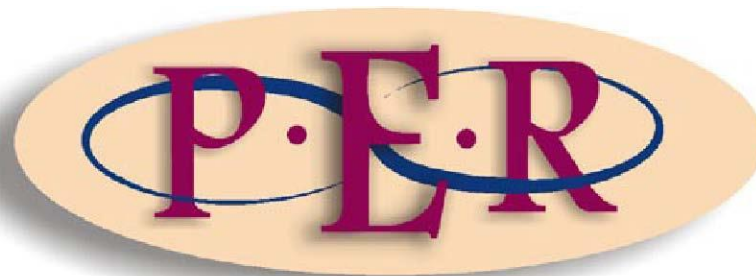


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ISSN 1727-3781



**2014 VOLUME 17 No 6**

<http://dx.doi.org/10.4314/pelj.v17i6.15>

**PROTECTING THE VULNERABLE? ASSESSING THE CONSTITUTIONALITY  
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**P Stevens\***

## **1 Introduction**

Johnnie is a registered sex offender. When he was eleven he touched his four-year-old half-sister's vagina (over her underwear). A few months later, she performed oral sex on him at his request. Johnnie's mother found out. She called the police and Johnnie spent sixteen months in a residential juvenile sex offender program; where he successfully completed treatment. When he was released, Johnnie's mother wanted nothing to do with him, so he ended up living with his grandmother. Two months after he started a new middle school, someone found Johnnie on the state's internet sex offender registry. Two days later, Johnnie walked into oncoming traffic and told a police officer he wanted to die. He transferred to an alternative school for juvenile delinquents. Even there, the harassment continued. Some of the other boys confronted Johnnie on the school bus, calling him a sex offender and yelling: "You tried to rape your sister!" As a result of anger and depression, Johnnie has twice been admitted to psychiatric hospitals. Not only is Johnnie suicidal, but when he transferred to yet another school and the harassment continued, he told a counsellor that he wanted to kill another student for taunting him. Johnnie knows what he did to his sister was wrong and continues to feel guilty about it. Johnnie has never committed another sex offence. Nevertheless his name, photo, address, and school information continue to appear on the internet registry where they will likely remain for the rest of his life.<sup>1</sup>

This article examines the legal framework underpinning the Register for Sex Offenders, with specific reference to recent judgments pronouncing on the

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<sup>1</sup> Jones 2007 [http://www.nytimes.com/2007/07/22/magazine/22juvenile-t.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2007/07/22/magazine/22juvenile-t.html?pagewanted=all&_r=0) as quoted in Brown 2010 *Stetson L Rev* 369.

constitutionality pertaining to the automatic inclusion of the names of child sex offenders in the Register. The above quotation describes the devastating and prolonged consequences to a specific young person officially listed as a sex offender against children. It also serves to set the stage for the theme of discussion in this contribution, which deals with the constitutionality of the National Register of Sex Offenders with specific reference to juvenile sex offenders.

The *Criminal Law (Sexual Offences and Related Matters) Amendment Act*<sup>2</sup> came into operation on 16 December 2007. One of the main focal points of SORMA is that it provides for comprehensive new crimes relating to sexual acts perpetrated against children and mentally disabled persons. The preamble of SORMA specifically emphasises 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 addition, SORMA provides for the establishment of a National Register of Sex Offenders.<sup>3</sup> The aim behind 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.<sup>4</sup> 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.<sup>5</sup>

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

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<sup>2</sup> *Criminal Law (Sexual Offences and Related Matters) Amendment Act* 32 of 2007 (hereinafter referred to as "SORMA"). See also Snyman *Criminal Law* 353; Snyman *Strafreg* 365; Smythe, Pithey and Artz *Sexual Offences* 1-1; Burchell *Principles of Criminal Law* 624.

<sup>3</sup> See Ch 6 of SORMA (hereinafter referred to as "the Register").

<sup>4</sup> Smythe, Pithey and Artz *Sexual Offences* 1-2.

