

Cape Town Office

3rd Floor Greenmarket Place • 54 Shortmarket Street • Cape Town 8001 • South Africa
PO Box 5227 • Cape Town 8000 • South Africa
Tel: (021) 481 3000 • Fax: (021) 423 0935 • Website • www.lrc.org.za
PBO No. 930003292
NPO No. 023-004 email: charlene@lrc.org.za

LRC

Legal Resources Centre

Your Ref:

Our Ref: CM/mm

23 January 2015

Ms Cindy Balie
The Committee Secretary
The Portfolio Committee on Justice and Constitutional Development

PER EMAIL: cbalie@parliament.gov.za

Dear Ms Balie,

WRITTEN SUBMISSIONS ON THE CRIMINAL LAW (SEXUAL OFFENCES AND RELATED MATTERS) AMENDMENT ACT / AMENDMENT BILL B18 – 2014

Please find enclosed the submissions of the Legal Resources Centre (LRC) in respect of the above Bill and the call for comment.

We thank the Committee for affording us the opportunity to make written submissions and would welcome an opportunity to make an oral presentation.

Should you have any queries please do not hesitate to contact:
Charlene May / Mandi Mudarikwa at the Legal Resources Centre
(021) 481 3000

Yours faithfully,
LEGAL RESOURCES CENTRE

PER:

CHARLENE MAY

**SUBMISSIONS TO THE PORTFOLIO COMMITTEE OF JUSTICE AND CORECTIONAL
SERVICES ON THE PROPOSED DRAFT CRIMINAL LAW (SEXUAL OFFENCES AND
RELATED MATTERS) AMENDMENT AMENDMENT BILL**

23 JANUARY 2015

SUBMISSIONS PREPARED BY:

Mandivavarira Mudarikwa, Charlene May and Nina Braude

on behalf of

Legal Resources Centre www.lrc.org.za

Tel: 021 481 3000

Fax: 021 423 0935

Email: mandy@lrc.org.za and charlene@lrc.org.za

CONTENTS

INTRODUCTION	3
BRIEF DESCRIPTION OF THE ORGANISATION	3
CONSENSUAL SEXUAL ACTS WITH CERTAIN CHILDREN	4
The Legislative Framework.....	4
Constitutional Challenge to Section 15 and 16 of the Sexual Offences Act: Teddy Bear Case..	6
Key Findings in the Teddy Bear Clinic Case relevant to the current Bill	7
Draft Criminal Law (Sexual Offences and Related Matters) Amendment Bill	10
NATIONAL REGISTER FOR SEX OFFENDERS	14
Legislative Framework for the register for Sexual Offenders	14
Constitutional Challenge to Section 50(2) of the Sexual Offences Act: J v S Case	15
Key Findings in the J v S Case	17
Draft Criminal Law (Sexual Offences and Related Matters) Amendment Bill	19
Suggested Amendments	20

INTRODUCTION

1. The **Legal Resources Centre ("LRC")**, hereby submits comments and recommendations on the proposed draft Criminal Law (Sexual Offences and Related Matters) Amendment Bill (hereinafter referred to as the "Bill")¹ as requested by the Portfolio Committee on Justice and Correctional Services.
2. The LRC welcomes this opportunity to make submissions which we believe will strengthen the legislative and policy framework aimed at protecting the rights of children.

BRIEF DESCRIPTION OF THE ORGANISATION

3. The LRC, established in 1979, is a South-African based human rights organisation with regional offices in Johannesburg, Durban, Grahamstown and Cape Town. The organisation uses the law as an instrument of justice for the vulnerable and marginalised, including poor, homeless, and landless people and communities who suffer discrimination by reason of race, class, gender, and disability or by reason of social, economic, and historical circumstances. The strategies employed to secure the protection and promotion of human rights include impact litigation, law reform, participation in partnerships and development processes, education, and networking within South Africa, the African continent and at the international level.
4. The LRC through its Equality and Non-Discrimination Project ("the project") focuses on promoting and advocating for the rights of marginalised and vulnerable persons that require special protection due to their vulnerability. Children fall within this project because of their vulnerability and continued marginalisation in some of areas of law. The project promotes the constitutional rights of children through providing legal advice; legal representation and by participating in advocacy and law reform.
5. The LRC in implementing this project as it relates to children, firmly agrees with Justice Kamphpe when she stated that "*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*

¹ Draft Bill B18-2014.

their positive growth and development. Indeed, this Court has recognised that children merit special protection through legislation that guards and enforces their rights and liberties. 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."²

6. We previously made submissions to the Department in respect of an earlier draft of the proposed Bill.³

CONSENSUAL SEXUAL ACTS WITH CERTAIN CHILDREN

The Legislative Framework

7. The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (hereinafter referred to as the "Sexual Offences Act") represents a comprehensive legislative reform of both statutory and common-law criminal liability in relation to the commission of sexual offences. This is specifically mentioned in the Preamble of the Sexual Offences Act which explains the aim of the Act as:

