

# The Constitutional Protection Afforded to Child Victims and Child Witnesses while Testifying in Criminal Proceedings in South Africa

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## Abstract

The protection of child victims and witnesses in the criminal justice system is of vital importance, as present-day research studies conducted on the victimisation of children in South Africa show that South African children in particular experience and witness exceptionally high levels of crime, and consequently represent a significant portion of the victims and witnesses that have to appear in court to testify about these crimes. This contribution consists of an in-depth discussion of the rights of the child victim and witness encompassed in the *Constitution of the Republic of South Africa*, 1996 in order to determine whether the current protection afforded to child victims and witnesses while testifying in criminal proceedings in South Africa is in line with South Africa's constitutional obligations. In this regard the general constitutional rights in the Bill of Rights relating to child victims and witnesses as well as the specific constitutional rights of child victims and witnesses in section 28 of the *Constitution* are discussed.

## Keywords

Protection of child victims and child witnesses; constitutional protection of child victims and child witnesses; children's rights; State obligations; section 28(1) of the *Constitution of South Africa*; section 28 (1)(d) of the *Constitution of South Africa*; section 170A of the *Criminal Procedure Act*; intermediary; secondary victimisation.

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## 1 Introduction

Children's rights in South Africa have undergone a significant change since 1994. This can be attributed *inter alia* to the enactment of a democratic Constitutional legal order, as the principles encompassed in both the *Interim Constitution of the Republic of South Africa*<sup>1</sup> and later the final *Constitution of the Republic of South Africa, 1996* (the *Constitution*) enhance the level of protection afforded to children in South Africa.<sup>2</sup> This also applies to the rights of child victims and child witnesses<sup>3</sup> in the criminal justice system.

Conversely, present-day research studies conducted on the victimisation of children in South Africa show that South African children in particular experience and witness exceptionally high levels of crime. The incidence of child rape and sexual assault upon minors, for example, has reached epidemic proportions.<sup>4</sup> Disturbingly, these studies also indicate a trend

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<sup>1</sup> *Constitution of the Republic of South Africa* 200 of 1993.

<sup>2</sup> Other aspects include South Africa's ratification and adoption of principal international instruments protecting the rights of children. See for example the *United Nations Convention on the Rights of the Child* (1989) (hereinafter referred to as the CRC), the *African Charter on the Rights and Welfare of the Child* (1990), the *Hague Convention on the Civil Aspects of International Child Abduction* (1980) and the *United Nations Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime* (2005). Due to the limited scope of this paper, this will not be addressed here.

<sup>3</sup> In terms of s 28(3) of the *Constitution of the Republic of South Africa, 1996* (hereinafter referred to as the *Constitution*) a child means a person under the age of 18 years. DOJ&CD *Service Charter for Victims of Crime* (hereinafter referred to as the Victims' Charter) defines a "victim" as a person who has suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of his or her fundamental rights through acts or omissions that are in violation of our criminal law. "Victims" include, where appropriate, the immediate family or dependants of the direct victim. A person may be considered a victim regardless of whether the perpetrator has been identified, apprehended, prosecuted or convicted and regardless of the familial relationship between perpetrator and victim. "Victim" includes everyone, without prejudice of any kind on the grounds of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. For the purposes of this study the concept of victim/complainant encompasses the term witness and the terms will be used interchangeably. It is acknowledged, however, that not all witnesses are *direct* victims of crime, but may be defined in terms of the above-mentioned definition as such, owing to the fact that they were witnesses to a crime and thus suffered emotional or mental harm. This definition is in line with the *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (1985). It is of significant importance to understand who would be regarded as a victim, as this informs who has standing to seek protection, support and redress.

<sup>4</sup> Paula Barnard, the national director of World Vision South Africa, speaking during National Child Protection Week in May 2017, stated that "Violence against children has reached epidemic proportions and like any other disease, be it HIV/Aids or Ebola, it should be treated as a national disaster and remedied accordingly" (Seeth 2017 <https://city-press.news24.com/News/violence-against-children-a-national->

towards a decrease in the age of these victims, while the use of brute force directed against them is escalating.<sup>5</sup> Population-based prevalence studies show that the most common forms of violence against children reported in South Africa are physical and sexual violence in the home and community.<sup>6</sup> In the event that the offenders are apprehended, these child victims and witnesses have to undergo the daunting experience of appearing in court to face the perpetrators. Statistics indicate that a growing number of the victims and witnesses who have to appear in court to testify about these crimes are therefore children.<sup>7</sup>

Owing to their particular vulnerability, the protection of child victims and child witnesses in the criminal justice system is thus of vital importance. The purpose of this discussion of South Africa's constitutional obligations is to determine whether the current protection afforded to child victims and child witnesses while testifying in criminal proceedings in South Africa is in line with South Africa's constitutional obligations. Strong emphasis will therefore

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disaster-20170529). A national prevalence study published in 2016 provides some data relating to the prevalence of violence against children. This study estimates that 34% of the country's children are the victims of sexual violence and physical abuse before they reach the age of 18 (Artz *et al* 2016 [http://www.cjcp.org.za/uploads/2/7/8/4/27845461/08\\_cjcp\\_report\\_2016\\_d.pdf](http://www.cjcp.org.za/uploads/2/7/8/4/27845461/08_cjcp_report_2016_d.pdf)). The SAPS crime stats for 2017-2018 indicate that murder rates increased during this year quite significantly, shooting up 7% to over 20 000 cases recorded. The number of reported rapes in South Africa also increased to 40,035 cases in the same year. Unfortunately, although certain categories such as homicide and sexual assault are routinely reported, the statistics were not disaggregated for children in 2017/2018, as had been done in 2011/2012 (Crime Stats SA 2018 <http://www.crimestatssa.com/national.php>).

<sup>5</sup> The Democratic Alliance (DA) Zakhele Mbhele, DA Shadow Minister of Police, said in a media statement on 16 May 2018 that children had been the victims of a shocking 41% of all 124,526 rape cases reported in the past three financial years in South Africa, and a parliamentary reply also revealed that in the same period more than 2 600 children were murdered, which constitutes 5% of all reported murders. Mbhele furthermore said that this also means that at least 46 children are raped every day and at least 2 children are murdered every single day in South Africa. Alarming only 21% of child rapes cases and only 1 in 3 murder cases resulted in successful convictions, he said. (See SApeople 2018 <https://www.sapeople.com/2018/05/16/children-are-victims-of-almost-half-of-all-rapes-cases-in-south-africa-46-raped-2-murdered-daily/>.)

<sup>6</sup> DSD, DWCPD and UNICEF *Violence against Children* 3; Jamieson, Sambu and Matthews *Out of Harm's Way?* reported that 56% of the children in Mpumalanga and the Western Cape reported a lifetime prevalence of physical abuse by caregivers, teachers or relatives.

<sup>7</sup> Artz *et al* 2016 [http://www.cjcp.org.za/uploads/2/7/8/4/27845461/08\\_cjcp\\_report\\_2016\\_d.pdf](http://www.cjcp.org.za/uploads/2/7/8/4/27845461/08_cjcp_report_2016_d.pdf). A report by Fang *et al* indicated that the estimated economic value of disability-adjusted life years lost owing to violence against children in 2015 amounted to R196 billion, or 4.9% of South Africa's GDP in 2015 (Fang *et al* 2016 <https://www.savethechildren.org.za/sci-za/files/47/47ab7077-1d0d-4c37-8ae2-161b18ae427a.pdf>).

be placed on the constitutional obligations relating to the protection of child victims and child witnesses while testifying in criminal proceedings.

