

# Recent Developments in Sexual Offences against Children – A Constitutional Perspective

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## Abstract

This contribution deals with recent developments in sexual offences against children with reference to sections in the *Criminal Law (Sexual Offences and Related Matters) Amendment Act* 32 of 2007. This Act is addressed against the backdrop of the Constitutional Court judgments in *Teddybear Clinic for Abused Children v Minister of Justice and Constitutional Development* and *J v National Director of Public Prosecutions*. These two judgments had a profound impact on the shaping of the newly formulated sexual offences in line with constitutional principles, ultimately culminating in the enactment and commencement of the *Criminal Law (Sexual Offences and Related Matters) Amendment Act* 5 of 2015. The approach by the Constitutional Court in both of these judgments is discussed and assessed. An analysis is provided of the Amendment Act with specific reference to its impact on sexual offences against children.

## Keywords

Sexual offences; children.

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## 1 Introduction

If our job is to protect our children, why in the heck would we want to make them sex offenders for the rest of their lives?<sup>1</sup>

Sexual offences against children have undergone radical reform since the advent of the *Constitution of the Republic of South Africa*.<sup>2</sup> The *Constitution* formally commenced on 4 February 1997. As with all other areas of law, it had a profound impact on the field of the criminal law, and more specifically within the ambit of sexual offences. Prior to the constitutional dispensation, sexual offences were partly catered for statutorily in terms of the previous *Sexual Offences Act* (SOA).<sup>3</sup> The offences of rape and indecent assault were common law offences.<sup>4</sup> The SOA provided for sexual offences against children, although the scope of the offences provided for was limited. With the birth of the *Constitution* giving rise to a human rights culture which ultimately changed the face of all fields of law, sexual offences in general as well as sexual offences against children were revisited. The advent of the *Constitution* undoubtedly played a pivotal role in the far-reaching transformation of the criminal law pertaining to sexual offences, eventually giving rise to the enactment and commencement the *Criminal Law (Sexual Offences and Related Matters) Amendment Act* (SORMA).<sup>5</sup> The Act repealed various common law crimes including rape and indecent assault, replacing them with statutory crimes and also providing for a gender neutral definition and scope for the crime of rape.<sup>6</sup>

One of the most prominent advancements in terms of the Act relates to a cluster of sexual offences against children.<sup>7</sup> The preamble of the Act

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<sup>1</sup> Magaw, as quoted in Stone 2011 *DePaul L Rev* 1169.

<sup>2</sup> *Constitution of the Republic of South Africa*, 1996 (hereinafter referred to as the "Constitution").

<sup>3</sup> *Sexual Offences Act* 23 of 1957 (hereinafter referred to as the "SOA"). Also see in general Snyman *Criminal Law* (2002) 362-365; Burchell *Principles of Criminal Law* (2005) 699 pertaining to the position in terms of the SOA.

<sup>4</sup> See Snyman *Criminal Law* (2014) 436, 445-452; Burchell *Principles of Criminal Law* (2013) 699-727; 734-740.

<sup>5</sup> *Criminal Law (Sexual Offences and Related Matters) Amendment Act* 32 of 2007 (hereinafter referred to as the "Act"). The Act effectively commenced on 16 December 2007.

<sup>6</sup> Snyman *Criminal Law* (2014) 341; Burchell *Principles of Criminal Law* (2013) 599-611; Smythe, Pithey and Artz *Sexual Offences* 13.

<sup>7</sup> See ch 3 of the Act. The specific sexual offences against children provided for in the Act are contained in ss 15-22 and include acts of consensual sexual penetration with certain children (s 15); acts of consensual sexual violation with certain children (s 16); the sexual exploitation of children (s 17); the sexual grooming of children (s 18); the exposure or display or causing the display or exposure of child pornography to children

specifically underscores the vulnerability of children and mentally disabled persons and pertinently states that the expansion of the offences "aims to address the particular vulnerability of children and persons who are mentally disabled in respect of sexual abuse and exploitation". The Act further provides for the establishment of a National Register of Sex Offenders.<sup>8</sup> The aim of the establishment of the Register is to establish a record of persons who have been convicted of sexual offences against children and against persons who are mentally disabled in order to prohibit such persons from being employed in a manner that places them in a position to work with or have access to or authority over children or persons who are mentally disabled. The Register accordingly seeks to protect specifically two of the most vulnerable groups of persons. Chapter 6 of SORMA provides for comprehensive procedures with reference to the Register and allows for employers, licensing authorities and authorities dealing with fostering kinship, care-giving, adoption and curatorship to apply for a certificate stating whether or not the particulars of a potential employee or applicant are contained in the Register.

Despite the fact that the Act was drafted within the climate of a constitutional dispensation with the aim of promoting the values enshrined in the Constitution, certain provisions were recently challenged on a constitutional basis. These provisions were specifically sections 15 and 16 dealing with consensual sexual penetration and violation between adolescents, as well as the provisions in the Act relating to the Register pertaining to juvenile sex offenders.

In this contribution, recent developments in sexual offences against children with reference to the latter provisions will be addressed against the backdrop of the Constitutional Court judgments in *Teddybear Clinic for Abused Children v Minister of Justice and Constitutional Development*<sup>9</sup> and

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(s 19); using children for or benefiting from child pornography (s 20); compelling or causing children to witness sexual offences, sexual acts or self-masturbation (s 21); and exposure to or the display of, or causing of exposure to or the display of the genital organs, anus or female breast to children (s 22). The Act thus provides for a wide scope of sexual offences against children, underscoring the particular vulnerability of children in society. For the purposes of the current contribution, emphasis will be placed on ss 15 and 16 of the Act.

<sup>8</sup> See ch 6 of the Act (hereinafter referred to as "the Register"). For the purposes of this contribution, only the most important aspects of the Register will be addressed with specific reference to children and accordingly juvenile offenders.

<sup>9</sup> *Teddybear Clinic for Abused Children v Minister of Constitutional Development* 2014 2 SA 168 (CC) (hereinafter referred to as "*Teddybear 2*"). Also see the judgment by the North Gauteng High Court under *Teddy Bear Clinic for the Abused Children v Minister of Justice and Constitutional Development* 2013 ZAGPPHC 1 (4 January 2013) (hereinafter referred to as "*Teddybear 1*").

*J v National Director of Public Prosecutions*.<sup>10</sup> These two judgments had a profound impact in terms of shaping newly formulated sexual offences in line with constitutional principles, culminating in the enactment and commencement of the *Criminal Law (Sexual Offences and Related Matters) Amendment Act*.<sup>11</sup> Finally an analysis of the Amendment Act will be provided with reference to its impact on sexual offences against children. It is accordingly essential first to take a closer look at these two important judgments by the Constitutional Court, after which an assessment and discussion will be provided.

## **2 Constitutional challenges to section 15 and 16 of the Act**

### **2.1 Sections 15 and 16 prior to the Amendment Act**

It is interesting to note that the initial aim behind the Act during its inception was to deal specifically with sexual offences against children.<sup>12</sup> It was later decided, however, that the Act should provide for all sexual offences, including sexual offences against adults.<sup>13</sup> Sections 15 and 16 are of particular importance for the present discussion pertaining to the recent developments in sexual offences against children.<sup>14</sup> Section 15 pertains to consensual sexual penetration of children, also more commonly referred to as "statutory rape", and criminalises acts of consensual sexual penetration with children.<sup>15</sup> Section 16 relates to consensual sexual violation with children and is also commonly referred to as statutory sexual assault, criminalising acts of consensual sexual violation with children.<sup>16</sup> It is also necessary for the purpose of clarity to note that "Child" is defined in section 1(1) of the Act as follows:

- (a) a person under the age of 18 years; or

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<sup>10</sup> *J v National Director of Public Prosecutions* 2014 ZACC 13 (6 May 2014) (hereinafter referred to as "*J v NDP*"). Also see the judgment in the High Court *S v IJ* 2013 2 SACR 599 (WCC) (hereinafter referred to as "*S v IJ*").