"to comprehensively and extensively review and amend all aspects of the laws and the implementation of the laws relating to sexual offences, and to deal with all legal aspects of or relating to sexual offences in a single statute, [including] by . . . enacting comprehensive provisions dealing with the creation of certain new, expanded or amended sexual offences against children and persons who are mentally disabled . . . despite some of the offences being similar to offences created in respect of adults as the creation of these offences aims to address the particular vulnerability of children and persons who are mentally disabled in respect of sexual abuse or exploitation; eliminating the differentiation drawn between the age of consent for different consensual sexual acts and providing for special provisions relating to the prosecution and adjudication of consensual sexual acts between children older than 12 years but younger than 16 years; . . . [and] creating a duty to report sexual offences committed with or against children or persons who are mentally disabled."

² *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* (CCT 12/13) 2014 (2) SA 168 (CC) para 1 (hereinafter referred to as "the Teddy Bear case").

³ Draft Bill B-2014.

8. Chapter 3, sections 15 – 22, of the Sexual Offences Act makes provision for sexual offences against children. This submission and the Amendment Bill both relates to Part 1 of Chapter 3, sections 15 – 16 that specifically deals with consensual sexual acts with certain children.
9. For ease of reference the current wording of section 15 – 16 before it was declared unconstitutional was as following:

Section 15:

15. Acts of consensual sexual penetration with certain children (statutory rape)

(1) A person ("A") who commits an act of sexual penetration with a child ("B") 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.

(2)(a) The institution of a prosecution for an offence referred to in subsection (1) must be authorised in writing by the National Director of Public Prosecutions if both A and B were children at the time of the alleged commission of the offence: Provided that, in the event that the National Director of Public Prosecutions authorises the institution of a prosecution, both A and B must be charged with contravening subsection (1).

(b) The National Director of Public Prosecutions may not delegate his or her power to decide whether a prosecution in terms of this section should be instituted or not.

Section 16:

16. Acts of consensual sexual violation with certain children (statutory sexual assault)

(1) A person ("A") who commits an act of sexual violation with a child ("B") 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.

(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 both A and B

were children at the time of the alleged commission of the offence: Provided that, in the event that the Director of Public Prosecutions concerned authorises the institution of a prosecution, both A and B must be charged with contravening subsection (1).

(b) The Director of Public Prosecutions concerned may not delegate his or her power to decide whether a prosecution in terms of this section should be instituted or not.

10. Some of key definitions in the Sexual Offences Act that are relevant to this submission are "child", "sexual penetration" and "sexual violation". For ease of reference we have provided the definitions for these words as entrenched in the Sexual Offences Act here.

9.1 For the purpose of sections 15 and 16, a child is a person who is 12 years or older but not yet 16.

9.2 Sexual penetration means "*any act which causes penetration to any extent whatsoever by the genital organs of one person into or beyond the genital organs, anus, or mouth of another person; 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; or the genital organs of an animal, into or beyond the mouth of another person.*"

9.3 Sexual violation means "*any act which causes direct or indirect contact between the sexual organs of one person and any part of the body of another person or an animal, or any object, which could causes sexual arousal or stimulation, including kissing, fondling and masturbation of one person by another.*"

Constitutional Challenge to Section 15 and 16 of the Sexual Offences Act: Teddy Bear Case

11. Following the decision of the North Gauteng High Court, Pretoria, which held that sections 15 and 16 of the Sexual Offences Act were constitutionally invalid to the extent that they criminalised consensual sexual conduct between children, the Constitutional Court had to consider the validity of this declaration in terms of section 172(2)(a) of the Constitution.

12. The Constitutional Court held that sections 15 and 16 of the Sexual Offences Act were unconstitutional as set out below. The court declared sections 15 and 16 of the Sexual Offences Act to be invalid only to the extent that they criminalise consensual sexual conduct between adolescents. Accordingly, the Constitutional Court gave Parliament 18 months to amend the provisions. As the Constitutional Court Judgment was handed down on 18 October 2013, the amended legislation incorporating the findings of the Court should be in place by 17 April 2015.

13. **It is important to note that the criminal entrenchments for non-consensual sexual conduct with children of any age and sexual activity between adults and children between 16 and 17 with adolescents remain unchanged. Additionally the *Teddy Bear* case has no impact on section 57(1) of the Sexual Offences Act which provides expressly that children under the age of 12 are incapable of consenting to sexual acts.**

Key Findings in the *Teddy Bear Clinic Case* relevant to the current Bill

14. Some of the key findings of the Constitutional Court Case in the *Teddy Bear* case can be summarised as following:

13.1 As stated above the Court held that sections 15 and 16 of the Sexual Offences Act infringed adolescents' rights in terms of sections 10 (human dignity), 14 (privacy) and 28(2) (best interests of the child) of the Constitution.⁴

13.2 **Vulnerability of adolescents:** In enacting section 15 and 16, Parliament clearly determined that a particular group of children, namely adolescents, were vulnerable and required special protection from sexual predation, by both adults and other children.⁵ However, the legislative decision to differentiate between different groups of children, i.e. adolescents and those persons who are 16- and 17-year old, was not challenged in this case.