The South African *Constitution* incorporates an extensive Bill of Rights which has been internationally acclaimed as a good example of a *Constitution* that provides for the advancement and protection of children's rights.<sup>8</sup> In this regard the Bill of Rights includes a special section or children's clause, namely section 28, which affords specific protection to children.<sup>9</sup> In so doing, the *Constitution* recognises that children are particularly vulnerable to violations of their rights and are in need of unique and distinct protection. Section 28 gives effect to the recognition of this vulnerability and embodies a dedicated commitment to the realisation of children's rights.<sup>10</sup>

Children are also included under "all people" in South Africa. They are thus afforded all the rights in the Bill of Rights<sup>11</sup> except for those rights that are expressly restricted to adults, such as the right to vote and to seek public office.<sup>12</sup> The rights in the Bill of Rights are repeated in section 28 to some degree. These rights therefore provide the context for the rights contained

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<sup>8</sup> Skelton "Constitutional Protection of Children's Rights" 327.

<sup>9</sup> Section 28 of the *Constitution* provides as follows:

- 1) Every child has the right—
  - (a) to a name and a nationality from birth;
  - (b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
  - (c) to basic nutrition, shelter, basic health care services and social services;
  - (d) to be protected from maltreatment, neglect, abuse or degradation;
  - (e) to be protected from exploitative labour practices;
  - (f) not to be required or permitted to perform work or provide services that—
    - (i) are inappropriate for a person of that child's age; or
    - (ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;
  - (g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be—
    - (i) kept separately from detained persons over the age of 18 years; and
    - (ii) treated in a manner, and kept in conditions, that take account of the child's age;
  - (h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and
  - (i) not to be used directly in armed conflict, and to be protected in times of armed conflict.
- (2) A child's best interests are of paramount importance in every matter concerning the child.
- (3) In this section "child" means a person under the age of 18 years.

<sup>10</sup> Bekink and Brand "Constitutional Protection of Children" 177.

<sup>11</sup> Section 7(1) of the *Constitution*. Also see *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* 2014 2 SA 168 (CC) para 38.

<sup>12</sup> Section 19(3)(a) and (b). Also see *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* 2014 2 SA 168 (CC) para 38.

in section 28.<sup>13</sup> Children are not only protected in general as "persons or people" in the Bill of Rights but are also specifically protected in terms of section 28.<sup>14</sup>

In order to throw light on the impact of the Bill of Rights on child victims and child witnesses in the criminal justice system, a general overview of the constitutional rights in the Bill of Rights relating to child victims and child witnesses will be given, whereafter the specific constitutional rights of child victims and child witnesses in section 28 of the Bill of Rights will be discussed.

## **2 The rights in the Bill of Rights as they relate to child victims and child witnesses within the criminal justice system**

The Bill of Rights enshrines the fundamental rights of all people in South Africa.<sup>15</sup> These rights are not mere guidelines; on the contrary the State is obliged "to respect, promote and fulfil" these rights. The Bill of Rights places an unambiguous obligation on the State with regard to the promotion, protection and realisation of children's rights.<sup>16</sup> These include the rights to equality;<sup>17</sup> dignity;<sup>18</sup> life;<sup>19</sup> freedom and security of the person;<sup>20</sup> individual autonomy construed from the rights to privacy;<sup>21</sup> freedom of religion;<sup>22</sup> freedom of expression;<sup>23</sup> freedom of association;<sup>24</sup> property;<sup>25</sup> housing;<sup>26</sup> health care services; food, water and social security;<sup>27</sup> education;<sup>28</sup> just administrative action;<sup>29</sup> and the rights of arrested, detained and accused persons to a range of protections.<sup>30</sup> The rights that are the most important

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<sup>13</sup> Bekink and Brand "Constitutional Protection of Children" 178.

<sup>14</sup> Friedman, Pantazis and Skelton "Children's Rights" 47-1; Skelton "Constitutional Protection of Children's Rights" 342.

<sup>15</sup> Section 7(2) of the *Constitution*. Also see Bekink and Brand "Constitutional Protection of Children" 173 and *Christian Lawyers Association v Minister of Health* 2005 1 SA 509 (T), where the court held at 528D that ss 10, 12(2)(a) and (b), 14 and 27(1)(a) of the *Constitution* apply to everyone.

<sup>16</sup> *S v M (Centre for Child Law as Amicus Curiae)* 2007 2 SACR 539 (CC) para 14.

<sup>17</sup> Section 9 of the *Constitution*.

<sup>18</sup> Section 10 of the *Constitution*.

<sup>19</sup> Section 11 of the *Constitution*.

<sup>20</sup> Section 12 of the *Constitution*.

<sup>21</sup> Section 14 of the *Constitution*.

<sup>22</sup> Section 15 of the *Constitution*.

<sup>23</sup> Section 16 of the *Constitution*.

<sup>24</sup> Section 17 of the *Constitution*.

<sup>25</sup> Section 25 of the *Constitution*.

<sup>26</sup> Section 26 of the *Constitution*.

<sup>27</sup> Section 27 of the *Constitution*.

<sup>28</sup> Section 29 of the *Constitution*.

<sup>29</sup> Section 33 of the *Constitution*.

<sup>30</sup> Section 35 of the *Constitution*.

or have the most significant impact on the child victim and child witness are the rights to equality, human dignity, freedom and security of the person (specifically the right to be free from all forms of violence) and the right to individual autonomy (specifically the right to privacy and freedom of expression). These rights are discussed separately below.

### **2.1 The rights to equality, human dignity, and freedom and security of the person**

Section 9 of the *Constitution* affords everyone the right to equality, and section 9(1) guarantees the right to equality before the law and equal protection and benefit of the law. Section 9(3) and 9(4) describes how this equality should be realised, namely by prohibiting unfair discrimination by the state and by private entities on a non-exclusive list of grounds. One of the grounds listed in section 9(3) is "age". The effect of this is that any distinction between children and others based on their age will be scrutinised in terms of the *Constitution* to determine whether it complies with the prohibition on unfair discrimination.<sup>31</sup> In *Christian Lawyers Association v Minister of Health*<sup>32</sup> the High Court considered age as a ground for discrimination. In the case in question the applicants challenged the validity of the provisions of the *Choice on Termination of Pregnancy Act*,<sup>33</sup> on the ground that girls under the age of 18 years should not be able to choose to terminate their pregnancies without parental consent as they were not capable of making the decision alone. The court rejected this challenge and concluded that the Act made informed consent, and not age, the basis for its regulation of access to termination of pregnancy. Mojaelo J emphasised that everyone is equal before the law and has the right to equal protection and benefit of the law and that any distinction between women on the ground of age would infringe these rights.<sup>34</sup>

The Constitutional Court has developed a detailed test to be followed when confronted with claims of unfair discrimination. This test assists the court in its decision on whether the state or a private party has unfairly discriminated against any person. The test was first set out in *Harksen v Lane*.<sup>35</sup> In

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<sup>31</sup> Bekink and Brand "Constitutional Protection of Children" 178; Albertyn and Goldblatt "Equality" 35-69.

