry process

For an informed and adequate decision to be reached by a presiding officer, it would be far more in line with the child's rights as contained in section 35 of the Constitution¹⁶, if the child had compulsory contact with a legal practitioner, in conjunction with his guardian. This would have a dichotomous effect. Firstly, the child will begin to appreciate the far-reaching consequences of his actions. Secondly, he will make more informed decisions regarding his interaction with the social worker. As the diversion option is dependent on the content of the report of the social worker, the child and his guardian should be made aware of this. It would also be prudent to offer more than one opinion regarding the child's criminal capacity. Justice is also not always a fair process, as anyone, even he who has instigated an altercation, has the democratic right to go to a police station and open a case or lay a charge against a person he believes to be the suspected offender. It is then up to the parties involved in the court processes to see where proof beyond a reasonable doubt¹⁷ lies and for the presiding officer to assess the evidence before her. This same opportunity should be presented to the child in conflict with the law. This will come as consultation with his attorney as he must understand all possible consequences of outcomes of the preliminary inquiry.

¹⁵Supra Note 12.

¹⁶Supra note 13.

¹⁷*S v Baloyi* 2000 (1) SACR 81 (CC) at 15.

Of significance, the prosecutor involved in the preliminary inquiry will in all likelihood be the very same prosecutor involved in the criminal prosecution of the child in conflict with the law in a child justice court, should diversion not be found to be a viable option.

7. Section 45-(2) of the Child Justice Act 75 of 2008

Chapter 7 of the Act, incorporating sections 43-50, deals with preliminary inquiries.¹⁸ It provides that information furnished during the preliminary inquiry stage shall not be used against the child in any subsequent bail application, trial, or other court proceeding. It must be borne in mind that if the prosecutor who conducts the preliminary inquiry is the same one who will proceed with the state's prosecution of the child, she will in all likelihood advise the complainant of information that such complainant would otherwise not have. Such information would include the version of the child in conflict with the law. This will be prejudicial to the child in the course of his criminal trial. The same could be said of the presiding officer of the court. Certain courts in South Africa are small and as such house a single court room with a single magistrate.¹⁹ Once a version has been heard, it cannot be unheard. Although the justice system is under pressure to finalise its already high court rolls, surely this should not be a vehicle to give rise to the infringement of the child's rights to a fair trial.

The presiding officer would then already have knowledge of the possible defence the child will raise at his subsequent trial. It is not guaranteed that a prosecutor who has knowledge which could potentially affect the outcome of a trial will not use the information to gain an advantage. It is better and would completely and genuinely guarantee a child's rights at trial if a completely different set of officials hear the matter once it goes to trial. Given the already congested court roll, another viable option would be to have the legal representative of the child present from the very beginning of the matter. Specifically, that is, once the child has to undergo an interview by a social

¹⁸Supra note 1 at section 43–50.

¹⁹Sloth-Nielsen, J 'Preliminary Inquiry Procedure: Paperweight or power tool' 2004 Article 40 6 (2) Child Justice Alliance at page 5.

worker. The attorney will now be able to advise her client and will be privy to the length and breadth of information divulged during the preliminary inquiry. This will ensure that section 45-(2)²⁰ is upheld. This will be so as the legal representative of the child will have knowledge of what was divulged during the preliminary inquiry and ensure that such information is not used against the child during other court proceedings. While section 45-(2) sets out to protect the child, by allowing his legal representative to be mandatorily present will guarantee that section 45-(2) is meticulously upheld. This will be in line with realising the best interests of the child and ensuring the integrity of the justice system. This would be so as the child would have his rights protected at all times, being both during and before the court process thus ensuring his best interests as required by the Constitution are upheld.²¹

The best scenario will be if an entirely different court, with different role players deal with the matter once the preliminary inquiry stage is at an end. This will not only be cognisant of the presumption that no information disclosed at preliminary inquiry stage be used against the child in conflict with the law, but will go further. It will ensure that this happens.