⁴ *Teddy Bear* para 49.

⁵ *Teddy Bear* para 51.

13.3 **Violation of the right to human dignity:** The Constitutional Court found that *"it cannot be doubted that the criminalisation of consensual sexual conduct is a form of stigmatisation 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 criminalised, one's innate sense of self-worth will inevitably be diminished..... There can also be no doubt that the existence of a statutory provision that punishes forms of sexual expression that are developmentally normal degrades and inflicts a state of disgrace on adolescents."*⁶

13.4 **Violation of the Right to Privacy:** Emphasising the previous finding of the Constitutional Court⁷ that the right to privacy recognises that everyone had a right to a sphere of private intimacy and autonomy which enables everybody to establish and nurture human relationships without interference from the outside community.⁸ As such the Constitutional Court held that because *"the criminal offences under sections 15 and 16 of the Sexual Offences Act apply to the most intimate sphere of personal relationships and therefore inevitably implicate the constitutional right to privacy. The offences allow police officers, prosecutors and judicial officers to scrutinise and assume control of the intimate relationships of adolescents, thereby intruding into a deeply personal realm of their lives. This intrusion is exacerbated by the reporting provisions: trusted third parties are obliged by section 54 of the Sexual Offences Act to disclose information which may have been shared with them in the strictest confidence, on pain of prosecution."*⁹

13.5 **Prosecutorial Discretion:** The Court found that the existence of prosecutorial discretion cannot save the otherwise unconstitutional provisions.¹⁰ This is because

⁶ *Teddy Bear* para 55.

⁷ *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* [1998] ZACC 15; 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) para 32.

⁸ *Teddy Bear* para 59.

⁹ *Teddy Bear* para 60.

¹⁰ *Teddy Bear* paras 75–76.

the Court found that if "*the discretion to prosecute exists, the prospect of an adolescent being arraigned under the impugned provisions is ever-present.*"¹¹

13.6 **Best interest of the Child** is a constitutional imperative which requires the best interest as paramount to any decision affecting a child as entrenched in section 28(2) of the Constitution. The Constitutional Court noted that the best interest of the child is both a right on its own accord as well as a guiding principle when making decisions affecting a child. Within this context, the Court found section 15 and 16 to be contrary to the best interest of children because:

13.7 The existence and enforcement of the criminal offences entrenched by sections 15 and 16 can only cause harm to adolescents because it undermines the support structures available to them, inadvertently preventing adolescents from seeking help and potentially driving adolescent sexual behaviour underground.¹²

13.8 The reporting mandates in the two sections could potentially create an atmosphere in which adolescents will not freely communicate about sexual relations with parents and counsellors which has the potential to sever any communication lines between adolescents and care givers etc.¹³

13.9 The implementation of sections 15 and 16 of the Sexual Offences Act could lead to imprisonment or, at the very least, diversion of both adolescents which means that the child would have to be arrested and interact with investigating officers and the criminal justice system. This interaction would require the child to disclose to and have police/magistrates etc scrutinise details of his or her intimate affairs.

13.10 In addition, it is irrational to prosecute both the adolescents involved in consensual sexual conduct. The Constitutional Court found that the two year **close-in-age exemption** entrenched in section 56(2)(b) is based on the belief that the greater the age gap between the participants in sexual conduct, the more likely it is that the older child may have unduly influenced the younger child. The court held that the close-in-age exemption could not be relied upon to cure this irrationality. This is

¹¹ *Teddy Bear* para 76.

¹² *Teddy Bear* para 72.

¹³ *Teddy Bear* para 73.

specifically because the Court found that prosecuting the younger child in these circumstances along with the older child is irrational. It simply does not make sense to reason that the younger the child or the greater the age gap between the children involved, the stronger the requirement to prosecute the younger child, particularly when the purpose behind the statutory provision is the protection of the younger child.¹⁴

13.11 The Constitutional Court found that there were less restrictive means to achieve the purpose intended in sections 15 and 16 which the State could use that do not involve criminalisation in order to ensure that children are protected and aid them in leading responsible sexual lives.

Draft Criminal Law (Sexual Offences and Related Matters) Amendment Bill

15. In light of the decision of the *Teddy Bear* case above, this draft Bill is correctly aimed at, among other things, ensuring that children of certain ages are not held criminally liable for engaging in consensual sexual acts with each other.

16. We will in the next section discuss the contents of the Bill relating to the amendment of sections 15 and 16 of the Sexual Offences Act and evaluate whether or not it has, at the very least, remedied the violation of constitutional rights as indicated in the above section.