<sup>32</sup> *Christian Lawyers Association v Minister of Health* 2005 1 SA 509 (T).

<sup>33</sup> *Choice on Termination of Pregnancy Act* 92 of 1996.

<sup>34</sup> *Christian Lawyers Association v Minister of Health* 2005 1 SA 509 (T) 528E.

<sup>35</sup> *Harksen v Lane* 1998 1 SA 300 (CC) para 54. It should be noted that although the test was developed under the Interim *Constitution* it has been followed under the Final *Constitution*. See *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) para 15. The Constitutional Court tabulated the test along the following lines:

(a) Does the challenged law or conduct differentiate between people or categories of people? If so, does the differentiation bear a rational connection

essence, the test entails that a preliminary enquiry must be conducted to establish whether the provision or conduct differentiates between people or categories of people. This is a threshold test in that if there is no differentiation then there can be no question of a violation of section 9(1). If a provision or conduct does differentiate between people or categories of people, a two-stage analysis must follow. The first stage concerns the question whether the differentiation amounts to discrimination. The test here is whether the law or conduct has a rational basis. This is the case where the differentiation bears a rational relation to a legitimate government purpose. If the answer is no, the law or conduct violates section 9(1) and fails at the first stage. If, however, the differentiation is shown to be rational the second stage of the enquiry is activated, namely whether the differentiation, even if it is rational, nevertheless amounts to unfair discrimination under section 9(3) or 9(4).<sup>36</sup> If the discrimination is on a specified ground, it would be presumed to be unfair. If the discrimination occurs on an unspecified ground the complainant will have to establish that the discrimination was unfair.<sup>37</sup>

If the discrimination is found to be unfair a court will proceed to the final stage of the enquiry as to whether the provision can be justified under

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to a legitimate government purpose? If it does not then there is a violation of section 9(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.

- (b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:
- (i) Firstly, does the differentiation amount to "discrimination"? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.
  - (ii) Secondly, if the differentiation amounts to "discrimination", does it amount to "unfair discrimination"? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of sections 9(3) and 9(4).
- (c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause.

<sup>36</sup> Ngcukaitobi "Equality" 216. Note, however, that the Constitutional Court held in *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) para 18 that this does not mean that in all cases the rational connection enquiry of the first stage must inevitably precede the second stage. According to the Constitutional Court the rational connection enquiry would clearly be unnecessary in a case in which a court holds that the discrimination is unfair and unjustifiable. A court need not perform both stages of the enquiry.

<sup>37</sup> Albertyn and Goldblatt "Equality" 35-75.

section 36 of the *Constitution*, the limitation clause.<sup>38</sup> This final stage, according to the Constitutional Court, "involve[s] a weighing of the purpose and effect of the provision in question and a determination as to the proportionality thereof in relation to the extent of its infringement of equality".<sup>39</sup> However, this stage applies to discrimination in terms of law of general application only, since it is only such discrimination that can be justified under the limitation clause.<sup>40</sup>

An evidentiary rule that severely impacts on child victims and child witnesses is the cautionary rule in relation to children's testimony. This rule stems from the presiding officer's practice of warning the jury against certain kinds of witnesses, notably accomplices, complainants in sexual cases, and young witnesses. The cautionary rule originated from the notion that the evidence of these witnesses could not safely be relied upon without some kind of corroboration in the form of other evidence confirming its trustworthiness. This rule differentiates between children and other witnesses on the grounds of age.<sup>41</sup>

In *Director of Public Prosecutions v S*<sup>42</sup> the court followed the approach of *S v Jackson*<sup>43</sup> and, referring to trends in countries such as Canada, Ireland, the United Kingdom, Australia and New Zealand, held that the proper approach was not to insist on the application of the cautionary rule as though it was a matter of rote, but to consider each case on its own merits. Although the evidence in a particular case might call for a cautionary approach, this was not a general rule. The court stressed that it could not be said that the evidence of children, in sexual and other cases, where they were sole witnesses, obliged the court to apply the cautionary rules before a conviction could take place.<sup>44</sup> What was required of the State was to prove the accused's guilt beyond all reasonable doubt. This might require the court to apply the cautionary rule.<sup>45</sup>

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<sup>38</sup> Albertyn and Goldblatt "Equality" 35-80.

<sup>39</sup> *Harksen v Lane* 1998 1 SA 300 (CC) at para 52.

<sup>40</sup> Albertyn and Goldblatt "Equality" 35-81.

<sup>41</sup> Zeffert and Paizes *Essential Evidence* 308-309.

<sup>42</sup> *Director of Public Prosecutions v S* 2000 (2) SA 711 (T).

<sup>43</sup> *S v Jackson* 1998 1 SACR 470 (A). Prior to 1998 the law took the view that the cautionary rule as it applies to accomplices had to be applied to the evidence of complainants in sexual cases. This rule was abolished by the Supreme Court of Appeal, however, in *S v Jackson* 1998 1 SACR 470 (A).

<sup>44</sup> *Director of Public Prosecutions v S* 2000 2 SA 711 (T) 715A-B. In the case under discussion the court *a quo* applied the cautionary rule in respect of all three aspects, namely the evidence of children in sexual cases where they are single witnesses (see *Director of Public Prosecutions v S* 2000 2 SA 711 (T) 715G-H).

<sup>45</sup> *Director of Public Prosecutions v S* 2000 2 SA 711 (T) 716B-D.



Despite what appeared to be the application of a more liberal approach by the judiciary, case law suggests otherwise.<sup>46</sup> In the case of *S v Hanekom*<sup>47</sup> the magistrate was criticised for failing to give sufficient weight to the two cautionary rules applicable to the case (the complainant was both a single witness and a child) and for failing to apply them with the degree of attention to detail demanded by the particular circumstances of the case. According to Saner AJ the magistrate had merely paid lip service to the cautionary rules.<sup>48</sup> In evaluating the matter, the court referred to *R v Manda*<sup>49</sup> and *S v Viveiros*,<sup>50</sup> stating that because of the potentially unreliable and untrustworthy nature of such evidence, it fully intended to heed the warning against accepting the evidence of children. According to the judge, the court must have proper regard to the danger of an uncritical acceptance of the evidence of both a single witness and a child witness.<sup>51</sup> In the case of *S v Haupt*<sup>52</sup> (the complainant in the case and also the main witness for the state, was a fifteen year old girl) the High Court highlighted that as the state had relied on the complainant's evidence it was imperative for her testimony to be clear and reliable in all material respects.<sup>53</sup> The court found that in *casu* this was not the case. The court furthermore stated that the trial court had not applied the cautionary rules adequately in evaluating the complainant's evidence, thereby constituting a misdirection.<sup>54</sup>

It is unsurprising that the rule has its critics. Whitear-Nel<sup>55</sup> expresses her concern, and justly so, over the fact that the court in the *Hanekom* case did not refer to recent research in the area of child psychology and development, which shows that children's ability to give reliable evidence has been greatly underestimated.<sup>56</sup> Schwikkard likewise points out that the trend internationally has been to abolish this cautionary rule.<sup>57</sup> She furthermore stresses that as the rule is based on discredited beliefs, a strong argument can be made that, just as the cautionary rule applicable to complainants in sexual cases was found to be irrational and based on stereotyped notions and hence abolished, so too should the cautionary rule applicable to children be abolished.<sup>58</sup> Schwikkard submits, which submission is supported by the writer hereof, that in the absence of a clear

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<sup>46</sup> See *S v Hanekom* 2011 1 SACR 430 (WCC); *S v Haupt* 2018 1 SACR 12 (GP).