<sup>5</sup> See for example ss 41-49 of SORMA.

against a child or a person who is mentally disabled *must* make an order that the particulars of the person are to be included in the Register.<sup>6</sup>

At first glance it seems as if the aims behind the Register are sound and specifically promote the best interests of the two vulnerable groups that SORMA seeks to protect, namely children and mentally disabled persons.<sup>7</sup> The reality, however, is that the Register does not create age categories for the inclusion of names on the Register. A distinction is therefore not drawn between adult offenders and juvenile offenders. As section 50 places an obligation upon courts that have convicted persons of offences against children to make an order that the person's details be entered on the Register, no opportunity is afforded to make representations or arguments as to why such a person's details should not be included in the Register. As such, a child who has committed a sexual offence against another child will inevitably run the risk of having his or her details placed on the Register should he or she consequently be convicted of such an offence. The decision under discussion is of particular relevance as the court was required to assess the constitutionality of the provisions relating to the Register with specific reference to juvenile sex offenders. In this contribution, the judgment delivered in the trial court and the consequent ruling of the Constitutional Court are discussed in order to elucidate the theme under discussion.

## 2 Facts

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>8</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 seven, by anally penetrating them. In addition he was charged with assault with the intent to do grievous bodily

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<sup>6</sup> See s 50(1) and (2) of SORMA.

<sup>7</sup> The current discussion will focus on juvenile offenders, and mentally disabled persons as a category will consequently not be addressed.

<sup>8</sup> *Child Justice Act* 75 of 2008 (hereinafter referred to as the "CJA"). Also see para 2-8 of *J v National Director of Public Prosecutions* 2014 ZACC 13 (6 May 2014) (hereinafter referred to as "*J v NDPP*").

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 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, if it was competent for the court to make an order in terms of section 50(2) of SORMA if proper cognisance was taken of the provisions of subsections 2, 3 and 4 of the CJA as well as section 28 of the *Constitution*.<sup>9</sup>

### **3 The Register – a synopsis**

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>10</sup> The object of the Register is to protect children and persons who are mentally disabled against sex offenders.<sup>11</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*

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<sup>9</sup> *Constitution of the Republic of South Africa*, 1996 (hereinafter referred to as the "*Constitution*"). See para 4 of *J v NDPP* above.

<sup>10</sup> See also Smythe, Pithey and Artz *Sexual Offences* 17-15.

<sup>11</sup> It is to be noted that the Register in terms of SORMA differs from the National Child Protection Register provided for in the *Children's Act* 38 of 2005 (hereinafter the "*Children's Act*") as the Child Protection Register deals with the abuse and neglect of children whereas the Register pertains specifically to sexual offences against children. See Smythe, Pithey and Artz *Sexual Offences* 17-3. Also see n 5 above for a comprehensive exposition of the objects of the register.

*Procedure Act*<sup>12</sup> and whose particulars have been entered in the Register may not be employed to work with children in any circumstances and may not 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 provides 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 over or care of a child, or become a foster parent, kinship caregiver, temporary safe care-giver or adoptive parent of a child.<sup>13</sup> The primary objective of the Register is to protect children and mentally disabled persons from sex offenders by recording the details of these sexual offenders and informing employers, licensing authorities and entities dealing with the care and adoption of children whether 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>14</sup>

In terms of section 40 the term "employer" refers to persons who employ employees who in any manner during the course of their employment who will be placed in a position to work with a child or in a position of authority, supervision or care of a child or will gain access to a child or places where children are present or congregate.<sup>15</sup> The latter definition applies to government departments in all spheres of government, a private person, organisation, institution, club or sports club or association. In addition, it also applies to anyone who owns, manages, operates, has any business or economic interest in, or is in any manner responsible for, or participates or assists in any entity, business or trade relating to the supervision of a child or who works with or gains access to a child. The words "employ", "employed" and "employment relationship" have corresponding meanings. A "licensing authority" is defined as "any authority which is responsible for the granting of licenses approving the management or operation of any entity, business concern or trade relating to the supervision over or care of a child or a person who is mentally disabled". A "relevant authority" refers to any department of state or administration in the national or provincial sphere of government or any municipality in the local

<sup>12</sup> *Criminal Procedure Act* 51 of 1977 (hereinafter referred to as the "CPA").

<sup>13</sup> Section 41(1)(c)-(d) of SORMA. Also see Smythe, Pithey and Artz *Sexual Offences* 17-11-17-12.

<sup>14</sup> Smythe, Pithey and Artz *Sexual Offences* 17-18-17-19.