Section 1 of the Bill

Definition of a child

17. This section defines a child as a person under the age of 18 and removes the specific definition relating to sections 15 and 16 of the Sexual Offences Act. This is because the specific ages and defences applicable to sections 15, 16 and 56(2)(b) are specifically included in the proposed amendments of section 15 and 16.

18. In the application of sections 15 and 16, there was often misconception about when exactly the definition of child in these sections applied. Inserting the clear definitions of the category of children targeted in the text of sections 15 and 16 as proposed by the Bill provides clarity about the application of the limited definition of the child without the need for referring to section 1. It is therefore unequivocally clear that both sections 15 and 16

¹⁴ *Teddy Bear* para 78.

aim primarily to protect children between 12 and 16 years. We therefore welcome this development proposed by the Bill.

Section 2 and 3 of the Bill

Non-criminalisation of sexual penetration and violation of adolescent children

19. We note that the possibility of prosecution for adolescent children aged 12 years but younger than 16 has been completely removed. We support this exclusion because it is in line with the finding of the Constitutional Court in the *Teddy Bear* case which is aimed at protecting the constitutional rights of children as discussed above.

The Close-in-age-defence

20. The proposed amendments to section 15 and 16 of the Sexual Offences Act provide for a close in age defence. Basically, a person "A" who commits either an act of sexual penetration or sexual violation with a child "B" who is 12 years of age but younger than 16 years will not be prosecuted if the following two conditions are met:

- a. if "A" is either 16 or 17 years old; and
- b. the age difference between A and B is not more than two years.

21. In line with removal of the criminalisation of consensual acts of sexual penetration or violation, we welcome that the Bill removes the applicability of the close-in-age defence for children aged 12 but younger than 16. In essence, this removes a possibility of the prosecution for this age group which is in line with the *Teddy Bear* judgement.

22. In the principal Act, the close-in-age defence was only limited to section 16. However we note that the Bill proposes the extension of the close-in-age defence to acts of sexual penetration as entrenched in section 2 of the Bill (dealing with Section 15 of the Sexual Offences Act). This is a development that we welcome. Further, as section 1 of the Bill defines a child as a person under the age of 18 similarly with section 28 of the Constitution, we submit that the close-in-age defence available to children aged 16 or 17 is a mechanism

that is aimed at also ensuring that they are protected from prosecution in certain circumstances. We therefore support the provision of the close-in-age defence for children aged 16 or 17 years.

Prosecutorial Discretion

23. If the close-in-age defence is not applicable to 16 or 17 year old children then person "A" as described above, would be guilty of an offence of having committed an act of consensual sexual penetration/violation with a child regardless of the child "B" consenting to these acts.
24. Both proposed sections state that the Director of Public Prosecutions concerned must authorise the institution of prosecution for the offences of committing an act of consensual sexual penetration/violation with a child if person "A" as described above was either 16 or 17 years old at the time the alleged offence was committed.
25. We submit that it is trite that it be understood that both adolescents aged 12 but younger than 16 and those aged 16 but younger than 18 are children in terms of the Constitution. However as the Constitutional Court pointed out, Parliament has clearly determined that adolescent children are vulnerable and merit special protection from sexual predation, by both adults and other children. This decision has not been challenged.
26. As 16 and 17 year olds are also children, we welcome the additional obligation on the Director of Public Prosecutions to evaluate and authorise the prosecution of this age group when sections 15 and 16 are violated. We are concerned however, that the Bill in both sections 2 and 3 proposes that the Director of Public Prosecutions can delegate this power. It is not stated as to whom this power can be delegated and the conditions related to this delegation, for example, whether it is a case-by-case delegation or whether it can be delegated permanently.
27. It is our suggestion that since the Constitution mandates that the best interests of children to be paramount importance and in light of the impact criminal prosecution and exposing a child to the criminal justice system has on a child, this power to decide whether to prosecute a child for violating section 15 and 16 should be reserved for the Director of

Public Prosecutions only. We believe that this would allow for uniformity in how the decisions whether or not to prosecute are made.

28. We note that the principal Act reserved this power to the National Director of Public Prosecutions which has been reported to cause delays on whether a child would be prosecuted or not. Another alternative to this could be to grant this power to decide whether to prosecute a child aged 16 or 17 years for violating sections 15 and 16 to the National Director of Prosecutions who is allowed to only delegate this power to the Director of Public Prosecution who cannot, in turn, delegate this power. We believe that either of these two approaches will allow for an efficient but balanced means of operation which protects the rights of both the children involved.

Section 9 of the Bill

29. Section 56(2)(b) of the Sexual Offences Act provides that:

Whenever an accused person is charged with an offence under 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.

30. The defence contained in this section i.e. that both the accused persons were children and the age difference between them was not more than two years have been inserted in the text of both sections 15 and 16. It is therefore logical to remove section 56(2)(b) and we support the deletion of this section as proposed

NATIONAL REGISTER FOR SEX OFFENDERS

31. Chapter 6 of The Sexual Offences Act establishes and creates the National Register for Sex Offenders ("the Register").