<sup>47</sup> *S v Hanekom* 2011 1 SACR 430 (WCC).

<sup>48</sup> *S v Hanekom* 2011 1 SACR 430 (WCC) para 7.

<sup>49</sup> *R v Manda* 1951 3 SA 158 (A).

<sup>50</sup> *S v Viveiros* 2000 2 All SA 86 (SCA).

<sup>51</sup> *S v Hanekom* 2011 1 SACR 430 (WCC) paras 9-10.

<sup>52</sup> *S v Haupt* 2018 1 SACR 12 (GP).

<sup>53</sup> *S v Haupt* 2018 1 SACR 12 (GP) para 18.

<sup>54</sup> *S v Haupt* 2018 1 SACR 12 (GP) para 18.

<sup>55</sup> Whitear-Nel 2011 SACJ 382 at 396.

<sup>56</sup> See Schwikkard "Getting Somewhere Slowly" 79.

<sup>57</sup> Schwikkard "Getting Somewhere Slowly" 79.

<sup>58</sup> Schwikkard 1996 *Acta Juridica* 154.

rationale it becomes difficult to justify the cautionary rule's inconsistency with a constitutional commitment to equality.<sup>59</sup>

It should be noted that this rule also differentiates between children in sexual cases and children in other criminal cases. Section 60 of the *Criminal Law (Sexual Offences and Related Matters) Amendment Act*<sup>60</sup> provides that a court may not treat the evidence of a complainant in a sexual offence with caution on account of the nature of the offence. In *S v M*<sup>61</sup> the court held that the approach applied in *S v Jackson*<sup>62</sup> also applied to all cases in which an act of a sexual nature was an element, and thus also to the evidence of children.

In the recent case *Levenstein v Estate of the Late Sidney Lewis Frankel*<sup>63</sup> the Constitutional Court handed down judgment in an application for the confirmation of an order of constitutional invalidity made by the High Court. The High Court declared section 18 of the *Criminal Procedure Act*<sup>64</sup> to be inconsistent with the *Constitution* and invalid to the extent that it bars, in all circumstances, the right to institute a criminal prosecution for all sexual offences, other than rape or compelled rape, trafficking persons for sexual purposes and using a child or person who is mentally disabled for pornographic purposes, after the lapse of a period of 20 years from the time when the offence was committed.<sup>65</sup>

In a unanimous judgment, the Constitutional Court held that the primary rationale for the distinction contemplated in section 18 is the perception that certain sexual offences are more serious than others.<sup>66</sup> The Constitutional Court acknowledged that the survivors of sexual assault face similar personal, social and structural impediments when reporting these offences and that the harm caused by different sexual offences is significantly similar, regardless of whether the harm is the consequence of rape or other forms of sexual assault.<sup>67</sup> The Constitutional Court furthermore pointed out that the effect of section 18 is that it over-emphasises the significance of the nature of the offence<sup>68</sup> at the expense of the harm it causes to survivors thereof, and therefore fails to serve as a mechanism to protect and advance

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<sup>59</sup> Schwikkard 2009 *Namibia LJ* 14.

<sup>60</sup> *Criminal Law (Sexual Offences and Related Matters) Amendment Act* 32 of 2007.

<sup>61</sup> *S v M* 1999 2 SACR 548 (SCA) 554-555.

<sup>62</sup> *S v Jackson* 1998 1 SACR 470 (A).

<sup>63</sup> *Levenstein v Estate of the Late Sidney Lewis Frankel* 2018 2 SACR 283 (CC).

<sup>64</sup> *Criminal Procedure Act* 51 of 1977 (hereinafter the *Criminal Procedure Act*).

<sup>65</sup> *L v Frankel* 2017 2 SACR 257 (GJ).

<sup>66</sup> *Levenstein v Estate of the Late Sidney Lewis Frankel* 2018 2 SACR 283 (CC) para 51.

<sup>67</sup> *Levenstein v Estate of the Late Sidney Lewis Frankel* 2018 2 SACR 283 (CC) paras 2 and 21.

<sup>68</sup> Own emphasis added.

the interests of the survivors.<sup>69</sup> In addition it penalises a complainant by preventing him or her from pursuing a charge, where the delay is caused by his or her inability to act, even though a reasonable explanation may exist for the delay.<sup>70</sup> Lastly, the Constitutional Court held that section 18 undermines the state's efforts to comply with international obligations, such as the *Convention on the Elimination of all Forms of Discrimination Against Women* and the *Convention on the Rights of the Child*, which impose a duty on the state to prohibit all gender-based discrimination.<sup>71</sup> The Constitutional Court consequently confirmed the High Court's order that section 18 is irrational and arbitrary, and therefore unconstitutional, insofar as it does not afford the survivors of sexual assault other than rape or compelled rape the right to pursue a charge after the lapse of 20 years from the time the offence was committed.<sup>72</sup> The Court accordingly suspended the declaration of invalidity for a period of 24 months to allow Parliament to cure the constitutional defect.<sup>73</sup>

In the light of the dictum of *Levenstein v Estate of the Late Sidney Lewis Frankel*<sup>74</sup> it is submitted by the writer hereof that to differentiate between the application of the cautionary rule with regard to children in sexual cases and children in other criminal cases (on the ground of the nature of the offence) may likewise be irrational and arbitrary, and therefore unconstitutional. In *L v Frankel*<sup>75</sup> the High Court with reference to the expert report of Higgings<sup>76</sup> highlighted that to have regard to the frequency and severity of child abuse may be more useful in determining the experience of trauma than the classification of the type of abuse. The abolition of the cautionary rule as a rule of general application thus seems fitting.

In *Centre for Child Law v Media 24 Limited*<sup>77</sup> the Supreme Court of Appeal *inter alia* handed down judgment in an application for the confirmation of an order of constitutional invalidity made by the High Court. The High Court declared section 154(3) of the *Criminal Procedure Act* to be inconsistent with the *Constitution* and invalid to the extent that it fails to confer protection

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<sup>69</sup> *Levenstein v Estate of the Late Sidney Lewis Frankel* 2018 2 SACR 283 (CC) para 52.

<sup>70</sup> *Levenstein v Estate of the Late Sidney Lewis Frankel* 2018 2 SACR 283 (CC) para 54.

<sup>71</sup> *Levenstein v Estate of the Late Sidney Lewis Frankel* 2018 2 SACR 283 (CC) para 60.

<sup>72</sup> *Levenstein v Estate of the Late Sidney Lewis Frankel* 2018 2 SACR 283 (CC) para 89.

<sup>73</sup> *Levenstein v Estate of the Late Sidney Lewis Frankel* 2018 2 SACR 283 (CC) para 89.

<sup>74</sup> *Levenstein v Estate of the Late Sidney Lewis Frankel* 2018 2 SACR 283 (CC).

<sup>75</sup> *L v Frankel* 2017 2 SACR 257 (GJ) para 54.

<sup>76</sup> Higgins 2004 *Family Malted* 50-55.