<sup>15</sup> See s 40 of SORMA.

government sphere, or other functionary or institution when exercising a power or performing a duty in terms of the *Constitution*, which is tasked with considering applications from prospective foster parents, kinship care-givers, temporary safe care-givers, adoptive parents or curators. Section 44 of SORMA sets out a number of persons or authorities who are entitled to apply for a certificate indicating whether or not the particulars of a person mentioned in the application have been included in the Register. In terms of section 47(1) a licensing authority is obliged not to grant a licence to or approve the management or operation of any entity, business concern or trade in relation to the supervision over or care of a child without having determined from the registrar whether or not the particulars of such a person have been included or recorded in the Register. In terms of section 47(3) any licensing authority who intentionally contravenes section 47 is guilty of an offence. In terms of section 48(1) a relevant authority may not consider an application of a person as a foster parent, kinship care-giver, temporary safe care-giver, an adoptive parent or curator without having determined, by way of application, whether or not the particulars of such a person have been recorded in the Register.

Section 46 provides that an employee in the employ of an employer, who is or was convicted 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 sub-sections 77(6) or 78(6) of the CPA, must disclose such conviction or finding to his or her employer. The latter obligation similarly applies if such a person wishes to apply for a licence in terms of section 47(1) to manage or operate any business, entity or trade in relation to the supervision or care of a child or a person who is mentally disabled. In terms of section 48(2) a similar obligation to disclose exists if such a person applies to become a foster parent, kinship care-giver, temporary safe care-giver, an adoptive parent or a curator. In terms of section 45(2) an employer shall, subject to subparagraph (d), not continue to employ an employee whose particulars are recorded in the Register. An employer is similarly obliged to terminate a person's employment should he or she fail to disclose a conviction of sexual assault against a child. An employer must in addition, in terms of section 45(2)(d), take reasonable steps to prevent an employee whose particulars have been entered into the Register from

continuing to gain access to a child in the course of his or her employment. Such a person may also be transferred from his or her current post or position to another post or position. Section 45(3) provides that an employer who fails to comply with the provisions of section 45 is guilty of an offence. Similarly, an employee who fails to disclose that he or she has been convicted of, or has been alleged to have committed a sexual offence against a child or mentally disabled person, and who has been dealt with in terms of sub-sections 77(6) or 78(6) of the CPA, is guilty of an offence.<sup>16</sup>

Section 49(b) provides that the personal particulars of the person whose name must be entered into the Register should be recorded, as well as the following information:

- (i) the sexual offence against the child or mentally disabled person in respect of which the offender was convicted;
- (ii) the sentence imposed and the date and place of conviction and sentence;
- (iii) the court where the trial took place and the case number;
- (iv) where it is alleged that a person has committed a sexual offence and had been referred to a medical institution in terms of the provisions of sub-sections 77(6) or 78(6) of the CPA, the name of that institution should also be recorded.

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

Persons whose names must be included in Register and related matters

(1) 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.

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<sup>16</sup> See ss 45-46 of SORMA. Also see Smythe, Pithey and Artz *Sexual Offences* 17-21-17-30.



Section 51 deals with the removal of the particulars of a person from the Register. A person's particulars may be removed from the Register only in the following circumstances:

... a person -

(a) who-

(i) has been sentenced for a conviction of a sexual offence against a child or a person who is mentally disabled to a term of imprisonment, periodical imprisonment, correctional supervision or to imprisonment as contemplated in section 276(1)(i) of the Criminal Procedure Act, 1977, without the option of a fine for a period of at least six months but not exceeding eighteen months, whether the sentence was suspended or not, may, on application as contemplated in subsection (3), be removed from the Register after a period of ten years has lapsed after that person has been released from prison or the period of suspension has lapsed;

(ii) ...for a period of six months or less, whether the sentence was suspended or not, may, on application as contemplated in subsection (3), be removed from the Register after a period of seven years has lapsed after that person has been released from prison or the period of suspension has lapsed; or

(iii) is alleged to have committed a sexual offence against a child or a person who is mentally disabled in respect of whom a court, whether before or after the commencement of this Chapter, has made a finding and given a direction in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977, may, on application as contemplated in subsection (3), be removed from the Register after a period of five years has lapsed after such person has recovered from the mental illness or mental defect in question and is discharged in terms of the Mental Health Care Act, 2002 (Act 17 of 2002), from any restrictions imposed on him or her ...