Legislative Framework for the register for Sexual Offenders

32. Section 42 of the Sexual Offences Act establishes the Register which is to include –

"particulars of persons convicted of any sexual offence against a child or a person who is mentally disabled or are alleged to have committed a sexual offence against a child or a person who is mentally disabled and who have been dealt with in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977, whether committed before or after the commencement of this Chapter and whether committed in or outside of the Republic."¹⁵

33. The purpose of the Register is to protect children and persons with mental disabilities from coming into contact with sex offenders by informing relevant employers, licensing authorities and childcare authorities that a particular person is listed on the Register.¹⁶

34. It is worth noting that a number of adverse consequences flow from having one's particulars entered on the Register. Section 41(1) of the Sexual Offences Act provides:

"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 has been dealt with in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977 whether committed before or after the commencement of this Chapter, whether committed in or outside the Republic, and whose particulars have been included in the Register, may not –

(a) be employed to work with a child in any circumstances;

(b) hold any position, related to his or her employment, or for any commercial benefit which in any manner places him or her in any position of authority, supervision or care of a child, or where he or she gains access to a child or place

¹⁵ Section 42(1).

¹⁶ Section 43.

where he or she gains access to a child or place where children are present or congregate;

(c) be granted a license or be given approval to manage or operate any entity, business concern or trade in relation to supervision over or care of a child or where children are present or congregate; or

(d) become foster parents, kinship care-giver, temporary safe care – giver or adoptive parent of a child.”

35. Accordingly an employer may not employ a person who is listed on the Register. Similarly, a licensing authority may not grant a license or approve the management or operation of an entity, business concern or trade relating to the supervision or care of children or persons with mental disabilities without determining whether or not the applicant for the license is listed on the Register. A relevant authority may not consider or approve an application of a person for appointment as a foster parent, kinship care-giver, temporary safe care-giver or adoptive parent without first determining whether the applicant is listed on the Register.

36. The Act has implications for the contraventions in respect of employers, licensing authorities or child care authorities as criminal sanctions can be imposed.

37. An offender is obliged under criminal threat of sanction to disclose any previous sexual offences against children or persons with mental disabilities to an employer, licensing authority and or child care authority even when they are no longer on the Register¹⁷.

38. Once a person is captured on the Register, a person's particulars may only be removed in limited circumstances. In terms of section 51(2), two circumstances exist in terms of which a person's details may never be removed from the Register. This applies to persons sentenced to a period of imprisonment of over 18 months or who have two or more convictions of a sexual offence against a child or mentally disabled person.

Constitutional Challenge to Section 50(2) of the Sexual Offences Act: J v NDPP Case

39. Before dealing with the key finding in this case it is perhaps prudent to summarize the facts of the case.

¹⁷ Section 47(2).

40. The Applicant J, was charged with the rape of a seven year old boy and two six year old boys in contravention of section 3 of the Sexual offences Act. He was charged further with assault with the intent to do grievous bodily harm for stabbing a 12 year old girl. J was 14 years old at the time of the commission of the offences.
41. In the Magistrates Court proceedings he was assisted by his mother and represented by a legal representative. He pleaded guilty to all four charges and was accordingly convicted. In respect of the three counts of rape he was sentenced to five years compulsory residence in the Child Youth Care Centre and a further three years imprisonment thereafter. In respect of the assault (GBH) charge he was given a suspended sentence of six months imprisonment. In addition the Magistrates' Court made an order in terms of section 50(2) of the Sexual Offences Act that the applicant's particulars be entered in the Register.
42. The matter came to the Constitutional Court from the High Court where it came on automatic review¹⁸ in terms of the Child Justice Act 75 of 2008. The High Court on its own accord raised the question 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 the Sexual Offences Act if regard is had to the provisions of sections 2, 3 and 4 of the [Child Justice Act] dealing with the objects of the Act, as well as section 28 of the Constitution.*"
43. The Full Bench¹⁹ held that section 50(2) of the Sexual Offences Act may violate the child offender's rights by requiring the particulars of a child offender to be included in the Register. The High Court went further, however, to hold that "*because of the consequences and impact of the inclusion of an offender's name in the Register, the rights of such offender ... whether a child or an adult, would indeed be violated.*" The High Court declared that Section 50(2) of the Sexual Offences Act is invalid and inconsistent with the Constitution, insofar as it does not allow the court to inquire and decide after affording the accused an opportunity to make representations, whether or not the particulars of the

¹⁸ Section 85(1)(a).

¹⁹ *S v JJ* 2013 (2) SACR 599 (WCC).

accused should be included in the National Register. The Constitutional Court had to confirm this finding.