<sup>11</sup> *Criminal Law (Sexual Offences and Related Matters) Amendment Act* 5 of 2015 (hereinafter referred to as the "Amendment Act"). The Amendment Act formally commenced on 7 July 2015.

<sup>12</sup> *Smythe, Pithey and Artz Sexual Offences V*.

<sup>13</sup> *Smythe, Pithey and Artz Sexual Offences V*.

<sup>14</sup> In terms of the position prior to 2007, when the Act commenced, sexual offences against children were regulated in terms of the framework provided for in s 14 of the SOA. See *Snyman Criminal Law* (2014) 362-365.

<sup>15</sup> See s 15 of the Act.

<sup>16</sup> See s 16 of the Act.

- (b) with reference to sections 15 and 16, a person 12 years or older but under the age of 16 years, and 'children' has a corresponding meaning.

Accordingly, for the purposes of sections 15 and 16 a child is a person of the age of 12, 13, 14 or 15 years, and the phrases "consensual sexual penetration" and "consensual sexual violation" of a child therefore refer to a child in the age group of 12 to 15 years.<sup>17</sup>

Section 57(1) provides that a child below the age of 12 years is incapable of consenting to any sexual act. In addition, a "sexual act" is defined in SORMA as "an act of sexual penetration or an act of sexual violation". Sections 15 and 16 thus also criminalise all acts of sexual penetration and sexual violation committed by any person with a child below the age of 12 years. In the latter instance the perpetrator will be guilty of rape, as the consent of the child in such an instance is regarded as invalid.<sup>18</sup> Statutory rape in terms of section 15 stretches much further than merely sexual intercourse due to the much wider definition accorded to the term "sexual penetration" in the Act.<sup>19</sup> Penetration can include penetration of the child's vagina, anus or mouth and penetration can also be performed with other parts of the body such as the fingers or toes or the genital organs of an animal or even objects such as sex toys.<sup>20</sup> Section 15(2)(a) in its original form provided that if both parties concerned were children at the time of the commission of the crime, written authorisation to prosecute had to be given by the National Director of Public Prosecutions.<sup>21</sup>

A specific anomaly which arose related to the situation where one of the parties was below the age of 16 years but the other was over the age of 16. In the latter instance only the older party would have been prosecuted.<sup>22</sup> Section 15 accordingly criminalised all consensual forms of sexual

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<sup>17</sup> Smythe, Pithey and Artz *Sexual Offences* 9-10-9-11.

<sup>18</sup> Snyman *Criminal Law* (2014) 384.

<sup>19</sup> Smythe, Pithey and Artz *Sexual Offences* 9-11.

<sup>20</sup> Snyman *Criminal Law* (2014) 384-385. Sexual penetration in terms of the Act is defined as follows:

"any act which causes penetration to any extent whatsoever by –

- (a) the genital organs of one person into or beyond the genital organs, anus, or mouth of another person;
- (b) any other part of the body of one person or, any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person;
- (c) the genital organs of an animal, into or beyond the mouth of another person."

<sup>21</sup> Smythe, Pithey and Artz *Sexual Offences* 9-11; Snyman *Criminal Law* (2014) 384. Also see Minnie "Sexual Offences against Children" 550-551.

<sup>22</sup> Minnie "Sexual Offences against Children" 550.

penetration between adults and children as well as amongst children themselves.

Section 16 criminalised all acts of sexual violation between adults and children as well as between children themselves. It is evident from the definition of "sexual violation" in the Act that it covers a wide spectrum of non-penetrative contact of a sexual nature.<sup>23</sup> Smythe and Pithey correctly note that the wide definition of sexual violation seeks to protect children from 12 to 16 years from adults who engage in these acts with children in circumstances where the children provide consent. The wide range of non-penetrative acts, however, becomes highly problematic when they are committed between two consenting children.<sup>24</sup> Research suggests that various biological changes that take place during puberty are considered to be the precipitating cause for increased sexual interest and behaviour amongst adolescents.<sup>25</sup>

Like section 15, section 16(2)(a) also provided that where both parties were children, both had to be prosecuted, provided that the National Director of Public Prosecutions had authorised the prosecution in writing.<sup>26</sup>

For the purposes of sections 15 and 16, defences were provided for in section 56(2) of the Act. Prior to its amendment section 56(2) read as follows:

- (2) Whenever an accused person is charged with an offence under –
  - (a) section 15 or 16, it is, subject to subsection (3), a valid defence to such a charge to contend that the child deceived the accused person into believing that he or she was 16 years or older at the time of the alleged commission of the offence and the accused person reasonably believed that the child was 16 years or older; or
  - (b) section 16, it is a valid defence to such a charge to contend that both the accused persons were children and the age difference between them was not more than two years at the time of the alleged commission of the offence.

It is important to note that the "close in age" defence was available only where the child had been charged with statutory sexual assault, and accordingly not to a child who had been charged with statutory rape. This defence provided that it would be a valid defence for a child to submit that

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<sup>23</sup> Smythe, Pithey and Artz *Sexual Offences* 9-17.

<sup>24</sup> Smythe, Pithey and Artz *Sexual Offences* 9-19.

<sup>25</sup> Smythe, Pithey and Artz *Sexual Offences* 9-18.

<sup>26</sup> Smythe, Pithey and Artz *Sexual Offences* 9-19; Minnie "Sexual Offences against Children" 551-553.

both the accused persons were children and that the age difference was not more than two years.

Section 56(3) provides that these defences cannot be invoked if the accused person is related to the child within the prohibited degrees of blood, affinity or an adoptive relationship. The problematic aspect relating to the defence afforded to a charge of contravention of section 16 was that where the age difference between the children was more than two years it would inevitably have resulted in both children facing the possibility of prosecution.

## **2.2 The Teddybear Judgment**

The salient facts appear from the judgment given by Rabie J in the North Gauteng High Court.<sup>27</sup> The first applicant was the Teddy Bear Clinic for Abused Children, a non-profit company providing a full range of services to abused children, including forensic medical examinations, forensic psychological counselling, psychological assessments, play therapy, preparation for court appearances, and various programmes designed with the aim of diverting young sex offenders away from the criminal justice system.

The second applicant was RAPCAN ("Resources Aimed at the Prevention of Child Abuse and Neglect"), also a non-profit company dedicated to the prevention of child victimisation and the promotion of children's rights.

The first respondent was the Minister of Justice and Constitutional Development and the second respondent was the National Director of Public Prosecutions. The three *amici curiae* who also participated were firstly the Women's Legal Centre Trust directed towards advancing and protecting the rights of all women and girls in South Africa and addressing the discrimination and disadvantage that women face; secondly the Tshwaranang Legal Advocacy Centre aimed at the promotion and protection of women's rights; and thirdly the Justice Alliance of South Africa aimed at upholding and developing Judaeo-Christian values.

The applicants brought the application in pursuit of challenging the constitutional validity of certain sections of the Act and more specifically the constitutional validity of aspects pertaining to sections 15 and 16, and also 56(2), which deals with defences in respect of sections 15 and 16.