Section 51(2) provides that the particulars of a person who has:

(a) been sentenced for a conviction of a sexual offence against a child or a person who is mentally disabled to a term of imprisonment, periodical imprisonment, correctional supervision or to imprisonment as contemplated in section 276(1)(i) of the Criminal Procedure Act, 1977, without the option of a fine for a period exceeding eighteen months, whether the sentence was suspended or not; or

(b) two or more convictions of a sexual offence against a child or a person who is mentally disabled,  
may not be removed from the Register.

In terms of the provisions of section 52, the information contained in the Register is confidential. This information may not be disclosed by the Registrar or any other person who assists the Registrar, except for the purpose of giving effect to the

provisions of Chapter 6 of SORMA, or when required to do so by any competent court.<sup>17</sup>

#### 4 The arguments advanced in the High Court

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>18</sup> The latter is specifically true with reference to the *Constitution* as well as the CJA, where a restorative justice and reconciliation approach is promoted in respect of child offenders. It was further argued that in terms of section 50(2), there was no discretion afforded to a court to decline to make an order that the particulars of an accused be entered into the Register.<sup>19</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>20</sup> These peremptory 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>21</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>22</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>23</sup> It was noted that the obligation of courts to include the particulars of a child offender fails to take note of

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<sup>17</sup> See s 52 of SORMA. Also see Smythe, Pithey and Artz *Sexual Offences* 17-14-17-42. S 52(4) of SORMA specifically provides that any person who wilfully discloses or publishes any information is guilty of an offence.

<sup>18</sup> *S v JJ* 2013 2 SACR 599 (WCC) para 52 (hereafter *S v JJ*).

<sup>19</sup> *S v JJ* para 53.

<sup>20</sup> *S v JJ* para 55.

<sup>21</sup> *S v JJ* para 56.

<sup>22</sup> *S v JJ* para 57.

<sup>23</sup> *S v JJ* para 57. 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."

the long-term effects of such an inclusion on the child offender.<sup>24</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 flew in the face of the guarding principles provided for in section 3 of the CJA, which stipulated 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>25</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>26</sup> The *amicus curiae* agreed with the arguments advanced on behalf of the accused, argued that the provisions of section 50(2) are not reasonable and justifiable, and submitted that the impugned provision was not adequately connected to its purpose, as the state had not indicated that children who committed sexual offences against their peers necessarily became adult sex offenders who preyed on children.<sup>27</sup>

It was further 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 purposes of section 50(2) could include every offence from rape to kissing.<sup>28</sup> The *amicus curiae* further emphasised that a conviction on more than one sexual offence (irrespective of its seriousness) renders an offender's particulars to be entered in the Register for the rest of his or her life.<sup>29</sup> On behalf of the Minister it was argued that the provisions of the impugned section that creates the Register are intended to protect children from sexual predators.<sup>30</sup> It was argued that the inclusion of an accused's particulars in the Register therefore 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>31</sup> It was stated that the inclusion of the accused's particulars in the Register does not fall short of the reconciliatory approach as provided for in the CJA and it does not

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<sup>24</sup> *S v JJ* para 59.

<sup>25</sup> *S v JJ* para 60.

<sup>26</sup> *S v JJ* para 64.

<sup>27</sup> *S v JJ* para 75.

<sup>28</sup> *S v JJ* para 79,

<sup>29</sup> *S v JJ* para 81.

<sup>30</sup> *S v JJ* para 83.

<sup>31</sup> *S v JJ* para 85.

offend any provisions of the *Children's Act*.<sup>32</sup> It was, in addition, argued on behalf of the Director of Public Prosecutions that an order resulting in the name of a child offender being entered into the Register would not be unconstitutional, nor would it offend the spirit and purport of the CJA.<sup>33</sup>

## 5 Judgment in the High Court

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>34</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>35</sup> It was held that the provisions of section 50(2) in requiring the particulars of a child sexual offender who has committed a sexual offence against another child to be included in the Register may violate the child offender's rights. These rights may be limited by a law of general application only, and the limitation must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.<sup>36</sup> It was held 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, that 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>37</sup> In respect specifically of the insertion of a child offender's details into the Register, Henney J held as follows.<sup>38</sup>