44. The High Court pronounced on the constitutionality of the section 50(2) of the Sexual Offences Act as it pertains to both adults and children regardless of the fact that the case before it dealt solely related to a minor. It is however worth noting that the Constitutional Court in effect pronounced on the constitutionality of Section 50(2) only as it pertains to children because it was argued before the Court that *"...a similar challenge to the rights of adult might not withstand constitutional scrutiny...."*
45. The Constitutional Court ordered that the High Court findings to be set aside and replaced with the following:
- a. Section 50(2)(a) of the Sexual Offences Act was declared to be inconsistent with the Constitution and invalid to the extent that it unjustifiably limits the right of child sex offenders which requires their best interest to be of paramount importance.
 - b. The declaration of invalidity was suspended for a period of 15 months from the date of this order to afford Parliament the opportunity to correct the defect in the light of this judgment.

Key Findings in the J v NDPP Case²⁰

46. The Constitutional Court had to grapple with and decide on whether the provisions of section 50(2)(a) infringed the rights of the child. In answering this question the Court outlined the following principles:

- 59.1 **The Best Interests of the Child:** The Court stated that starting point when dealing with matters concerning the child is section 28(2) which states that *"a child's best interests are of paramount importance in every matter concerning the child."* The Court further held that the "best interest" or "paramountcy" principle creates a

²⁰ *J v National Director of Public Prosecutions and Another* [2014] ZACC 13 (hereinafter referred to as "*J v NDPP*").

right that is independent and extends beyond the recognition of other children's rights in the Constitution.

- 59.2 **A child is a person developing and capable of change:** and this is encapsulated in the principle of the best interests of the child. The child is in need of nurturing to enable him/herself to determine and develop to his/her fullest potential and to develop a moral compass. The Court emphasized the developmental impetus of the best interest principle in securing children's rights to grow and learn how they should conduct themselves and make choices in the wide and moral world of adulthood. The Court noted that The Child Justice Act affirms the moral malleability or reformability of a child offender.
- 59.3 **The law should generally distinguish between child and adult offenders:** However, section 50(2) in its current form, applies generally and makes no distinction between adult and child offenders.
- 59.4 **An individual approach:** An individual approach regarding the placement of names on the register should be followed and this approach must be sensitive children's rights and their malleability. The best interests standard should therefore be flexible in order to allow individuals' circumstances to determine which factors guarantees that the best interests of a particular child are secured. Such individualized justice the Child Justice Act, and the guiding principles need to be taken into account in implementing criminal justice concerning children. The individualised circumstances include that all *"consequences arising from the commission of an offence by a child should be proportionate to the circumstances of the child, the nature of the offence and the interest of society."*²¹ The Court also emphasised that the child or his/her legal representative must be afforded an appropriate and adequate opportunity to make representations and to be heard at every stage of the justice process, giving due weight to the age and maturity of the child.²²

²¹ Section 3(a) of the Child Justice Act.

²² *C and Others v Department of Health and Social Development, Gauteng, and Others* 2012 (2) SA 208 (CC)

Draft Criminal Law (Sexual Offences and Related Matters) Amendment Bill

- 60 We note that the amendment Bill only relates to child sex offenders. The purpose of the amendment is *"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, to provide for a procedure in terms of which certain persons may apply for the removal of their particulars from the National Register for Sex Offenders; and to provide for matters connected therewith."*
- 61 We note that the proposed amendments to section 46, 47 and 48 of the Sexual Offences Act comprehensively include and extend the application of the Act in order to eliminate any ambiguity or confusion that could be relied upon in potentially arguing whether the sections are applicable in certain cases.
- 62 The proposed amendment of section 50(2) should also seek to give effect to the Constitutional Court Order in *J v NDPP* in order to outline how child sex offenders should be dealt with in respect of the Register. Section 7 of the draft Bill aims to amend section 50(2) of the Sexual Offences Act, by extending discretionary powers to Magistrates when making an order that would place the child offender's name onto the Register. The amendment seeks to mandate a Magistrate to inform a child sex offender or the offender who was a child at the time of the commission of the offence, that an order can be made to have his/her name captured on the Register.
- 63 The Magistrate is obligated to explain the content and the implications of the order placing the child on the register. The provision for the Magistrate receiving and considering an assessment report compiled by a psychologist, psychiatrist or social worker prior to making any order which appeared in Draft Bill-2014 has now been removed. There is provision for the child offender being allowed an opportunity to make representations as to why such an order should not be made.
- 64 Section 8 of the draft Bill seeks to amend s 51 of the Act in order to give effect to what is in essence Part B of the Constitutional Court order in *J v NDPP*, where the Court ordered that a Report be produced which listed the number of persons whose particulars appeared on the National Register who were children at the time of the commission of the sexual offence, the offence which they were convicted off, the details of the Court where they

were convicted as well as the dates on which such orders were made. The Court specifically requested this detail in order to salvage the rights of children whose details have already been on the Register contrary to the principles set out above. This implies that the Court was also concerned with the children whose details already appeared on the Register. However, this should not be construed as the Constitutional Court acting retrospectively but merely the Court wishing to assess the extent of the impact of the Court's order.