<sup>77</sup> *Centre for Child Law v Media 24 Limited* 2018 2 SACR 696 (SCA).

on *victims* of crime who are under the age of 18 years.<sup>78</sup> While section 154(3) of the *Criminal Procedure Act* affords anonymity to an accused and a witness at criminal proceedings who are under the age of 18 years, similar protection is not offered to children under the age of 18 years who are the victims of a crime.

The Supreme Court of Appeal concurred with the High Court and pointed out that the purpose of the limitation on the disclosure of any information which reveals or may reveal the identity of a victim is twofold. Firstly, as in the cases of an accused and a witness under the age of 18 years, to protect children who are victims of crime from the glare of publicity at criminal proceedings.<sup>79</sup> Secondly, to ensure that the section complies with the equality provision of section 9 of the *Constitution*. The Supreme Court of Appeal accordingly held that the exclusion of child victims from the provisions of section 154(3) of the *Criminal Procedure Act* is irrational and in breach of section 9(1) of the *Constitution*, which guarantees everyone the right to equal protection and benefit of the law. The denial of equal protection to child victims, who are equally vulnerable, the court pointed out, can therefore not be justified.<sup>80</sup> Parliament was consequently ordered to remedy the constitutional invalidity within 24 months of the date of the order. Pending parliament's remedying the constitutional invalidity, the section is deemed to include such protection.<sup>81</sup> The aforementioned constitutional case is welcomed in so far as it affirms the child victims' and child witnesses' right to equality.

It should be kept in mind that equality is a very contentious and intricate issue when it comes to children's rights. Skelton points out that as a general rule the children's rights sector petitions for the special protection, rather than the equality of children. She emphasises, however, that despite this call, there is a strong case to be made for the position that children should not receive less protection than adults would in the same circumstances.<sup>82</sup> In addition, cognisance should be taken of the fact that children's inequality is often the very cause of their need for special protection. Birch comments that child abuse occurs in part because of the inequalities between a child and an adult in size, knowledge and power, and that these inequalities have been institutionalised by one-sided rules of evidence.<sup>83</sup> The cross-examination of child victims and child witnesses during a criminal trial serves as an example. For cross-examination to be fair and just the parties

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<sup>78</sup> *Centre for Child Law v Media 24 Limited* 2018 2 SACR 696 (SCA) para 35; own emphasis added.

<sup>79</sup> *Centre for Child Law v Media 24 Limited* 2018 2 SACR 696 (SCA) para 28.

<sup>80</sup> *Centre for Child Law v Media 24 Limited* 2018 2 SACR 696 (SCA) para 29.

<sup>81</sup> *Centre for Child Law v Media 24 Limited* 2018 2 SACR 696 (SCA) para 35.

<sup>82</sup> Skelton "Constitutional Protection of Children's Rights" 342.

<sup>83</sup> Birch 1992 *Crim LR* 269.

to the proceedings should have equal standing.<sup>84</sup> It goes without saying that, when exposed to harsh cross-examination by adults, children are in a position unequal to that of the adults and may find it difficult to protect themselves. In order to uphold children's right to equality and to ensure an equality of outcome, it may therefore be necessary to treat children differently from everyone else.<sup>85</sup> This type of differentiation is acknowledged by section 9(2) of the equality clause, which provides that legislative and other measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination may be taken in order to promote equality.<sup>86</sup>

It is submitted that the application of section 170A of the *Criminal Procedure Act*,<sup>87</sup> which allows for children to be cross-examined by an intermediary, could level the playing field in this regard. The introduction of the function of an intermediary by the insertion of section 170A(1) into the *Criminal Procedure Act* is one of the more important interventions in respect of the protection of child witnesses.<sup>88</sup> The South African Law Commission (as it was then known) conducted an investigation into the effect of testimony by child witnesses in open court in 1989. The Commission came to the conclusion that children were severely traumatised by the adversarial criminal procedures followed. In an attempt to alleviate the effect of the accusatorial system on child witnesses and to avoid direct confrontation between a child and an accused, the Commission recommended the introduction of the function of an intermediary into the criminal justice system.<sup>89</sup>

An intermediary is a person specifically qualified to facilitate communication between the court and a child in a manner that is not only age-appropriate but also understandable to a child. The intermediary takes the child's cognitive and developmental abilities into account when conveying the meaning and contents of the court's questions to the child and acts as a "barrier or shield" between the formal justice system and the child, thus

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<sup>84</sup> SALC *Project 73* para 2.11.

<sup>85</sup> Currie and De Waal *Bill of Rights Handbook* 210-211.

<sup>86</sup> Elphick *et al* 2014 *SAJHR* 227.

<sup>87</sup> Section 170A(1) of the *Criminal Procedure Act* determines that "Whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness under the biological or mental age of eighteen years to undue mental stress or suffering if he or she testifies at such proceedings, the court may, subject to subsection (4), appoint a competent person as an intermediary in order to enable such witness to give his or her evidence through that intermediary".

<sup>88</sup> *Criminal Procedure Act* 51 of 1977, as amended by the *Criminal Law Amendment Act* 135 of 1991 and the *Criminal Law (Sexual Offences and Related Matters) Amendment Act* 32 of 2007.

<sup>89</sup> SALC *Project 71*.

ensuring that the child's rights are respected.<sup>90</sup> The use of an intermediary therefore provides an enabling environment for the child witness and child victim to present his or her testimony and should be regarded as an example of an equalising measure.

The right to dignity is enshrined in section 10 of the *Constitution*. The Constitutional Court in *S v Makwanyane*<sup>91</sup> stated as follows:

The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in chap 3. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others.

The Constitutional Court further pointed out that the right to dignity is intricately linked to other human rights.<sup>92</sup> According to the Constitutional Court:

Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched in chap 3.<sup>93</sup>

In *Dawood v Minister of Home Affairs*<sup>94</sup> the Constitutional Court further elaborated on the importance of this right by stating that "dignity is not only a *value* fundamental to our Constitution, it is a justiciable and enforceable *right* that must be respected and protected". Currie and De Waal point out that although we can be certain of the pivotal importance of human dignity in the *Constitution*, we can be less certain of the meaning of the concept. This is because neither the *Constitution* nor the Constitutional Court has ventured to offer a comprehensive definition of human dignity.<sup>95</sup> Instead, the court has stated, it has "a wide meaning which covers a number of different values" and which gives a person "infinite worth".<sup>96</sup>

It goes without saying that children are also entitled to the right to dignity. In *S v Mokoena; S v Phaswane*<sup>97</sup> Bertelsmann J with reference to Sachs J in

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<sup>90</sup> *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development* 2009 2 SACR 130 (CC) para 96 (hereinafter referred to as *DPP v Minister of Justice and Constitutional Development*).

<sup>91</sup> *S v Makwanyane* 1995 3 SA 391 (CC) para 144.

<sup>92</sup> *S v Makwanyane* 1995 3 SA 391 (CC) para 328.

<sup>93</sup> *S v Makwanyane* 1995 3 SA 391 (CC) para 328.

<sup>94</sup> *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC) para 35.

<sup>95</sup> See Woolman "Dignity" 36.2, where he identifies five definitions of dignity in the Constitutional Court's jurisprudence.

<sup>96</sup> Currie and De Waal *Bill of Rights Handbook* 251; *Le Roux v Dey* 2011 3 SA 274 (CC) para 138; *S v Dodo* 2001 3 SA 382 (CC) para 38.