A child offender cannot be less of a sex offender merely because such an offender is a child. Such an offender will remain a sex offender, irrespective of whether such a person's particulars will be included in the Register or not. The mere fact that an offender is a child sex offender, in my view, is not sufficient justification *per se* for not having such a person's particulars entered into the Register. Under certain circumstances it may well be that entering such details is a reasonable and justifiable limitation of the rights of such an offender and this would be especially so where such a child sex offender might reasonably pose a threat or harm to

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<sup>32</sup> *S v JJ* para 87.

<sup>33</sup> *S v JJ* para 93.

<sup>34</sup> *S v JJ* para 94.

<sup>35</sup> *S v JJ* para 96.

<sup>36</sup> *S v JJ* para 105.

<sup>37</sup> *S v JJ* para 111.

<sup>38</sup> *S v JJ* para 115.

children or mentally disabled persons. However, in my view, such decision to do so in the case of children has to be constitutionally compliant and has to be a measure of last resort, given the circumstances of any particular case.

It was held that in cases where a child has committed a serious sexual offence and there is a need to have the child's particulars entered into the Register and there is a concomitant need to counterbalance the rights of the child offender against the harm and danger such child offender could pose to victims of sexual abuse, the best interests and *paramountcy* principle of the child offender may be limited.<sup>39</sup> Henney, J expressed particular concern for the fact that section 50(2) is overbroad and as such provides that all sexual offenders who commit sexual offences against children must be included in the Register. In the latter regard Henney J stated the following:<sup>40</sup>

In my view, there may be particular circumstances, in a case involving a child sex offender and his or her child victim, that do not call for the inclusion of the former's details in the Register owing to the fact that the ultimate goal of protecting children against sexual abuse and exploitation is not served by such an approach. Considerations that may justify a decision to decline to include the details in the Register include the seriousness of the offence committed, the presence of the consent of both parties and the respective ages of the parties involved.

It was held that the lack of discretion granted to the presiding official together with the overbreadth 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>41</sup> Henney J expressed concern in respect of section 50(2) 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 this absence violates an offender's right to a fair hearing and the principle of *audi alteram partem*.<sup>42</sup> It was held that the failure to afford an offender the right to be heard before an order is made in terms of section 50(2) is 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>43</sup> It was stated by the court that section

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<sup>39</sup> *S v JJ* para 120.

<sup>40</sup> *S v JJ* para 121.

<sup>41</sup> *S v JJ* para 122.

<sup>42</sup> *S v JJ* para 126. Also see *De Beer v North-Central Local Council and South-Central Local Council* 2002 1 SA 429 (CC) para 11.

<sup>43</sup> *S v JJ* para 130.

50(2) offends 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. This problem could, however, be adequately addressed if the offender as well as the prosecution were to be afforded an opportunity to address the court as to whether it would be in the interests of justice to direct that the particulars of an accused person be entered into the Register.<sup>44</sup> Henney J accordingly held as follows:<sup>45</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 following order was consequently made by Henney J:<sup>46</sup>

(1) Section 50(2) of (SORMA) is declared 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 accused should be included in the Register.

(2) The declaration in para (1) shall not be retrospective and its effect shall be suspended for 18 months to afford the legislature an opportunity to amend section 50(2) so that it can be constitutionally compliant.

(3) During the period of suspension or until such sooner date as any amendments in para (2) above come into force, section 50(2) shall be deemed to read as follows:

2(a) A court that has in terms of the 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 ...

must subject to the provisions of paragraph (c), make an order that the particulars of the person be included in the Register.

(b) [When] Before making an order contemplated in paragraph (a) the court must explain the contents and the implications of the order, including section 45, to the person in question.

(c) Notwithstanding paragraph (a) above, a court contemplated in that paragraph, may on good cause shown direct that such person's particulars not be included in the Register and shall, before making an order in terms of paragraph (a) inform the convicted person of the court's power to make a direction under this paragraph (c) and afford him or her an opportunity to make representations as to whether such a direction should be made or not.

(4) This order is referred to the Constitutional Court for confirmation of the order of constitutional invalidity.