Suggested Amendments

- 65 Based upon our reading of the judgment and the order, we wish to make the following submissions and recommendations on how the draft Bill can be improved in order to ensure that the constitutional precepts enunciated in the *J v NDPP* judgment are adhered to.
- 66 We do so having regard to the processes of inclusion and removal of a child offender's name from the Sexual Offences Register. Such processes, to comply with *J v NDPP*, should adhere to the child's best interests standard in respect of both the child offender and the complainant. Further, we submit that such processes can and should be integrated into the existing monitoring and assessment mechanisms provided for in the Child Justice Act (being amended accordingly). Our submissions below are made with a view to streamlining the process and reducing ambiguity in respect of both pieces of legislation.

Submissions concerning inclusion in the National Register of Sex Offenders (s 50)

- 67 We note that s 7 of the draft Bill has now amended s 50(2)(c)(i) of the principal Act to include the word "child". In light of the proposed amendments made to s 1, we find that this ensures uniformity and clarity in the reading of the Act.
- 68 We submit that the proposed draft amendment to s 50(2) of the Act which concerns inclusion in the Register falls short as it fails to protect the rights of child offenders adequately and does not take into account the necessary principles and guidelines explored by the Constitutional Court and specified in s 69 of the Child Justice Act. Further, we submit that it does not sufficiently cohere with existing processes provided for by the Child Justice Act.

69 In light of the above, we suggest the following:

- (a) One of the key elements is the wording of section 50(2)(a) which includes the word "**must**". This presumes that the presiding officer has no option but to include the child's name on the National Register of Sex Offenders. As we pointed out in our submission made to the Department of Justice and Constitutional Development in relation to Bill B-2014, our reading of the judgment is that the wording must be of such a nature that the presumption should favour the child offender, as this will recognise that a child is a vulnerable member of society, an individual who is capable of rehabilitation and who can change the course of his/her future.²³ Based on this interpretation, the wording of the section should clearly favour an approach where the presumption is that the name of a sex offender does not or should not be recorded unless there are exceptional circumstances which would compel the child's name to be added to the Register.
- (b) The decision as to the existence of such circumstances should be taken, by the Presiding Officer, during sentencing with assistance, not only of submissions by the child offender, as provided for by the new subsection (c), but also, with the assistance of a pre-sentencing report from the Probation Officer. It is our submission that when the request for the Probation Officer's report is made by a Court in terms of s 71(1) of the Child Justice Act, the Presiding Officer must note the possibility of including the child's name in the Register. The Probation Officer's report, prepared in terms of s 71(2) should then include a recommendation regarding whether or not the child's name should be included with reasons justifying this decision. The requirement for such report may either be specified in regulations pursuant to s 97(1) of the Child Justice Act or through the addition of such requirement to s 71(2) of the Child Justice Act.
- (c) In view of the above, we submit that section 71(1)(b) of the Child Justice Act should be amended to preclude a court from dispensing with a pre-sentencing report in cases concerning sexual offences, including statutory sexual assault and statutory rape in terms of sections 15 and 16 of Sexual Offences Act. We submit that s 71(1)(b) should read as follows:

²³ *J v NDPP* para 42.

"A child justice court may dispense with a pre-sentence report where a child is convicted of an offence referred to in Schedule 1 or where requiring the report would cause undue delay in the conclusion of the case, to the prejudice of the child, but no child justice court sentencing a child may impose a sentence involving compulsory residence in a child and youth care centre providing a programme referred to in section 191(2)(j) of the Children's Act, imprisonment or a sentence involving inclusion on the National Register of Sex Offenders in terms of s 50 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, unless a pre-sentence report has first been obtained."

(d) We submit further that s 50(2)(a) of the Sexual Offences Act should read:

"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) Made a finding and given a direction in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977, that the person is by reason of mental illness or mental defect not capable of understanding the proceedings so as to make a proper defence or was, by reason of mental illness or mental defect, not criminally responsible for the act which constituted a sexual offence against a child or a person who is mentally disabled, in the presence of that person,

may, subject to paragraph (c) and having regard to the child's best interests and taking into account the findings and recommendations of the Probation Officer,
make an order that the particulars of the person be included in the Register.

(e) We submit that the vehicle for facilitating the process is already in place in terms of the Child Justice Act, and that through this proposed process the presiding officer will have all the necessary information in order to make an informed decision about the sentencing of the child offender, but also whether the child offender needs to be added to the Register.