<sup>97</sup> *S v Mokoena; S v Phaswane* 2008 2 SACR 216 (T) para 50 (hereinafter referred to as *S v Mokoena*).

*S v M (Centre for Child Law as amicus curiae)*<sup>98</sup> pointed out that every child has a dignity of his or her own, which entails that a child is to be constitutionally regarded as an individual with a distinctive personality and not merely as a miniature adult waiting to reach full size. The court emphasised that the importance of the right to dignity for the child victim and child witness demands the following:<sup>99</sup>

At the very least the criminal procedure and the courts should administer the criminal justice system in such a fashion that children who are caught up in its workings are protected from further trauma and are treated with proper respect for their dignity and their unique status as vulnerable young human beings.

This position was reiterated by the Constitutional Court in *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development*<sup>100</sup> when it held the following:

Each child must be treated as a unique and valuable human being with his or her individual needs, wishes and feelings respected. Children must be treated with dignity and compassion. In my view these considerations should also inform the principle that the best interest of the child are of paramount importance in all matters concerning the child as envisaged in s 28(2) of the Constitution.

In *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development*<sup>101</sup> the Constitutional Court, in addition to reaffirming the importance of dignity in recognising the inherent worth of children, emphasised that children's rights to dignity are not dependent on the rights of their parents; nor is the exercise of these rights held in abeyance until children reach a certain age.

It is clearly not only important that the child victim and child witness be treated with the necessary dignity and compassion, but also essential that the child victim and child witness should not be exposed to treatment such as demeaning cross-examination while testifying. Once again, the use of an intermediary may prove to be invaluable in this regard.

Section 12 of the *Constitution* guarantees the right to freedom and security of the person.<sup>102</sup> Of particular importance to the child victim and child

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<sup>98</sup> *S v M (Centre for Child Law as Amicus Curiae)* 2007 2 SACR 539 (CC) para 18.

<sup>99</sup> *S v Mokoena* para 50.

<sup>100</sup> *DPP v Minister of Justice and Constitutional Development* para 79.

<sup>101</sup> *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* 2014 2 SA 168 (CC) para 52.

<sup>102</sup> Section 12 of the *Constitution* states that:

- (1) Everyone has the right to freedom and security of the person, which includes the right –
  - (a) not to be deprived of freedom arbitrarily or without just cause;
  - (b) not to be detained without trial;

witness is the right guaranteed in section 12(1)(c) of the *Constitution*, namely the right to be free from violence,<sup>103</sup> as well as that guaranteed in section 12(1)(e), namely the right not to be treated or punished in a cruel, inhuman or degrading way.<sup>104</sup>

Although sections 12(1)(c) and 12(1)(e) may normally not be associated with court proceedings, it is submitted that it can be argued that exposing a child in open court to aggressive cross-examination by the alleged perpetrator or legal representative may amount to (secondary) violence or cruel, inhuman or degrading treatment. In support of this argument the Constitutional Court in *DPP v Minister of Justice and Constitutional Development*<sup>105</sup> acknowledged that a child complainant who relates in open court in graphic detail in the presence of the accused the abusive acts perpetrated upon him or her will in most instances experience undue stress and suffering. This is exacerbated when the child is subjected to intensive and at times aggressive cross-examination by the accused or his or her legal representative. The Constitutional Court emphasised that cumulatively these experiences [this treatment] are often "as traumatic and as damaging to the emotional and psychological wellbeing of the child complainant as the original abusive act" or may even expose the child to "further trauma, possibly as severe as the trauma caused by the crime" itself.<sup>106</sup>

Currie and De Waal define violence against an individual as a grave invasion of that individual's personal security.<sup>107</sup> Bishop and Woolman<sup>108</sup> point out, however, that the violence contemplated in section 12(c) should

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- (c) to be free from all forms of violence from either public or private sources;
  - (d) not to be tortured in any way; and
  - (e) not to be treated or punished in a cruel, inhuman or degrading way.
- (2) Everyone has the right to bodily and psychological integrity, which includes the right –
- (a) to make decisions concerning reproduction;
  - (b) to security in and control over their body; and
  - (c) not to be subjected to medical or scientific experiments without their informed consent.

<sup>103</sup> Although one may normally not associate court proceedings with violence, cognisance should be taken of the fact that General Comment No 13 (GC 13) of the Committee on the Rights of the Child defines violence as including *all forms* of physical or mental violence, including psychological maltreatment. It calls on all States Parties to introduce legislation and other measures to implement the rights of children in its guidelines, including treating child victims in a child-friendly and sensitive manner. Refer to Committee on the Rights of the Child *General Comment No 13: The Right of the Child to Freedom from All Forms of Violence* UN Doc CRC/C/GC/13 (2011).

<sup>104</sup> Own emphasis added.

<sup>105</sup> *DPP v Minister of Justice and Constitutional Development* para 108.

<sup>106</sup> *DPP v Minister of Justice and Constitutional Development* para 108.

<sup>107</sup> Currie and De Waal *Bill of Rights Handbook* 281.

<sup>108</sup> Bishop and Woolman "Freedom and Security of the Person" 40-49.



not be narrowly construed as "grave", as this would fail many of the people whom the right is meant to protect. In support of their argument they point out that women, for example, or men trapped in abusive relationships may suffer from psychological as well as physical violence that could probably not be successfully categorised as grave but could still entitle them to the protection of section 12(1)(c).

Section 12(1)(c) guarantees the right to be protected against an invasion of an individual's personal security, whether by the state or by private individuals. It therefore places an obligation on the state to protect individuals both negatively by itself refraining from such invasion and positively by restraining or discouraging private individuals from any invasion.<sup>109</sup>

With specific reference to the child victim and child witness, Bertelsmann J in *S v Mokoena*<sup>110</sup> emphasised that "foundational to the enjoyment of the right to childhood is the promotion of the right as far as possible to live in a secure and nurturing environment free from violence, fear and avoidable trauma."<sup>111</sup> Judge Bertelsmann pointed out that both individually and collectively all children have the right to:

... express themselves as independent social beings, to have their own laughter as well as sorrow, to play, imagine and explore in their own way, to themselves get to understand their own bodies, minds and emotions, and above all to learn as they grow how they should conduct themselves and make choices in the wide social and moral world of adulthood.<sup>112</sup>

He furthermore stressed that, although no constitutional injunction can in and of itself isolate children from the shocks and peril of harsh family and neighbourhood environments, the law can create conditions that protect children from abuse. The state should create positive conditions for recovery to take place and diligently seek to avoid conduct by its agencies that has the effect of placing children in peril.<sup>113</sup>

It can be argued that this means that the State has an obligation to protect children from further trauma; to develop conditions for the child to testify in a child-friendly environment conducive to recovery, and to refrain from placing the child in further peril by for example requiring the child to testify in the sight of an alleged perpetrator. It is precisely this secondary trauma

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<sup>109</sup> Currie and De Waal *Bill of Rights Handbook* 282; Bishop and Woolman "Freedom and Security of the Person" 40-49, 40-54.

<sup>110</sup> *S v Mokoena* para 19.

<sup>111</sup> *S v Mokoena* para 19.

<sup>112</sup> *S v Mokoena* para 19.

<sup>113</sup> *S v Mokoena* para 20.

that section 170A(1) of the *Criminal Procedure Act* seeks to prevent,<sup>114</sup> and accordingly the application of section 170A(1) could play an invaluable role in fulfilling this obligation.