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<sup>27</sup> Also see *Teddybear 2* paras 4-9, 25-27.

It was argued on behalf of the applicants that adolescents find themselves in peculiar situations in that physically they are developing and maturing rapidly but psychologically they remain vulnerable to the influence of adults. As such the applicants did not seek to challenge the provisions of sections 15 and 16 as far as they criminalised sexual conduct by adults, but contended that as far as they criminalised the sexual conduct of children they were unconstitutional.<sup>28</sup> The impugned provisions which were challenged were specifically those that criminalised sexual activity between children as well as the consequential reporting and registration of sex offender provisions.<sup>29</sup>

The applicants argued that the criminalisation of acts of consensual sexual violation between adolescents where the age difference was more than two years violated their constitutional rights.<sup>30</sup> A further important aspect raised by the applicants related to the National Register for Sex Offenders created in terms of chapter 6 of the Act. In terms of section 43 such a register contains the particulars of persons convicted of any sexual offence against a child or a person who is mentally disabled, or persons who are alleged to have committed a sexual offence against a child or a mentally disabled person.<sup>31</sup>

It was further submitted that sections 15 and 16 should be assessed in conjunction with the provisions of section 54(1) of the Act, which provides that a person who has knowledge that a sexual offence has been committed against a child must report such knowledge immediately to a police official, and failure to do so constitutes an offence for which the person is liable upon conviction to a fine or imprisonment for a period not exceeding five years or both a fine and such imprisonment. This section inadvertently also applies to the consensual offences criminalised in terms of sections 15 and 16.<sup>32</sup> Expert opinion by relevant experts concluded that intimate relationships between adolescents are developmentally normative and that it is usually within these intimate relationships that adolescents begin to explore a wide range of sexual behaviours such as kissing, petting, oral sex, vaginal intercourse and even anal intercourse.<sup>33</sup>

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<sup>28</sup> *Teddybear 1* para 24.

<sup>29</sup> *Teddybear 1* para 24.

<sup>30</sup> *Teddybear 1* para 38.

<sup>31</sup> *Teddybear 1* para 42.

<sup>32</sup> *Teddybear 1* para 44.

<sup>33</sup> *Teddybear 1* para 49.



The experts also submitted that the criminalisation of consensual sexual acts limits the ability of support organisations to educate, empower and support adolescents in their sexual development. Despite the discretion afforded to the National Director of Public Prosecutions as to whether or not to prosecute as well as the process of diversion for child offenders, the reality remains that even if the children are not ultimately prosecuted for sections 15 and 16 offences, the children will still be subjected to the initial stages of the criminal justice system, which can include arrest, providing detailed statements, questioning by the police, appearance at the preliminary enquiry, and the possibility of detention. Even if the child is diverted, he or she would still be regarded as a sex offender and would have to admit responsibility for the sections 15 and 16 offences.

The respondents' main argument in opposition to the application by the applicants was that the impugned provisions did not violate any constitutional rights of children. The respondents also specifically contended that the provisions of section 15 and 16 had to be considered against the backdrop of the *Children's Act* 38 of 2005 as well as the *Child Justice Act*.<sup>34</sup> It was held by Rabie J in the High Court that the impugned provisions constituted an unjustified invasion of control into the intimate and private sphere of children's personal relationships in such a way as to cause them great harm, and as such constituted a violation of section 28(2) of the *Constitution*, and stigmatised and degraded children on the grounds of their consensual sexual conduct.<sup>35</sup> It was held that even in the absence of being prosecuted under sections 15 and 16, or where diversion takes place following a decision to prosecute, children would still endure considerable and substantial trauma as a result of being exposed to the earlier processes in the criminal justice system, such as arrest, statement-taking, police questioning and detention in police cells.<sup>36</sup>

In addition, the system of diversion does not completely protect the potential child offender, as some of the consequences of this process include that the child may be arrested, taken to the police station, be required to sign warning statements, have to appear at a preliminary enquiry, have to be assessed by a probation officer whilst the parents are present and, more damagingly, the child has to acknowledge responsibility for the offence. It was held that there exists no legislation or other guidelines to assist the relevant official to decide which cases to prosecute, and the existence of

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<sup>34</sup> *Teddybear 1* para 62.

<sup>35</sup> *Teddybear 1* paras 74, 77.

<sup>36</sup> *Teddybear 1* para 85.

the discretion cannot save the constitutionality of these provisions.<sup>37</sup> Sections 15 and 16 were accordingly declared unconstitutional.<sup>38</sup>

The matter was consequently referred to the Constitutional Court for the purpose of confirmation of the order granted by the High Court. In delivering judgment the Constitutional Court emphasised the vulnerability of children in society and held as follows per Khampepe J:<sup>39</sup>

Children are precious members of our society and any law that affects them must have due regard to their vulnerability and their need for guidance. We have a duty to ensure that they receive the support and assistance that is necessary for their positive growth and development ... We must be careful, however, to ensure that, in attempting to guide and protect children, our interventions do not expose them to harsh circumstances which can only have adverse effects on their development.

From the outset the Constitutional Court emphasised that the matter did not deal with the question as to whether or not children should engage in sexual conduct, but rather whether it was constitutionally sound to subject children to criminal sanctions in order to prevent them from engaging in early sexual conduct.<sup>40</sup> It was once again indicated by the applicants that the provisions infringed a range of constitutional rights of children, namely their rights to human dignity, privacy, and bodily and psychological integrity, as well as the principle of foregrounding the best interests of the child.<sup>41</sup>

The Constitutional Court noted that the applicants challenged the said provisions on two bases, firstly that the sections were constitutionally invalid and could not be severed, and secondly, whilst it could be permissible to criminalise 16 and 17 year olds for engaging in consensual sexual acts with adolescents, the former should have available to them a "close in age" defence to reduce the harsh impact of such criminalisation.<sup>42</sup> The applicants, however, did not challenge the legislative differentiation between different groups of children.<sup>43</sup> The expert evidence presented, in addition, related only to the impact of the sections on adolescents. Accordingly the findings regarding the unjustifiable limitation of rights pertained to the constitutional rights of adolescents only.<sup>44</sup>

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<sup>37</sup> *Teddybear 1* para 92.

<sup>38</sup> *Teddybear 1* para 125.

<sup>39</sup> *Teddybear 2* para 1.

<sup>40</sup> *Teddybear 2* para 3.

<sup>41</sup> *Teddybear 2* para 29.

<sup>42</sup> *Teddybear 2* para 50.

<sup>43</sup> *Teddybear 2* para 51.

<sup>44</sup> *Teddybear 2* para 51.

In terms of the impact of the criminalisation of consensual sexual conduct on the child's right to dignity, Khampepe stated the following:<sup>45</sup>

It cannot be doubted that the criminalization of consensual sexual conduct is a form of stigmatization which is degrading and invasive. In the circumstances of this case, the human dignity of the adolescents targeted by the impugned provisions is clearly infringed. If one's consensual sexual choices are not respected by society, but are criminalized, an innate sense of self-worth will inevitably be diminished. Even when such criminal provisions are rarely enforced, their symbolic impact has a severe effect on the social lives and dignity of those targeted. ... To my mind, therefore, the stigma attached to adolescents by the impugned provisions is manifest. The limitation of section 10 of the Constitution is obvious and undeniable.