Submissions concerning removal of name from the National Register of Sex Offenders (s 51)

- 70 We note that in *J v NDPP*, the Constitutional Court held 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...*”²⁴ In our submission to the Department of Justice and Constitutional Development, we noted, in relation to B-2014, that the suggested inclusion of section 51(2A)(a)(i) for an assessment report by a psychologist, psychiatrist or social worker must come with clearer guidelines in respect of the content of the report. We note that, rather than addressing concerns about the contents of such report, this provision has now been entirely removed.
- 71 We note further that the Bill provides for a court application for removal from the Register. We welcome this proposed amendment to the previous draft. However, we note that the criteria for removal from the Register emphasise recidivism and rehabilitation only and do not adequately provide for the balance required between the best interests of the child offender and other children and mentally disabled persons at risk. It is our submission that guidelines should provide specifically for ensuring that the factors and circumstances warranting inclusion on the Register no longer exist. Such criteria should include reference to the “best interests” standard and be stated clearly in the legislation, particularly as, to date, children remain on the Register who may seek removal in the near future.
- 72 In this regard we make two submissions. The first seeks to integrate reporting requirements into the processes for monitoring child offenders provided for in the Child Justice Act and to provide for an automatic review process. Again our proposals seek to utilise and extend existing legislation provisions.
- 73 The second seeks to elaborate on the report provided for by Bill-2014 in instances where a child should seek removal from the Register before the automatic review process is initiated. These submissions are made on the understanding that inclusion of the child’s name on the Register is a possible sentence where a person has been convicted of a sexual offence.

²⁴ *J v NDPP* para 36.

- 74 Six different sentencing options are provided for in sections 72-77 (inclusive) of the Child Justice Act. Probation Officers' monitoring reports are required in respect of community-based sentences (s 72), restorative justice sentences (s 73) and sentencing to a fine or alternative to fine (s 74). No such monitoring processes are provided for sentences involving correctional supervision (s 75), sentences of compulsory residence in child and youth care centre (s 76) and sentences of imprisonment (s 77).
- 75 It is our submission that, in respect of conviction of any sexual offence, monitoring processes by the appropriate official should be extended to include those sentences as outlined above in the Child Justice Act and that recommendations for removal should be included in Probation Officer's reports generated through such monitoring processes. The text of the Child Justice Act as it stands can accommodate such intervention in relation to community-based sentences (s 72(2)(a)), restorative justice sentences (s 73(4)(a)) and sentences to a fine or alternative to a fine (s 74(3)(a)). We would submit that, to ensure uniformity in cases of inclusion in the National Register that the following be inserted into s 69 of the Child Justice Act:

"(e) When deciding to include a child's name on the National Register of Sex Offenders in terms of s 50(2) of the Criminal Laws (Sexual Offences and Related Matters) Amendment Act 32 of 2007, a Court shall provide that a social worker monitors the child, providing regular reports to the Court throughout the duration of the sentence. Such report shall make recommendations as to the continued need for the child's name to be included on the Register."

- 76 We submit that such processes will allow for an almost automatic review of inclusion of the child's name on the Register, minimizing costs to the State and to the child offender, and ensuring that the best interests of the child is at the forefront of the provision.
- 77 We submit that, in practice, where a child wishes to apply (through an administrative process that can be provided for through regulations) for removal from the Register him or herself, such monitoring reports must be considered by the Presiding Officer in determining whether it is in the best interests of the child to have the name removed or if it serves society better to have the name remain. This will provide comprehensive guidance to the Presiding Officer in making his or her decision. We believe that this

process is crucial in order to ensure that the process does not, in practice, become merely an administrative function where neither the interests of the child offender nor the interests of society are served.

78 In light of the above, we submit that s 51(2A) of the Sexual Offences Act should read:

“(2A)(1) A person falling into the categories contemplated in subsection (1), who was a child at the time of the commission of the offence concerned, may, at any time before the expiration of the periods referred to in subsection (1), apply to the court referred to in section 50(2)(c) for an order that his or her particulars must be removed from the Register by –

(a) Addressing the court on the reasons for such application and showing good cause why it is in his or her best interests to be removed therefrom, including why he or she has been rehabilitated and is unlikely to commit another sexual offence against a child or a person who is mentally disabled, as the case may be; and

(b) Submitting to the court an affidavit by him or her stating that no charge relating to a sexual offence against a child or a person who is mentally disabled, as the case may be, is pending against him or her.

(c) Submitting a report compiled by the child’s Probation Officer, head of child and youth care centre or person otherwise deemed suitable by the Court, to the effect that the person concerned has been rehabilitated, is unlikely to commit another sexual offence against a child or a person who is mentally disabled, as the case may be and that, where the person is still a child, that it is in the best interests of the child to have his or her name removed from the Register.

(2) The Court must, after having considered the application and if satisfied that that the person is unlikely to commit another sexual offence against a child or a person who is mentally disabled, as the case may be, that there is no charge relating to a sexual offence concerned pending against him or her and, where the person is a child, that it is in the child’s best interests, remove the particulars of the person contemplated in paragraph (a) from the Register.

79 Lastly, we note that section 10 of the draft Bill provides for the enactment of regulations regarding the procedure to be followed in respect of applications for removal from the Register. We submit that such regulations, which the Minister "may" make, should be gazetted as soon as possible to avoid undue delays with applications for removal from the Register, given that child offenders who are currently affected by their inclusion on the Register may continue to be prejudiced unjustly.

ENDS