## **2.2 The right to individual autonomy**

Like everyone else, children are entitled to the rights to privacy,<sup>115</sup> freedom of religion,<sup>116</sup> freedom of expression<sup>117</sup> and freedom of association.<sup>118</sup> Of particular importance to the child victim and child witness is the right to privacy and the right to freedom of expression.

Section 14 of the *Constitution* provides that everyone has the right to privacy, which includes the right not to have their persons, property or homes searched, their possessions seized or the privacy of their communications infringed. This right in the Bill of Rights closely relates to the common-law personality right to privacy, which forms part of a person's *dignitas*.<sup>119</sup> Neethling *et al*, in confirmation of the importance of the right to privacy, point out that a lack of privacy may negate the whole physical disposition of a person.<sup>120</sup> A breach of a person's right to privacy may occur in two ways, namely when there is an unlawful intrusion of a person's personal privacy (for example where electronic equipment is used to eavesdrop on a private conversation) or an unlawful disclosure of private facts about a person (for example where a doctor relates his patient's ills to friends).<sup>121</sup> This infringement must be subjectively contrary to the person's will and must also be objectively contrary to the contemporary *boni mores* and the general sense of justice of the community, as perceived by the courts.<sup>122</sup>

The importance of protecting the privacy of the child victim and child witness in criminal proceedings is recognised by our law, in that sections 153 and 154 of the *Criminal Procedure Act* respectively make provision for children to testify "in camera" and prohibit the publication of information which might reveal the identity of the complainant or the witness at such criminal

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<sup>114</sup> *S v Mokoena* para 108.

<sup>115</sup> Section 14 of the *Constitution*.

<sup>116</sup> Section 15 of the *Constitution*.

<sup>117</sup> Section 16 of the *Constitution*.

<sup>118</sup> Section 17 of the *Constitution*.

<sup>119</sup> Currie and De Waal *Bill of Rights Handbook* 296.

<sup>120</sup> Neethling *et al Law of Personality* 29.

<sup>121</sup> *Prinsloo v Bramley Children's Home* 2005 5 SA 119 (T); Neethling *et al Law of Personality* 33.

<sup>122</sup> Currie and De Waal *Bill of Rights Handbook* 296.

proceedings.<sup>123</sup> In *S v Mokoena*<sup>124</sup> Bertelsmann J describes the rationale for the protection of the privacy of the child victim and witnesses while testifying in criminal proceedings as follows:

Vulnerable witnesses must be protected from public exposure, either because disclosure of their identity may endanger their life or limb or because the sense of embarrassment and discomfort at having to testify before an audience, particularly concerning traumatic and sexually sensitive events, may expose the witness to emotional and psychological harm.

The need to protect such a child victim and child witness from possible harm therefore warrants the court's excluding the public or certain members of the public from attending the hearing and from revealing the identity of the child witness to the public.<sup>125</sup>

The child victim's right to privacy was examined by the court in *Prinsloo v Bramley Children's Home*.<sup>126</sup> The applicants in the case were facing criminal charges for indecent assault and the possession of child pornography. The applicants launched a civil application for an order granting them access to the personal files, held by the Bramley Children's Home, of the two minor complainants in the criminal case. The applicants were suggesting that the children might have been involved in previous sexual misbehaviour or other improper conduct. They hoped to discover facts or suggestions in the children's personal files that might enable them, *inter alia*, to confront the minors during cross-examination with innuendos or allegations of misbehaviour of this nature.<sup>127</sup>

As to the merits of the application for access to the information, the court noted that there was no suggestion that the applicants had any knowledge that any such impropriety had occurred in the past and that they had intended to launch a dragnet operation to uncover anything of this nature to discredit the complainants' characters.<sup>128</sup> The court furthermore stated that the information being sought was of a very personal nature and it was clear

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<sup>123</sup> Note that the High Court in *Centre for Child Law v Media 24 Limited* 2017 2 SACR 416 (GP) paras 53-58 ruled that s 154(3) of the *Criminal Procedure Act* must be read with s 153(1) of the *Criminal Procedure Act* and s 63(5) of the *Child Justice Act* 75 of 2008, thereby affording protection to child victims, witnesses, the accused, and offenders.

<sup>124</sup> *S v Mokoena* para 101.

<sup>125</sup> See for example *Prinsloo v Bramley Children's Home* 2005 5 SA 119 (T), where the applicants cited the minors individually and by name. The court held at 123C-D that the minors could be seriously harmed if they were identified regardless of the outcome of the application. The court accordingly ordered at 123I that the minors were not to be identified by the media or anybody else, by name or otherwise, either directly or indirectly.

<sup>126</sup> *Prinsloo v Bramley Children's Home* 2005 5 SA 119 (T).

<sup>127</sup> *Prinsloo v Bramley Children's Home* 2005 5 SA 119 (T) 123D-E.

<sup>128</sup> *Prinsloo v Bramley Children's Home* 2005 5 SA 119 (T) 123E-H.

that the mere launching of such an application, even if nothing relevant was found in the personal files, might cause the children considerable distress. The children's involvement in the criminal trial would be traumatic in itself without their having to face the additional prospect of an attack of this nature's being launched upon their credibility, morals and probity.<sup>129</sup>

The court stressed that it was of paramount importance that the children's interests should be safeguarded by the court and that to allow access to the information would result in the infringement and limitation of the rights of the children and in particular their right to privacy, to emotional and psychological integrity, and to dignity.<sup>130</sup>

The court therefore resolved that the applicants bore the onus of proving to the court that their right to a fair trial justified the limitation of the children's aforementioned rights. The court held that in order to succeed with such an application, the applicants had to persuade the court, on a balance of probabilities, that it was essential for the preparation of their defence to have access to the information.<sup>131</sup> In this instance the applicants had chosen not to disclose the nature of their defence and had failed to show any basis for the relief sought; instead, the grounds presented by them were "vague, superficial and unsupported by factual allegations". The application was accordingly dismissed.<sup>132</sup> It is submitted that unless very strong factual grounds are presented, the application of the best interests of the child criteria will prevent any limitation of the child's right to privacy.

Children's right to privacy also played a significant role in another leading decision of the Constitutional Court, namely *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development*.<sup>133</sup> The case concerned an application for the confirmation of a ruling by the High Court that certain provisions of the *Criminal Law (Sexual Offences and Related Matters) Amendment Act*<sup>134</sup> relating to the criminalisation of consensual sexual conduct with children of a certain age were unconstitutional and accordingly invalid.<sup>135</sup>

It is important to note that in considering the matter the Constitutional Court emphasised from the outset that the case was not about whether children should or should not engage in sexual conduct, nor was it about whether

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<sup>129</sup> *Prinsloo v Bramley Children's Home* 2005 5 SA 119 (T) 123E-H.

<sup>130</sup> *Prinsloo v Bramley Children's Home* 2005 5 SA 119 (T) 128B-C.

<sup>131</sup> *Prinsloo v Bramley Children's Home* 2005 5 SA 119 (T) 128B-C.

<sup>132</sup> *Prinsloo v Bramley Children's Home* 2005 5 SA 119 (T) 123I-J, 130B-C.

<sup>133</sup> *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* 2014 2 SA 168 (CC).