It was further held that the stigma of criminalisation was further exacerbated by the provisions in the Act pertaining to the Register in terms of which the name of any person who commits an offence in terms of section 15 or 16 must be entered into the Register.<sup>46</sup> It was accordingly held that sections 15 and 16 limited adolescents' rights to human dignity.<sup>47</sup> With reference to adolescents' right to privacy, it was held that sections 15 and 16 related to the most intimate sphere of personal relationships as they permitted police officials, prosecutors and judicial officers to scrutinise and assume control over intimate relationships of adolescents, ultimately invading a deeply personal sphere of their lives.<sup>48</sup> It was accordingly held that sections 15 and 16 encroached upon adolescents' right to privacy.<sup>49</sup> The Constitutional Court proceeded to analyse the impact of section 15 and 16 on the principle of the best interests of the child enshrined in section 28(2) of the *Constitution*. It was held that the existence and enforcement of the sexual offences provided for by sections 15 and 16 exacerbated the risk to adolescents by negating support structures to adolescents and ultimately preventing adolescents from seeking help.<sup>50</sup> It was further held that the latter would result in an atmosphere in which adolescents would refrain from freely communicating about sexual interactions with parents and

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<sup>45</sup> *Teddybear 2* para 55.

<sup>46</sup> *Teddybear 2* para 57. See also the discussion pertaining to the Register below.

<sup>47</sup> *Teddybear 2* para 58.

<sup>48</sup> *Teddybear 2* para 60. Also see *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 12 BCLR 1517 (CC) para 32, where the right to privacy was espoused as follows: "Privacy recognizes that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. The way in which we give expression to our sexuality is at the core of this area of private intimacy. If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of our privacy."

<sup>49</sup> *Teddybear 2* para 64.

<sup>50</sup> *Teddybear 2* para 72.

counsellors.<sup>51</sup> The prospect of adolescents facing the risk of being exposed to the criminal justice process in terms of arrest, interrogation and even having to formally acknowledge responsibility for the offence, it was held, offended the principle of the best interest of the child.<sup>52</sup> It was held that the existence of a prosecutorial discretion did not alleviate the unconstitutionality of these sections.<sup>53</sup> Ultimately it was held that sections 15 and 16 offended the best interest principle and had the effect of actually harming the adolescents they were intended to protect.<sup>54</sup> After conducting a thorough analysis in terms of section 36 of the *Constitution*, it was held that the limitations imposed by sections 15 and 16 could not be justified in terms of section 36, and accordingly that these sections were unconstitutional in imposing criminal liability on adolescents for engaging in consensual sexual conduct.<sup>55</sup> The Constitutional Court concluded by finding that the scope of the findings was limited to consensual sexual conduct between children and, in addition, that the findings of invalidity were limited to the extent to which sections 15 and 16 criminalised the conduct of adolescents between the ages of 12 and 16 years.<sup>56</sup> The Constitutional Court accordingly held that sections 15 and 16 of the Act were inconsistent with the *Constitution*. In terms of the order Parliament was granted eighteen months to correct the defects in the Act.

### **3 Reflections on the constitutionality of the register in respect of juvenile sex offenders**

Another recent development pertaining to sexual offences against children was the ruling on the constitutionality of the provisions of the Act dealing with the Register with reference to juvenile sex offenders. The latter related specifically to the constitutionality pertaining to the automatic inclusion of the names of child sex offenders in the Register.

An important aspect of the provisions pertaining to the Register relates to section 50(2), which provides that a court which has convicted a person of a sexual offence against a child or a person who is mentally disabled *must* make an order that the particulars of such a person be included in the Register.<sup>57</sup>

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<sup>51</sup> *Teddybear 2* para 73.

<sup>52</sup> *Teddybear 2* para 74.

<sup>53</sup> *Teddybear 2* para 76.

<sup>54</sup> *Teddybear 2* para 79.

<sup>55</sup> *Teddybear 2* para 101.

<sup>56</sup> *Teddybear 2* para 113.

<sup>57</sup> See ss 50(1) and (2) of the Act.

In *J v NDPP* the Constitutional Court was required to assess the constitutionality of the provisions relating to the Register, with specific reference to juvenile sex offenders.

### **3.1 A brief overview of the provisions in the Act pertaining to the Register**

In order to comprehend the judgment under discussion, it is necessary to take a closer look at the context of the Register. Section 42 of SORMA provides for the establishment of the Register and in terms of this section it is incumbent upon the Minister of Justice and Constitutional Development to designate a fit and proper person as the registrar of the Register.<sup>58</sup> The object of the Register is to protect children and persons who are mentally disabled against sex offenders.<sup>59</sup> Section 41 provides that a person who has been convicted of the commission of a sexual offence against a child or is alleged to have committed a sexual offence against a child and has been dealt with in terms of section 77(6) of 78(6) of the *Criminal Procedure Act*<sup>60</sup> and whose particulars have been entered in the Register may not be employed to work with children in any circumstances; hold any position in respect of his or her employment which places him or her in any position of authority, supervision or care of a child; or gain access to a child or places where children are present. A person may, in addition, not be granted a licence or be given approval to manage any business or entity in relation to the supervision of or care of a child or become a foster parent, kinship caregiver, temporary safe care-giver or adoptive parent of a child.<sup>61</sup> The primary objective of the Register is to protect children and mentally disabled persons from sex offenders by recording the particulars of these sexual offenders and in response to their queries informing employers, licensing authorities and entities dealing with the care and adoption of children whether or not particular names appear in the Register. These sex offenders will be prohibited from employment or any activities where they would have responsibility for or access to children.<sup>62</sup>

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<sup>58</sup> Smythe, Pithey and Artz *Sexual Offences* 17-15.

<sup>59</sup> It is to be noted that the Register in terms of the Act differs from the National Child Protection Register provided for in the *Children's Act* 38 of 2005 (hereinafter "*Children's Act*") as the Child Protection Register deals with abuse and neglect of children whereas the Register pertains specifically to sexual offences against children. See Smythe, Pithey and Artz *Sexual Offences* 17-3.

<sup>60</sup> *Criminal Procedure Act* 51 of 1977 (hereinafter referred to as the "CPA").

<sup>61</sup> S 41(1)(c)-(d) of the Act. See also Smythe, Pithey and Artz *Sexual Offences* 17-11-17-12.

<sup>62</sup> Smythe, Pithey and Artz *Sexual Offences* 17-18-17-19. See in general s 40 of the Act, where "employer", "licensing authority" and "relevant authority" are defined.

A particularly important section for the purpose of the present discussion is section 50 of SORMA. Section 50(1) *inter alia* reads as follows:

The particulars of the following persons must be included in the Register:

- (a) A person who in terms of this Act or any other law-
  - (i) has been convicted of a sexual offence against a child or a person who is mentally disabled;
  - (ii) is alleged to have committed a sexual offence against a child or a person who is mentally disabled in respect of whom a court has made a finding and given a direction in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977.

Section 50(2)(a), in addition, reads as follows:

A court that has in terms of this Act or any other law-

- (i) convicted a person of a sexual offence against a child or a person who is mentally disabled and, after sentence has been imposed by that court for such offence, in the presence of the convicted person, or ...
- (ii) ... *must* make an order that the particulars of the person be included in the Register.<sup>63</sup>

It is clear from the wording of section 50(2)(a) that a court retains no discretion in terms of entering in the Register the particulars of a person who has been convicted in terms of the Act. The latter formed the cornerstone of the constitutional challenge to this section, with specific reference to juvenile sex offenders in the *J v NDPP* decision, which will be discussed below.