8. Legal representation at the preliminary inquiry stage

If the legal representative of the child was legally required to be involved in the preliminary inquiry process from the very beginning when the child is first advised to appear in a court, this would provide far more protection to the child. If the process were to be somewhat altered so that the social worker had access to the child after his initial interaction with his attorney, this would render the process fair and more in line with being conducive to the actual criminal justice system. The Act is designed to be in line with the options less rigorous than the criminal court system however the child does not in every instance have his matter diverted. Should the child have the benefit of the presence of his legal representative from the very beginning of his being focused on by

²⁰ Section 45-(2) provides that “*no information furnished by any person at a preliminary inquiry in respect of the child may be used against that child in any bail application, plea, trial or sentencing proceedings*”

²¹Section 28 of the Constitution.

the investigation team, this will ultimately provide the full protection of the rights guaranteed to him in term of section 35 of the Constitution²² should he stand trial in a child justice court. The aim of the Act and the preliminary inquiry is to be more child-friendly but it is not in the best interests of the child to have his consultation with a social worker and his preliminary inquiry held in the absence of his eventual legal representative.

9. Application of section 35 of the Constitution and section 45-(2) of the Child Justice Act

To continue with the preliminary inquiry in the absence of a child's legal representative is at its very core prejudicial to the child and a violation of his rights to a fair trial in terms of section 35-(3), as contained in chapter 2 forming the Bill of Rights of the Constitution.²³ The rights specifically infringed will be section 35-(1)-(b)-(i) and (ii), the right to remain silent and the consequences that flow from not exercising this right. Section 35-(1)-(c) containing the right not to be compelled to make any confession or admission that could be used in evidence against said person making such admission or confession, will also be infringed. Once the child has been advised of the charges he becomes an accused person. The rights guaranteed in section 35 of the Constitution therefore apply to the child, even at this stage. It will later be argued that the process has been initiated once the child is approached by police officials. Once a child has been visited by a police official and becomes the recipient of a written notice, summons or is placed in detention, he becomes an accused person. Once the child becomes an accused person he is afforded the rights as contained in section 35 of the Constitution.²⁴ Another consideration is that as legal representatives are declared non-essential in the preliminary inquiry process, how will the legal representative be able to protect her client's rights to her full mandate? Section 45-(2) and the absolute fulfilment of its stipulations will require the presence of a legal representative.

²²S35 of the Constitution contains rights pertaining to accused persons. All persons appearing in a criminal court facing a criminal prosecution are referred to as accused persons.

²³Supra Note 12.

²⁴Supra Note 12.

The child can now be considered a person charged with the alleged commission of an offence. The legal practitioner conducting the child's defence is already fighting an uphill battle, without having been involved in the initial stages of the child's informal appearance at the preliminary inquiry stages. The process of diversion is not without its flaws. This is so as the court officials making suggestions to the presiding officer usually only form part of the prosecution. It is unlikely or rare that the defence becomes involved. Once the prosecution has reached the conclusion that the child is not taking responsibility for his actions or in other words is pleading not guilty, the option of diversion becomes a distant memory. There may be other reasons as to why the child behaved in such a manner. These could be provocation, bullying, home instability or any number of other factors that prevail in the childhood of certain young South Africans. This will only come to the fore if proper investigation is done. Considering the best interests standard, proper investigation is not always achieved by allowing only the social worker and the police to look into the matter. A more nuanced version of events would be attainable if legal representation was compulsory at the preliminary inquiry stage. This is so as the legal representative can meaningfully contribute to the in-chamber process by having the child's version of the events available to clarify and better allow the presiding officer to understand the child's supposed behaviour. This information will be available if the legal representative of the child consults with him before the preliminary inquiry is held.

There should be consequences attached to any official involved who fails to act with the requisite *bona fides*.²⁵ The presence of a legal practitioner will also facilitate protection to the child from unscrupulous behaviour on the side of the prosecution. This will open the way to a greater number of diversions and a more involved, effective process and outcome for the child in conflict with the law.

²⁵Latin term used in the legal field to denote good faith.

While those that were opposed to the inclusion of the concept of diversion in the Act²⁶ find that diversion seems to be too lenient for the child in conflict with the law, one must bear in mind that these are still young South Africans, who are minors and who are at times victims of their circumstances.²⁷

10. The adversarial nature of the criminal justice system

The South African criminal justice system is of an adversarial nature.²⁸ The child in conflict with the law finds himself in this system.

There is a dual nature to the role of legal counsel to the child, in representing her client ethically and at the same time upholding the best interests of the child, as the standard proposed and approved of in the representation of children in conflict with the law.