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<sup>44</sup> *S v JJ* para 133.

<sup>45</sup> *S v JJ* para 134.

<sup>46</sup> *S v JJ* para 137.

## 6 Judgment delivered by the Constitutional Court

The matter was consequently referred to the Constitutional Court for the purpose of confirmation of the order granted by the High Court. During the hearing before the Constitutional Court it was argued on behalf of the state respondents that although they did not in principle oppose the confirmation of the High Court's order, the order was overbroad for two reasons. Firstly it was argued that the order should have pertained to section 50(2)(a) only and not to section 50(2)(b) as well. Secondly it was submitted that the order granted by the High Court inadvertently extended to adult offenders and that the declaration of constitutional invalidity should have been limited exclusively to child offenders.<sup>47</sup> The *amici curiae*<sup>48</sup> supported the confirmation of the order of invalidity but argued that the High Court had erred by not finding that the provision unjustifiably infringed on the applicant's right in terms of section 28(2) of the *Constitution*, and argued further that individual assessments are pivotal in order to cure the defect in the provision.<sup>49</sup>

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>50</sup> The Constitutional Court specifically had to consider whether the order of constitutional invalidity should apply to both child and adult offenders. It was held, however, that the facts before the High Court dealt with the application of the provision to child offenders, that different considerations could apply to adult offenders, and that these had neither been canvassed before the court nor argued. It was 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>51</sup> It was further held that the ambit of the order of invalidity pertained only to section 50(2)(a), to the exclusion of section 50(2)(b).<sup>52</sup>

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<sup>47</sup> See *J v NDPP* para 12. Also see s 50(2)(b) of SORMA.

<sup>48</sup> Childline of South Africa, Teddy Bear Clinic for Abused Children and the National Institute for Crime Prevention and Reintegration of Offenders.

<sup>49</sup> See *J v NDPP* para 13.

<sup>50</sup> See *J v NDPP* paras 20-25. Also see *Teddy Bear Clinic for Abused Children v Minister of Constitutional Development* 2014 2 SA 168 (CC) para 57.

<sup>51</sup> See *J v NDPP* para 31.

<sup>52</sup> See *J v NDPP* para 32.

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>53</sup> The *amici curiae* argued that the section infringed upon the principle of the best interests of the child, as enshrined in section 28(2) of the *Constitution*.<sup>54</sup> It was held that the starting point in all matters concerning a child is section 28(2).<sup>55</sup> The latter was canvassed by Skweyiya ADCJ in stating:<sup>56</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. This 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 the child, catering for the individual circumstances in order to secure the best interests of a particular child. Thirdly, the child or his 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>57</sup>

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>58</sup> It was held by Skweyiya ADCJ as follows:<sup>59</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

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<sup>53</sup> See *J v NDPP* para 34.

<sup>54</sup> *J v NDPP* para 35.

<sup>55</sup> *J v NDPP* para 35.

<sup>56</sup> *J v NDPP* para 36.

<sup>57</sup> *J v NDPP* paras 37-40.

<sup>58</sup> *J v NDPP* para 41.

<sup>59</sup> *J v NDPP* para 42.



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 as flow from the provision may not always affect the child offender whilst still a child, but may do so later, in adulthood.<sup>60</sup> Skweyiya ADCJ held as follows:<sup>61</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*. With regard to whether the limitation was justifiable, Skweyiya ADCJ stated the following:<sup>62</sup>

There are less restrictive means to achieve the aims of the Register. Affording courts a discretion and the concomitant opportunity to the child offender to lead evidence and make argument on the question of registration would permit the possibility of greater congruence between the limitation and its purpose. Where a court decides on matters affecting children, discretion plays an important role in allowing for an individual response to meet the child's best interests.

It was held that the limitation of the right of child offenders contained in section 50(2)(a) was not justified in an open and democratic society and as such 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>63</sup>

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<sup>60</sup> *J v NDPP* para 43.

<sup>61</sup> *J v NDPP* para 44.

<sup>62</sup> *J v NDPP* para 50.

<sup>63</sup> *J v NDPP* para 57.

## 7 Assessment

The decision under discussion opens the door to a debate as to the desirability and effectiveness of the use of the Register in respect of juvenile sex offenders. One of the primary aims of SORMA 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 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 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) not affording child sex offenders an opportunity of making representations as to why his or her 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 reaffirmed 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.