### **3.2 S v IJ; J v NDPP**

The salient facts appear from the judgment given by Henney J. The matter was brought before the court as an automatic review in terms of section 85(1)(a) of the *Child Justice Act*.<sup>64</sup> The accused, fourteen years of age, was charged with three counts of rape in contravention of section 3 of SORMA in that he had raped three young boys, two of them six years of age and one of seven, by anally penetrating them. In addition he was charged with assault with the intent to do grievous bodily harm in that he had allegedly stabbed a twelve year-old girl with a knife. The accused pleaded guilty to all of the charges and was subsequently convicted in respect of all of them. In

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<sup>63</sup> Section 51 of the Act deals specifically with the removal of the particulars of a person from the Register. Emphasis added.

<sup>64</sup> *Child Justice Act* 75 of 2008 (hereinafter referred to as the "CJA").

respect of the sexual offences, he was sentenced to five years' compulsory residence in Eureka, a Child and Youth Care Centre in terms of the provisions of section 76(1) of the CJA. In addition he was sentenced to three years' imprisonment after the completion of the five years' compulsory residence in terms of the provisions of section 76(3) of the CJA. In respect of the conviction of assault with the intent to do grievous bodily harm, he was sentenced to six months' imprisonment suspended for a period of three years on condition that he was not convicted of assault committed in the period of suspension. In addition to the sentence, an ancillary order in terms of section 50(2) of SORMA was made to the effect that the accused's name be entered in the Register. The question was raised by the high court with the regional magistrate and the Director of Public Prosecutions, Western Cape, whether it was competent for the court to make an order in terms of section 50(2) of SORMA if proper cognisance is taken of the provisions of subsections 2, 3 and 4 of the CJA as well as section 28 of the *Constitution*.

It was argued on behalf of the accused that children are neither physically nor mentally on the same level as adults and should receive guidance and nurturing, and that special provision should be made for the rights of children.<sup>65</sup> It was further argued that in terms of section 50(2) no discretion was afforded to a court to decline to make an order that the particulars of an accused be entered into the Register.<sup>66</sup> These peremptory provisions, it was argued, seriously infringed upon the constitutional rights of children with specific reference to the right to dignity, the right to privacy, and the rights to fair labour practice and freedom of trade, occupation and profession.<sup>67</sup> These provisions, in addition, infringed section 28 of the *Constitution* protecting the best interests of the child and also violated the child's right to be protected from degradation and not to have his or her wellbeing and moral and social development placed at risk.<sup>68</sup> It was further stated that child offenders should be placed in a different category from adult offenders, thereby acknowledging their unique and vulnerable position in society.<sup>69</sup> It was argued that although the limitation of rights in the *Constitution* may be justifiable in respect of adult offenders, in terms of the limitations clause of section 36 of the *Constitution*, this was not the case in respect of child offenders with specific reference to section 28 of the *Constitution*.<sup>70</sup> It was

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<sup>65</sup> S v IJ para 52.

<sup>66</sup> S v IJ para 53.

<sup>67</sup> S v IJ para 55.

<sup>68</sup> S v IJ para 56.

<sup>69</sup> S v IJ para 57.

<sup>70</sup> S v IJ para 58. S 28(2) of the *Constitution* provides for the following: "A child's best interests are of paramount importance in every matter concerning the child."

noted that the obligation of courts to include the particulars of a child offender failed to take note of the long-term effects of the inclusion on the child offender.<sup>71</sup> It was argued that the absence of a discretion afforded to a judicial officer whether or not to order that the particulars of a child offender be entered or not flew in the face of the principles provided for in section 3 of the CJA stipulating that the consequences arising from the commission of an offence should be proportionate to the circumstances of the child, the nature of the offence and the interests of society.<sup>72</sup> It was stated that the limitation of the child offender's rights in these circumstances was not reasonable and justifiable in terms of the *Constitution*.<sup>73</sup>

It was argued on behalf of the *amicus curiae* that the impugned provisions were overbroad in the sense that there are less restrictive means for achieving the purpose of the provisions, as a sexual offence for the purposes of section 50(2) could include every offence from rape to kissing.<sup>74</sup> The *amicus curiae* further emphasised that a conviction on more than one sexual offence (irrespective of its seriousness) rendered an offender's particulars to be entered in the Register for the rest of his or her life.<sup>75</sup> On behalf of the Minister it was argued that the provisions of the impugned section that created the Register are intended to protect children from sexual predators.<sup>76</sup> It was argued that the inclusion of an accused's particulars in the Register cannot reasonably be said to constitute an infringement of his or her right to dignity as the contents of the Register are not for public consumption.<sup>77</sup> It was stated that the inclusion of the accused's particulars in the Register does not fall short of the reconciliatory approach provided for in the CJA and it does not offend any provisions of the *Children's Act*.<sup>78</sup>

In delivering judgment Henney J firstly emphasised the fact that the court was dealing with a child offender and that such an offender had to be dealt with in terms of the provisions of the CJA.<sup>79</sup> It was held that the purpose of the CJA, in accordance with the underlying values of the *Constitution*, is to grant special protection to children who commit criminal offences.<sup>80</sup> It was

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<sup>71</sup> S v IJ para 59.

<sup>72</sup> S v IJ para 60.

<sup>73</sup> S v IJ para 64.

<sup>74</sup> S v IJ para 79.

<sup>75</sup> S v IJ para 81.

<sup>76</sup> S v IJ para 83.

<sup>77</sup> S v IJ para 85.

<sup>78</sup> S v IJ para 87.

<sup>79</sup> S v IJ para 94.

<sup>80</sup> S v IJ para 96.



held that with regard to the legitimate and constitutional purpose that SORMA seeks to protect, namely the protection of the dignity, freedom and physical integrity of women and children as vulnerable groups, the inclusion *per se* of the particulars of an offender who commits a sexual offence against a child constitutes a limitation that is reasonable and justifiable.<sup>81</sup>

It was held that the lack of discretion granted to the presiding official together with the over broadness of offences falling under the term "sexual offence" means that the courts cannot take the particular circumstances into account: whether the child poses a threat to other children and whether the circumstances justify such an approach.<sup>82</sup> Henney J expressed concern in respect of section 50(2)'s not affording a sexual offender an opportunity to make representations to persuade a court not to make an order that his or her particulars be placed on the Register. It was held that the latter violates an offender's right to a fair hearing and the principle of *audi alteram partem*.<sup>83</sup> It was held that the failure to afford an offender the right to be heard before an order was made in terms of section 50(2) was not a reasonable and justifiable limitation of the rights of a sexual offender in order to protect the dignity, freedom and physical integrity of children.<sup>84</sup> It was stated by the court that section 50(2) offended against a person's right to a fair hearing by not allowing the court a discretion to consider whether or not an order should be made. Henney J accordingly held as follows:<sup>85</sup>

... s 50(2) should be declared unconstitutional and invalid only to the extent that a presiding officer is not allowed a discretion whether or not to make such an order, and that an offender is not given an opportunity to make representations before such an order is made. This limitation of the right to a fair hearing cannot be justified. To this extent only, I hold that the provisions of s 50(2) are invalid and inconsistent with the Constitution.

The matter was consequently referred to the Constitutional Court for confirmation of the order granted by the High Court.

In delivering judgment the Constitutional Court pertinently emphasised the adverse consequences flowing from having a person's details entered into the register as discussed above.<sup>86</sup> The Constitutional Court had to consider specifically whether the order of constitutional invalidity should apply to both child and adult offenders. It was held, however, that the facts before the

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<sup>81</sup> *S v IJ* para 111.