Karels asserts that this double role as it were, brings some confusion to the role of the attorney in the proceedings.²⁹ This however can be overcome. The legal representative of the adult accused before court has a duty toward her client, which is to represent him to the best of her ability without fear and while still maintaining her ethical responsibility toward the court. It is the same position which is to be held if the legal representative were to represent a child who finds himself in conflict with the law. The additional responsibility arises in the form of the best interests of the child requirement which comes in directly from the Constitution, specifically in section 28.³⁰ This phrase is the cornerstone of the legal representation of the child who finds himself in conflict with the law.

In theory this dual role may appear to be so. One must however consider the nature of the attorney-client relationship. In the normal course of events wherein the legal representative is representing an adult accused the duty the attorney has toward his

²⁶Supra Note 1. The preamble of the Act indicates that children as a result of their circumstances may have come into conflict with the law.

²⁷Supra Note 4 at 51.

²⁸M Karels, "The triumvirate role of legal counsel for child offenders: representative, intercession or agent?" 2013, *South African Criminal Law Journal* at 255.

²⁹Supra Note 22 at 278.

³⁰Section 28-(2) of the Constitution, 1996.

client is to represent his client to the best of his ability and to do so in accordance with this ethical duty as an officer of the court.

In her representation of the child in conflict with the law the attorney bears the same duty. In all representation scenarios the attorney has to advise her client of the best possible outcome and advise him of all the possible outcomes, taking into account the client's best interests. The client may still instruct the attorney contrary to what is in his best interests and the attorney will be required to proceed with the instruction. The attorney is after all a creature of instruction. Looking at the child in conflict with the law, the same practical procedure will apply. The difference could be seen through the attorney taking instructions differently from the child in the language being used or the nature of the questions being asked, and the presence of the child's guardian.

Ultimately however the end-product in the process of attaining instructions should be the same as the process with an adult client. Legal representation for children appearing in all courts of law is mandatory and found to be in their best interests.³¹ This representation can easily be attained through Legal Aid South Africa.³² Legal Aid officers, attorneys admitted to the board of attorneys, are present in each and every court in South Africa³³ to provide legal services for accused persons who cannot afford the high cost involved in securing legal representation. Involving legal representatives in the preliminary inquiry process is a very tangible goal which will ensure that justice is actually achieved and not simply seen to be achieved.

Karels mentions that the child in conflict with the law should be afforded legal representation as early as the preliminary inquiry stage as this is essentially the beginning of the court procedure.³⁴ I concur and vigorously so. In fact, if we are to look at the entire process of the getting of the child to court, one has to reasonably consider that this process starts with the laying of the charge to police officials. After this the police officials then go out and locate the child. By this time the arresting officer now

³¹Chapter 11, section 80-(1)-(d) of the Child Justice Act 75 of 2008.

³²Legal Aid South Africa is established by Act 39 of 2014. Legal Aid South Africa is an independent organization which employs admitted attorneys to represent accused persons who are not in a financial position to pay for the services of an attorney due to the high cost involved in securing legal services.

³³Legal Aid Act 39 of 2014, Section 4-(1)-(f).

³⁴Supra Note 22 at 280.

discovers that the accused or child is a minor and therefore under 18 years of age. The police officials should be aware that in order for the matter to reach the preliminary inquiry stage, there are certain requirements which need to be met. In the normal course of events the investigating officer is a different individual from the arresting officer. The investigating officer will ask the child what has happened, he will also request a birth certificate of the child from his guardian, advise the complainant that a person has been located and possibly taken into police custody, contact a social worker and request her to draft a report regarding the child who has now been located and possibly detained. In her report the social worker details what had happened as per the child in conflict with the law. This report is then handed to the police official who reads it. The police official then takes the report to the prosecutor dealing with the matter. The prosecutor then also reads it and sees if the child is accepting responsibility for the offence. If not, this will be divulged at the preliminary inquiry and the matter referred to the Child Justice Court. At the Child Justice Court it is the very same prosecutor now proceeding with the prosecution against the child. This practical side to the preliminary inquiry has already trampled on the child's right to attorney-client privilege, his rights afforded in terms of section 35 of the Constitution, his right to remain silent upon apprehension, and most importantly it has invaded his right to a vigorous and proper defence. The defence which the child will raise has already been disclosed without the child exercising informed consent or advice from his legal representative. This places the child in a worse-off position than the adult accused in his criminal trial. It is then apparent that the best interests of the child are being flagrantly disregarded under the farce of the prospect of diversion.