It could be argued that in the case under discussion the court struck a balance between the rights of the offender to a fair trial on the one hand and the rights of the child victims and other potential victims of sexual offences by not banishing the Register *in toto*. The question which inevitably arises is if the Register is really effective and 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. For example, if a person is convicted of two or more sexual offences against a child or mentally disabled person, that person's details may not be removed from the Register.<sup>64</sup> "Sexual violation", for example, in terms of SORMA

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<sup>64</sup> See s 51(2)(b) of SORMA.

is defined in such a wide manner that it could include acts ranging from mere kissing or hugging to touching another person's genital organs. If for instance 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 of the SORMA are often not in sync with one another. The case under discussion indeed paves 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 their names being entered in the Register. The entire notion of the Register seems to be in direct conflict with the objects of the CJA, which are expressed in section 2 (of the CJA) as follows:

- (a) (to) protect the rights of children as provided for in the Constitution;
- (b) promote the spirit of ubuntu in the child justice system through-
  - (i) fostering children's sense of dignity and worth;
  - (ii) reinforcing children's respect for human rights and the fundamental freedoms of others b holding children accountable for their actions and safe guarding the interests of victims and the community;
  - (iii) supporting reconciliation by means of restorative justice response; and
  - (iv) involving parents, families, victims and, where appropriate, other members of the community affected by the crime in procedures in terms of this Act in order to encourage the reintegration of children;
- (c) provide for the special treatment of children in a child justice system designed to break the cycle of crime, which will contribute to safer communities, and encourage these children to become law abiding and productive adults;
- (d) prevent children from being exposed to the adverse effects of the formal criminal justice system by using, where appropriate, processes, procedures, mechanisms, services or options more suitable to the needs of children and in accordance with the Constitution, including the use of diversion, and
- (e) promote co-operation between government departments, and between government departments and the non-governmental sector and civil society, to ensure an integrated and holistic approach in the implementation of the Act.

It is submitted that making the provisions of the Register in terms of SORMA also applicable to juvenile offenders contradicts the goals of the CJA. The question then 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 has 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 the objects of the CJA as cited above. Research suggests that juvenile sex offenders have a generally lower overall recidivism rate for sexual offences than adult sex offenders.<sup>65</sup> Juvenile sex offenders, in addition, show lower recidivism rates when placed in treatment and rehabilitation programmes specifically tailored for juvenile offenders, as opposed to adult sex offenders.

Research accordingly indicates that juvenile sex offenders also have more potential for rehabilitation.<sup>66</sup> The general patterns of behaviour of juvenile sex offenders seem to be less embedded than those found in adult sex offenders.<sup>67</sup> The sexual behaviour of adult sex offenders tends to be more as a result of deeply ingrained pathology, whereas juvenile sex offenders appear to be more exploratory in their sexual behaviours.<sup>68</sup> 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>69</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>70</sup>

Some acts by juveniles may be part and parcel of innocent sexual experimentation as a result of growing up, but these offenders will nevertheless inevitably face the risk of a lifelong stigma when classified as sex offenders in the Register. Such inclusion could prove detrimental to the eventual rehabilitation of the juvenile sex

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<sup>65</sup> Geer 2008 *Dev Mental Health* L 40. See also Kokrda 2005 *Dev Mental Health* L 1-4.

<sup>66</sup> Geer 2008 *Dev Mental Health* L 41.

<sup>67</sup> Geer 2008 *Dev Mental Health* L 41.

<sup>68</sup> Geer 2008 *Dev Mental Health* L 41-42.

<sup>69</sup> Geer 2008 *Dev Mental Health* L 41.

<sup>70</sup> Geer 2008 *Dev Mental Health* L 42. Also see Shepherd 2006 *Criminal Justice* 53.

offender, who may therefore never become a productive member of society. Despite the fact that the decision under discussion is to be welcomed in the sense of exposing the unconstitutionality of section 50(2) of SORMA in respect of juvenile sex offenders specifically, the dilemma remains as to how to effectively remedy the problem. It is submitted that in respect of juvenile sex offenders, a more holistic approach should be adopted with due regard to the *Constitution*, the objects of the CJA, and the specific circumstances of the offence. It is notable that section 40 of the *Convention on the Rights of the Child*<sup>71</sup> specifically requires age-appropriate proceedings for juvenile offenders. As such, children should 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.