<sup>82</sup> *S v IJ* para 122.

<sup>83</sup> *S v IJ* para 126. Also see *De Beer v North-Central Local Council and South-Central Local Council* 2002 1 SA 429 (CC) para 11.

<sup>84</sup> *S v IJ* para 130.

<sup>85</sup> *S v IJ* para 134-137.

<sup>86</sup> See *J v NDPP* paras 20-25.

High Court dealt with the application of the provision to child offenders and that different considerations could apply to adult offenders, which had neither been canvassed before the court nor argued, and as such it was held that it would not be in the interests of justice for the Constitutional Court to make findings pertaining to the provision's application to adult offenders.<sup>87</sup> It was further held that the ambit of the order of invalidity pertained to section 50(2)(a) only, to the exclusion of section 50(2)(b).<sup>88</sup>

The state respondents argued that although the purpose behind section 50(2)(a) was constitutional, the section did not allow for an individual approach and conceded that "individualised justice is required to avert injustice".<sup>89</sup> The *amici curiae* argued that the section infringed the principle of the best interests of child as enshrined in section 28(2) of the *Constitution*.<sup>90</sup> It was held that the starting point in all matters concerning the child is section 28(2).<sup>91</sup> The latter was canvassed by Skweyiya ADCJ in stating:<sup>92</sup>

The contemporary foundations of children's rights and the best-interests principle encapsulate the idea that the child is a developing being, capable of change and in need of appropriate nurturing to enable her to determine herself to the fullest extent and to develop her moral compass.

It was further held that certain principles flow from the approach of the best interests of the child, which include firstly that the law should generally distinguish between adults and children. The latter principle highlights the intrinsic defect in section 50(2)(a), which fails to draw a distinction between adult and child offenders. Secondly the law should provide for an individuated approach to children, catering for individual circumstances, in order to secure the best interests of a particular child. Thirdly, the child or her representatives must be afforded an appropriate and adequate opportunity to render recommendations and to be heard at every stage of the process with due regard to the age and maturity of the child.<sup>93</sup>

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<sup>87</sup> See *J v NDPP* para 31.

<sup>88</sup> See *J v NDPP* para 32.

<sup>89</sup> See *J v NDPP* para 34.

<sup>90</sup> *J v NDPP* para 35.

<sup>91</sup> *J v NDPP* para 35.

<sup>92</sup> *J v NDPP* para 36.

<sup>93</sup> *J v NDPP* paras 37-40.

It was held that section 50 of SORMA left a court with no discretion whether or not to include an offender's particulars on the Register.<sup>94</sup> It was held by Skweyiya ADCJ as follows:<sup>95</sup>

The provision requires that registration follows automatically from conviction of and sentencing for the particular crimes. This infringes the best interests of the child. The opportunity for an individuated response to the particular child offender, taking into account the child's representations and views, is excluded both at the point of registration and in the absence of an opportunity for review. The limited circumstances in which an offender can apply for his or her removal from the Register are insufficiently flexible to consider the particular child's development or reform.

With reference to the serious consequences of being placed on the Register, it was held that such consequences which flow from the provision may not always affect the child offender whilst he or she is still a child, but may do so later in adulthood.<sup>96</sup> Skweyiya ADCJ held as follows:<sup>97</sup>

Child offenders who have served their sentences will remain tarred with the sanction of exclusion from areas of life and livelihood that may be formative of their personal dignity, family life, and abilities to pursue a living. An important factor in realising the reformative aims of child justice is for child offenders to be afforded an appropriate opportunity to be reintegrated into society. ... Given that a child's moral landscape is still capable of being shaped, the compulsory registration of the child sex offender in all circumstances is an infringement of the best interests principle.

It was accordingly held that the provision limited a child offender's right in terms of section 28(2) of the *Constitution*.

It was held that the limitation of the rights of child offenders contained in section 50(2)(a) was not justified in an open and democratic society and therefore that section 50(2)(a) was constitutionally invalid to the extent that it unjustifiably limited the right of child sex offenders to have their best interests considered of paramount importance. It was further held that the declaration of invalidity should be suspended for a period of 15 months from the date of the order in order to afford Parliament the opportunity to correct the defect.<sup>98</sup>

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<sup>94</sup> *J v NDPP* para 41.

<sup>95</sup> *J v NDPP* para 42.

<sup>96</sup> *J v NDPP* para 43.

<sup>97</sup> *J v NDPP* para 44.

<sup>98</sup> *J v NDPP* para 57.

## 4 Changes brought about by the Amendment Act

In order to effectively address the issues raised in the *Teddybear* and *J* decisions, the Amendment Act was drafted and officially commenced on 7 July 2015. The preamble to the Amendment Act states that the object of the Amendment Act is:

... to ensure that children of certain ages are not held criminally liable for engaging in consensual sexual acts with each other ... to give presiding officers a discretion in order to decide in individual cases whether the particulars of children should be included in the National Register for Sex offenders or not ...

According to the Amendment Act a child is now defined as a person under the age of eighteen years.<sup>99</sup>

In order to address the concerns in the *Teddybear* decision, section 15 was amended to read as follows:<sup>100</sup>

- (1) A person ('A') who commits an act of sexual penetration with a child ('B') who is 12 years of age or older but under the age of 16 years is, despite the consent of B to the commission of such an act, guilty of the offence of having committed an act of consensual sexual penetration with a child, unless A, at the time of the alleged commission of such an act, was –
  - (a) 12 years of age or older but under the age of 16 years; or
  - (b) Either 16 or 17 years of age and the age difference between A and B was not more than two years.
- (2)
  - (a) The institution of a prosecution for an offence referred to in subsection (1) must be authorised in writing by the Director of Public Prosecutions if A was either 16 or 17 years of age at the time of the alleged commission of the offence and the age difference between A and B was more than two years.
  - (b) The Director of Public Prosecutions concerned may delegate his or her power to decide whether a prosecution should be instituted or not.

The most significant development in terms of the Amendment Act is that children between the ages of 12 and 15 can no longer be prosecuted for engaging in consensual sexual penetration. Children aged 16 or 17 can similarly not be prosecuted for engaging in consensual sexual acts of penetration with children below the age of 16, provided that the age difference between them is not more than two years. The "close in age" defence which existed previously in terms of section 16 only is now incorporated in section 15, although it does not operate as a defence, as in

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<sup>99</sup> See s 1 of the Amendment Act.

<sup>100</sup> See ss 15 and 16 of the Amendment Act.

these cases the children will not have committed an offence. Children aged 16 or 17 who engage in consensual sexual penetration with children below the age of 16, where the age difference is more than two years, can be prosecuted in terms of section 15. The discretion to prosecute lies with the Director of Public Prosecutions. The position in respect of 16 and 17 year-old children has accordingly vastly improved compared to the original wording of sections 15 and 16 of the Act. Previously 16 and 17 year-olds had to be prosecuted if they engaged in consensual sexual activity with other adolescents. The Director of Public Prosecutions now has a discretion to prosecute 16 or 17 year-old children where the age difference between them and the younger child was more than two years. The Amendment Act has not changed the position pertaining to adults having consensual sexual penetration with children, where the adult will still be prosecuted.