Section 52 of the Act contains the aspects to be taken into consideration for the exercise of the diversion option. Section 52 indicates that a matter may be diverted after considering all the relevant information at a preliminary inquiry, and it is specifically stated at subsection (1)-(a) "the child acknowledges responsibility for the offence."³⁵

11. Issues with diversion

³⁵Consideration of diversion as set out in section 52-(1)-(a) of Act 75 of 2008.

The issue which arises is what is to happen in the event the complainant in the matter is actually the initial offending party who acted criminally against the child and that in turn caused in him a display of physicality or the offending response. The Act while attempting to nobly put the best interests of the child offender at the center of its application has failed to consider the alternative to a child in conflict with the law having had a reasonable and possibly non-criminal explanation for his behaviour. The child in this particular hypothetical scenario should be offered the diversion option and the complaining party should face the consequences of his misleading actions.

The scenario posed above postulates a gap in the Act. Not all children who appear before a magistrate in terms of the Act for a preliminary inquiry will be the party at fault. There is no provision made in the Act for the prosecutor or any other court official involved in the matter to make a value judgement and not place the matter in child justice court, or to allow diversion in this particular scenario or to completely withdraw the matter. In practicality unless the child admits his action was unlawful, the option of diversion is not available to him. Therefore should all relevant facts not be available at the time the decision regarding diversion is being made, the best interests of the child are not being protected. The child in conflict with the law will not be taking responsibility for the offence as he will not see himself as the instigator of the behaviour. This will in turn lead the child's matter to be transferred to Child Justice Court which will then run its course in the form of a full-scale criminal trial and as the administration of justice is not always unequivocal, the child may even have attained a criminal conviction in the process.

12. Conclusion

By amending the Act and adding in a value judgement which can be exercised by court officials should such a scenario arise, the Act will then be more effective in providing for the best interests of the child or more accurately, children involved. This is so as the practical application of the Act does not always allow the diversion process as illustrated above. In practice prosecutors allow diversion only if the child admits that he was wrong. It could be that the explanation he has available could exonerate him of

unlawfulness but in this scenario he will not be given the option for diversion. As the child does not have legal knowledge, he will deny the allegations. In this scenario, the child will deny responsibility and therefore criminal liability. He will face a criminal trial. The legal representative will be better suited to recognise this and advise the child accordingly. The child will avoid a criminal trial.

Officers of the court, presiding officers, prosecutors and legal representatives have the power to change the course of the life of a child who finds himself in conflict with the law. Utilizing the legislative tools available correctly is an excellent starting point for achieving what the legislators set out to do and that is preserving the best interests of the child in conflict with the law. By allowing legal representation to be compulsory for a child in conflict with the law at the preliminary inquiry stage will be affording better protection to a child in conflict with the law. The addition of a value judgement provides a greater opportunity for actual justice to be achieved in terms of the Act. A more carefully considered process would inevitably yield a better more justiciable result.

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S v Baloyi 2000 (1) SACR 81 (CC)

Table of statutes

Child Justice Act 75 of 2008

s 42

s 43

s 44

s 45

s 46

s 47

s 48

s 49

s 50

s 52

s 80

Constitution Act 108 of 1996

s 28

s 35

Legal Aid Act 39 of 2014

s 4



Miss Yaseera Latchman (205500485)
School Of Law
Pietermaritzburg

Dear Miss Yaseera Latchman,

Protocol reference number: 00006207

Project title: Preliminary Inquiries for Children in Conflict with the Law: Protection or Prejudice

Exemption from Ethics Review

In response to your application received on 05 June 2020, your school has indicated that the protocol has been granted **EXEMPTION FROM ETHICS REVIEW**.

Any alteration/s to the exempted research protocol, e.g., Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through an amendment/modification prior to its implementation. The original exemption number must be cited.

For any changes that could result in potential risk, an ethics application including the proposed amendments must be submitted to the relevant UKZN Research Ethics Committee. The original exemption number must be cited.

In case you have further queries, please quote the above reference number.

PLEASE NOTE:

Research data should be securely stored in the discipline/department for a period of 5 years.

I take this opportunity of wishing you everything of the best with your study.

Yours sincerely,



Mr Simphiwe Peaceful Phungula
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