In the ultimate assessment of the efficacy of the Register in respect of juvenile sex offenders, it is submitted that there are two ways of approaching the problem. The first approach would entail repealing the provisions of the Register in respect of juvenile sex offenders and thus rendering the Register applicable to adult sex offenders only.

A second approach, as supported by the Constitutional Court judgment discussed above, would be to amend the provisions of SORMA in line with the order granted by Skweyiya ADCJ in the Constitutional Court decision under discussion, but also amending it in such a manner so as to render it more appropriate for juvenile sex offenders. An interesting feature of the judgment by Skweyiya ADCJ in the Constitutional Court judgment is the emphasis placed on an *individuated* response to juvenile sex offenders having due regard to each juvenile sex offender as an individual. The latter approach by the Constitutional Court is a welcome response catering for the specific circumstances of each child sex offender.<sup>72</sup>

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<sup>71</sup> *Convention on the Rights of the Child* (1989).

<sup>72</sup> This approach is in line with earlier judgments. See *S v M* 2007 2 BCLR 1312 (CC) para 37 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

It is submitted that a more holistic model should then be provided for in SORMA in respect of juvenile sex offenders with specific reference to assessing whether a juvenile offender's name should be placed on the Register. It is further suggested that SORMA should have built-in safeguards when dealing with juvenile sex offenders to cater specifically for the needs of juvenile sex offenders in order to also bring it in line with the objects of the CJA and the *Constitution*. In such a multi-faceted approach, provision could be made for individual risk assessment, the potential for reintegration, and the rehabilitation possibilities. Emphasis could be placed on each offender as an individual. The latter by no means detracts from the fact that juvenile sex offenders should be taken seriously. It is submitted, however, that when dealing with juvenile sex offenders a more individualistic approach should be followed having regard to the factors mentioned above. SORMA could, for example, provide for specific assessment procedures by qualified mental health experts when dealing with juvenile sex offenders in order to specifically assess the potential risk and danger of the offender to the community, and the possibility of rehabilitation and reintegration. The decision under discussion is to be supported for exposing the inherent unconstitutionality of section 50(2)(a) and the provisions of SORMA pertaining to the Register with specific reference to juvenile sex offenders. One can only hope that should this decision be constitutionally confirmed, the legislature will amend the provisions of SORMA in such a manner as to harmonise the provisions of SORMA with the objects of the CJA and the *Constitution*, catering for the specific needs and individual circumstances of juvenile sex offenders in line with the judgment of the Constitutional Court with specific reference to the emphasis the court placed on the need for an individuated response in respect of juvenile sex offenders.

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be contrary to the best interests of the child concerned." Also see *AD v DW* 2008 3 SA 183 (CC) para 55 where it was held: "Child law is an area that abhors maximalist legal propositions that preclude or diminish the possibilities of looking at and evaluating the specific circumstances of the case. ... This means that each child must be looked at as an individual, not as an abstraction ...".

## **8 Conclusion**

At the outset of this contribution the harsh and serious impact of having one's particulars entered into the Register was enunciated. The impact is exacerbated when juvenile sex offenders are at stake. The entering of a juvenile sex offender's details into the register could prove severely detrimental to the potential for rehabilitation, especially if the offender is very young at the time of the commission of the offence. It is submitted that a juvenile sex offender's details should be entered into the Register in exceptional circumstances only. The latter should be done against the backdrop of the decision by the Constitutional Court under discussion in terms of affording the offender the opportunity of addressing the court as to why his or her details should not be entered. It is submitted that ancillary to the latter, reports from mental health experts and/or testimony should be received in order to properly assess each case based on its own unique circumstances. Only if these safeguards are provided for in SORMA can it be said that the principle of the best interest of the child is being truly served.

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**LIST OF ABBREVIATIONS**

CJA	Child Justice Act 75 of 2008
CPA	Criminal Procedure Act 51 of 1977
Dev Mental Health L	Developments in Mental Health Law
SORMA	Sexual Offences and Related Matters Amendment Act 32 of 2007
Stetson L Rev	Stetson Law Review