Section 16 was amended to read as follows:

- (1) A person ("A") who commits an act of sexual violation with a child ("B") who is 12 years of age or older but under the age of 16 years is, despite the consent of B to the commission of such an act, guilty of the offence of having committed an act of consensual sexual violation with a child, unless A, at the time of the alleged commission of such an act, was
  - (a) 12 years of age or older but under the age of 16 years; or
  - (b) Either 16 or 17 years of age and the age difference between A and B was not more than two years;
- (2)
  - (a) The institution of a prosecution for an offence referred to in subsection (1) must be authorised in writing by the relevant Director of Public Prosecutions if A was either 16 or 17 years of age at the time of the alleged commission of the offence and the age difference between A and B was more than two years;
  - (b) The Director of Public Prosecutions concerned may delegate his or her power to decide whether a prosecution in terms of this section should be instituted or not.

Like the situation in section 15 as discussed above, children between the ages of 12 and 15 can no longer be prosecuted for engaging in acts of consensual sexual violation. Children aged 16 or 17 can similarly not be prosecuted for engaging in acts of consensual sexual violation with children below the age of 16, provided that the age difference between them is not more than two years. Accordingly, children who are aged 16 or 17 and who engage in acts of consensual sexual violation with children below the age of 16 and where the age difference is more than two years can be prosecuted in terms of section 16. The Director of Public Prosecutions has a discretion as to whether or not to prosecute in such circumstances. The position pertaining to adults committing acts of consensual sexual violation

with children remains unchanged and the adult in those circumstances will be prosecuted.

The constitutional issues raised in the *J* decision were addressed and resulted in the amendment *inter alia* of section 50. Section 50(2)(a) still provides for the mandatory entering of a person's details in the Register where such a person was convicted of a sexual offence against a child or a mentally disabled person, or where a finding was made that the person was either not fit to stand trial or criminally responsible for the act which constituted a sexual offence against a child or mentally disabled person, subject to paragraph C of the particular section. Paragraph C, which now reads directly after section 50(2)(b), now provides as follows:

- (c) If a court has, in terms of this Act or any other law, convicted a person ("A") of a sexual offence referred to in paragraph (a)(i) and A was a child at the time of the commission of such offence, or if a court has made a finding and given a direction referred to in paragraph (a)(ii) in respect of A who was a child at the time of the alleged commission of the offence, the court may not make an order as contemplated in paragraph (a) unless –
  - (i) the prosecutor has made an application to the court for such an order;
  - (ii) the court has considered a report by the probation officer referred to in section 71 of the Child Justice Act, 2008, which deals with the probability of A committing another sexual offence against a child or a person who is mentally disabled, as the case may be, in future;
  - (iii) A has been given the opportunity to address the court as to why his or her particulars should not be included in the Register; and
  - (iv) the court is satisfied that substantial and compelling circumstances exist based upon such report and any other evidence, which justify the making of such an order.
- (d) In the event that a court finds that substantial and compelling circumstances exist which justify the making of an order as contemplated in paragraph (a), the court must enter such circumstances on the record of the proceedings.

Section 50 accordingly now grants a court a discretion whether or not to enter juvenile sex offenders' particulars into the Register. Accordingly, there is a general prohibition in terms of the entering of juvenile sex offenders' particulars into the Register, unless the conditions provided for in the section are complied with. The Amendment Act, in addition, provides for the inclusion under section 51(2) of the provisions of (2A), which inclusion essentially provides an opportunity for juvenile sex offenders convicted prior to the commencement of the Amendment Act and whose particulars have

been recorded in the Register to apply to a court to have his or her particulars removed.<sup>101</sup>

## 5 Assessment

From a purely constitutional perspective, the judgments in both *Teddybear* and *J v NDPP* were a welcome response to the exposure of the inherent flaws in the Act, paving the way for a more constitutionally sound approach, which eventuated in the enactment of the Amendment Act. Both decisions essentially centred on the principle of the best interests of the child which, in all matters concerning the rights of the child, remains paramount.<sup>102</sup> The judgments underscored the child's basic rights to dignity, privacy, psychological and bodily integrity, and the right not to be treated or punished in a cruel, inhuman or degrading manner.<sup>103</sup> Sections 15 and 16 in their original form criminalised consensual sexual activity between adolescents. This not only impacted on the way in which adolescents viewed their own sexual exploration and development, but it further inevitably resulted in adolescents' potentially facing the harsh realities of the criminal justice system and being exposed thereto. Adolescents also faced the possibility being convicted of a sexual offence in terms of the Act and having their details recorded in the Register. A further anomaly flowed from the fact that in respect of section 54 of the Act an obligation was imposed on any person who had knowledge that a sexual offence had been committed against a child to report such knowledge immediately to the police, failing which that person was guilty of an offence.<sup>104</sup> Accordingly, a child who for whatever reason discussed his or her sexual experience with a parent or care-giver, for example, would inevitably precipitate a situation in which the parent or caregiver have an obligation to report the sexual activity or face prosecution in terms of section 54. Section 15 and 16 also did not cater for any protection or defences for children who were 16 and 17 years old. No discretion in the matter of prosecution was afforded to the Director of Public Prosecutions in respect of 16 and 17 year-old adolescents. As a result of the *Teddybear* decision, these problematic issues have been addressed. Adolescents

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<sup>101</sup> See s 8 of the Amendment Act.

<sup>102</sup> Also see Davel and Skelton *Commentary on the Children's Act 2-5-2-10*; Clark 2000 *Stell LR* 3-20; Muller and Jaff 1999 *De Jure* 322-329.

<sup>103</sup> These fundamental rights of all people, including children, are well established in terms of the *Constitution* s 10, which provides the right to human dignity; s 14, which deals with the right to privacy; and s 12, which deals with the freedom and security of the person. S 28(2), in addition, provides that the best interest of the child remain paramount in every matter concerning a child. Also see Currie and De Waal *Bill of Rights Handbook* 210; 250-268; 269-286.

<sup>104</sup> Sections 54(1)(a) and (b).

between the ages of 12 and 15 will not be criminally liable for engaging in consensual sexual conduct. Despite the fact that 16 and 17 year-old adolescents did not form part of the submissions in the *Teddybear* decision, the legislator addressed this particular age category by providing that 16 and 17 year old adolescents will not be criminally liable for engaging in consensual sexual conduct with children younger than 16, provided that the age difference between them is not more than two years. In the event that the age difference is more than two years, the Director of Public Prosecutions retains a discretion to prosecute. The latter is undoubtedly a huge advancement over the original position. It remains to be seen if the prosecution of 16 and 17 year-old adolescents will form the basis of a further constitutional challenge in future. If so, it could be argued that all adolescents below the age of 18 years should be free from prosecution where they engaged in consensual sexual conduct. The judgment in the *Teddybear* decision acknowledges to a large extent the reality that adolescents are autonomous beings who should be afforded the right to sexual autonomy. This is part of a child's inherent right to be treated as an equal and to have his or her autonomy respected.<sup>105</sup> Research on adolescent teenage sexual behaviour clearly suggests that sexual exploration is a normal and expected component of development.<sup>106</sup> Criminalising consensual sexual acts between adolescents could be severely detrimental to children, infringing not only their' right to freedom of choice of lifestyle and social interactions, but also their developmental interests to enter adulthood free from prejudice and stigmatisation.<sup>107</sup> The decriminalisation of these actions was a welcoming response to the requirement that adolescents' best interests should be protected in situations where they engage in consensual sexual activity. Stone encapsulates the distinction to be made in this situation by stating:<sup>108</sup>

While one may be morally opposed to two teenagers having sexual relations with each other, 'sex' is not the proper area for expansive legislation on morality. There is a fine line between immorality and criminality.

The judgment in *J v NDPP* proclaimed the unconstitutionality of the provisions of the Register pertaining to juvenile sex offenders. One of the primary aims of the Act with the establishment of the Register was clearly to protect children and mentally disabled persons, as vulnerable groups in society, against sexual predators. The reality is, however, that child sex

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<sup>105</sup> Boezaart *et al Child Law in South Africa* 255.

<sup>106</sup> Meiners-Levy 2006 *Temp L Rev* 499-506.

<sup>107</sup> See Boezaart *et al Child Law in South Africa* 256-257.

<sup>108</sup> Stone 2011 *DePaul L Rev* 1171.



offenders will inevitably also fall into the category of persons whose names and details should be entered into the Register, should they commit sexual offences against children.

In both the judgment delivered by the High Court as well as that delivered by the Constitutional Court, the inherent unconstitutionality of section 50(2)(a) was proclaimed. It is notable, however, that in the judgment of the High Court the unconstitutionality was pertinently traced to section 50(2)(a)'s not affording child sex offenders an opportunity of making representations as to why their particulars should not be placed on the Register. In the Constitutional Court judgment the inherent unconstitutionality is taken a step further in the sense of not providing for an individuated approach in respect of juvenile sex offenders. The latter response by the Constitutional Court is welcomed, as the paramountcy of the principle of the best interests of the child was once again affirmed and emphasised. It could further be argued that such an approach provides for a more holistic and multifaceted approach when dealing with juvenile sex offenders. The amendment to section 50 as provided for in the Amendment Act is to be welcomed, as it provides for a more holistic approach when dealing with juvenile sex offenders. A question which inevitably arises is whether or not the Register is desirable in respect of juvenile sex offenders.

It was indicated above that the consequences of having one's details entered into the Register are extremely harsh. "Sexual violation", for example, is defined in such a wide manner in the Act that it could include acts ranging from mere kissing or hugging to touching another person's genital organs. And if a child commits two acts of sexual violation and is convicted as a result thereof, he or she faces the danger of his or her particulars never being removed from the Register. Is the latter really in the best interest of children? It almost seems as though the objects of the CJA and SORMA are often not in line with one another. The *J v NDPP* decision and ultimately the Amendment Act indeed paved the way for a more constitutional approach in respect of the process followed, by affording the offender the right to make representations as to why his or her name should not be entered into the Register. The latter does, however, not relieve the uneasiness in terms of juvenile sex offenders and the risk they face in terms of the consequences of the Register.

The question arises as to whether the Register serves any rehabilitative function in respect of juvenile offenders. Even if a juvenile sex offender has the opportunity to show good cause as to why his or her details should not be entered into the Register, the possibility still exists that the court could

rule that good cause had not been shown and that his or her details should appear in the Register.

The juvenile sex offender would thus be classified amongst the worst class of offenders. It is submitted that by making the provisions of the Register applicable to juvenile sex offenders, sight is lost of the essential differences between adult and juvenile sex offenders, as well as of the objects of the CJA as described above. Research suggests that juvenile sex offenders have a generally lower overall recidivism rate for sexual offences than adult sex offenders.<sup>109</sup> Juvenile sex offenders, in addition, show lower recidivism rates than adult sex offenders when placed in treatment and rehabilitation programmes specifically tailored for juvenile offenders.

Research indicates that juvenile sex offenders also have more potential for rehabilitation.<sup>110</sup> The general patterns of behaviour of juvenile sex offenders seem to be less embedded than those found in adult sex offenders.<sup>111</sup> The sexual behaviour of adult sex offenders tends to be a symptom of deeply ingrained pathology, whereas juvenile sex offenders appear to be more exploratory in their sexual behaviours. Juvenile sex offenders, in addition, tend to be more receptive to treatment programmes. Juvenile sex offenders also tend to commit sexual offences of a less serious and aggressive nature than adults do.<sup>112</sup> According to research, juvenile sex offenders have proven to be less likely to resort to aggressive behaviour, have significantly lower recidivism rates, and are more amendable to treatment and rehabilitation programmes.<sup>113</sup>

It is notable that section 40 of the *Convention on the Rights of the Child*<sup>114</sup> requires age-appropriate proceedings for juvenile offenders. Children should accordingly be treated in such a way as to promote their dignity as well as their reintegration into society, having regard to the specific circumstances of the offence. In terms of the latter, children should be placed on the Register only if they pose a demonstrable risk and danger to the community.

The Amendment Act now provides for various safeguards in terms of assessing whether or not to enter a particular juvenile offender's particulars into the Register. Most importantly, the juvenile is now afforded the

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<sup>109</sup> Geer 2008 *Dev Mental Health* L 33-52.

<sup>110</sup> Geer 2008 *Dev Mental Health* L 41.

<sup>111</sup> Geer 2008 *Dev Mental Health* L 41.

<sup>112</sup> Geer 2008 *Dev Mental Health* L 41.

<sup>113</sup> Geer 2008 *Dev Mental Health* L 42.

<sup>114</sup> *Convention on the Rights of the Child* (1989).

opportunity to address the court as to why his or her particulars should not be entered. This corresponds to a large extent with the Constitutional Court judgment in *J v NDPP*, where emphasis was placed on an *individuated* response which should be applied in cases of juvenile sex offenders, having due regard to each juvenile sex offender as an individual.

It is submitted that when dealing with juvenile sex offenders it is essential to follow an individualistic approach. It is submitted that within the framework of the Amendment Act juvenile sex offenders should also be assessed by qualified mental health experts in order to specifically assess the potential risk and danger of the offender to the community, and the possibility of rehabilitation and reintegration. The latter could be provided for within the ambit of the address to the court as to why the individual's details should not be recorded in the Register. The latter by no means detracts from the fact that the offences of juvenile sex offenders should be taken seriously. It merely ensures that a holistic approach is followed when dealing with juvenile sex offenders.

## 6 Conclusion

This contribution dealt essentially with recent developments in sexual offences against children. The Constitutional Court in *Teddybear* and *J v NDPP* paved the way for transforming the Act in line with constitutional values and principles ultimately underscoring the principle of the best interests of the child. In response to these two judgments the Amendment Act was enacted and officially commenced. The provisions of the Amendment Act radically revised the provisions challenged constitutionally in the two Constitutional Court judgments, ultimately aligning them with the values and principles enshrined in the *Constitution*. What becomes clear from the discussion is that children and ultimately juvenile offenders are a vulnerable group in society requiring an individualised approach. In conclusion, the *dictum* by the Constitutional Court in *S v M*<sup>115</sup> comes to mind, where it was held:

A truly principled child-centred approach requires a close and individualised examination of the precise real-life situation of the particular child involved. To apply a predetermined formula for the sake of certainty, irrespective of the circumstances, would in fact be contrary to the best interests of the child concerned.

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<sup>115</sup> *S v M* 2007 2 BCLR 1312 (CC) para 37.

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*Convention on the Rights of the Child (1989)*

### **List of Abbreviations**

CJA	Child Justice Act 75 of 2008
CPA	Criminal Procedure Act 51 of 1977
DePaul L Rev	DePaul Law Review
Dev Mental Health L	Developments in Mental Health Law
RAPCAN	Resources Aimed at the Prevention of Child Abuse and Neglect
SOA	Sexual Offences Act 23 of 1957
SORMA	Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007
Stell LR	Stellenbosch Law Review
Temp L Rev	Temple Law Review