<sup>134</sup> *Criminal Law (Sexual Offences and Related Matters) Amendment Act* 32 of 2007 (hereinafter the *Sexual Offences Act*).

<sup>135</sup> See ss 15, 16, 56, 52(2)(a)(i) and 54 of the *Sexual Offences Act*.

Parliament may set a minimum age for consensual sexual conduct. Rather it dealt with the question whether it was constitutionally permissible for children to be subjected to criminal sanction in order to deter early sexual intimacy and to combat the risks associated therewith.<sup>136</sup>

The main question before the Constitutional Court was whether the impugned sections were inconsistent with the *Constitution* insofar as they limited adolescents' fundamental rights.<sup>137</sup> The court found that sections 15 and 16 of the *Sexual Offences Act* did in fact constitute an encroachment on adolescents' rights and specifically their rights to human dignity (section 10) and privacy (section 14), and the principle of the best interests of the child (section 28(2)), as set out in the *Constitution*.<sup>138</sup> The court also found that these limitations were not reasonable and justifiable in terms of section 36 of the *Constitution*.<sup>139</sup>

In considering whether the impugned sections infringed adolescents' right to privacy the Constitutional Court referred to *National Coalition for Gay and Lesbian Equality v Minister of Justice*,<sup>140</sup> where it was held as follows:

Privacy recognises that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. The way in which we give expression to our sexuality is at the core of this area of private intimacy. If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of our privacy.

The Constitutional Court held that the principled basis of reasoning followed in the *National Coalition for Gay and Lesbian Equality v Minister of Justice* applied with equal force to the consensual sexual conduct of adolescents.<sup>141</sup> This was due to the fact that the criminal offences under sections 15 and 16 of the *Sexual Offences Act* apply to the most intimate sphere of personal relationships and inevitably involve adolescents' constitutional right to

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<sup>136</sup> *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* 2014 2 SA 168 (CC) para 3.

<sup>137</sup> *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* 2014 2 SA 168 (CC) para 37.

<sup>138</sup> *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* 2014 2 SA 168 (CC) 58, 64 and 79. Note that a "child" is defined for the purposes of ss 15 and 16 of the *Sexual Offences Act* as "a person 12 years or older but under the age of 16 years". For ease of reference the Constitutional Court refers to children that fall into this category as adolescents. See *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* 2014 2 SA 168 (CC) fn 5 para 15.

<sup>139</sup> *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* 2014 2 SA 168 (CC) paras 94 and 100.

<sup>140</sup> *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) para 32.

<sup>141</sup> *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* 2014 2 SA 168 (CC) para 60.

privacy.<sup>142</sup> The offences allow police officers, prosecutors and judicial officers to scrutinise and assume control of the intimate relationships of adolescents, thereby intruding into the personal realm of their lives. This intrusion, the court pointed out, is exacerbated by the reporting provisions set out in section 54, which oblige third parties to disclose information which may have been shared with them in the strictest confidence.<sup>143</sup>

The Constitutional Court accordingly declared sections 15 and 16 of the *Sexual Offences Act* inconsistent with the *Constitution* and invalid to the extent that they impose criminal liability on children under the age of sixteen years.<sup>144</sup> This declaration of invalidity was suspended for a period of eighteen months, allowing Parliament to correct the defects in the *Sexual Offences Act*,<sup>145</sup> which was subsequently amended by the *Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act*<sup>146</sup> in order *inter alia* to ensure that children of certain ages are not held criminally liable for engaging in consensual sexual acts with one another.<sup>147</sup>

The two aforementioned constitutional cases, namely *Johncom Media Investments Limited v M* and *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* are welcomed in that they contribute to developing a jurisprudence that recognises children as independent rights-holders of fundamental rights such as the right to privacy.<sup>148</sup>

As explained above, the privacy of the child victim and child witness in criminal proceedings is recognised by our law, in that section 154 of the *Criminal Procedure Act* prohibits the publication of information which might reveal the identity of the complainant or the witness at such criminal proceedings. It should be noted, however, that the protection afforded in terms of this section ceases to exist once the child victim or witness attains the age of eighteen. In the case of *Centre for Child Law v Media 24*<sup>149</sup> the

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<sup>142</sup> *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* 2014 2 SA 168 (CC) para 60.

<sup>143</sup> *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* 2014 2 SA 168 (CC) para 60.

<sup>144</sup> *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* 2014 2 SA 168 (CC) para 110.

<sup>145</sup> *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* 2014 2 SA 168 (CC) para 117.

<sup>146</sup> *Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act* 5 of 2015.

<sup>147</sup> See ss 2 and 3 of the *Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act* 5 of 2015.

<sup>148</sup> Kruger "Protection of a Child's Right to Privacy" 283.

<sup>149</sup> *Centre for Child Law v Media 24* 2017 2 SACR 416 (GP).

North Gauteng High Court ruled<sup>150</sup> that child offenders, victims and witnesses may be identified once they turn eighteen years of age.

Upon appeal of the matter, the Supreme Court of Appeal<sup>151</sup> concurred with the High Court, namely that the protection afforded by section 154(3) of the *Criminal Procedure Act* to victims and witnesses of crime under the age of 18 years does not continue to protect such victims and witnesses after they turn 18 years.<sup>152</sup> The Supreme Court of Appeal like the High Court considered the language of the section, stating that the section is unambiguous and the interpretation contended by the appellants, whether in respect of the victim extension or adult extension, was unduly strained.<sup>153</sup> The appellants submitted that the section had to be interpreted in line with what was described as "the principal of ongoing protection".<sup>154</sup> The appellants argued, which argument is supported by the writer hereof, that an interpretation that ensured ongoing protection better promoted section 28(2) of the *Constitution*, the "best interest of the child" provision, and protected child victims and witnesses from the severe harm of identification.<sup>155</sup> The Supreme Court of Appeal, however, held that as the section is an exception to the open justice rule and by virtue of the fact that it carries a criminal sanction, it must be interpreted in favour of individual liberty. Furthermore, that the extension of the anonymity protection for children conflicts with the right to freedom of expression and freedom of the press and other media entrenched in section 16(1)(a) of the *Constitution*.<sup>156</sup>

After conducting the proportionality analysis<sup>157</sup> the Supreme Court of Appeal held that in the absence of any limitation on the nature and extent of the adult extension, the relief sought by the appellants was overboard and did not strike an appropriate balance between the rights and interest involved. The proposed limitation on the right of the media to impart information was furthermore neither reasonable nor justifiable, in terms of section 36 of the *Constitution*. The Supreme Court of Appeal consequently concluded that the constitutional challenge to the provision of section 154(3) of the *Criminal Procedure Act* on this basis must fail.<sup>158</sup>

Nonetheless, the Supreme Court of Appeal, upheld the interim order made to protect the identity of the victim in the matter, Zephany Nurse, pending

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<sup>150</sup> *Centre for Child Law v Media 24* 2017 2 SACR 416 (GP) para 67.

<sup>151</sup> *Centre for Child Law v Media 24 Limited* 2018 2 SACR 696 (SCA).

<sup>152</sup> *Centre for Child Law v Media 24 Limited* 2018 2 SACR 696 (SCA) para 35.

<sup>153</sup> *Centre for Child Law v Media 24 Limited* 2018 2 SACR 696 (SCA) para 12.

<sup>154</sup> *Centre for Child Law v Media 24 Limited* 2018 2 SACR 696 (SCA) para 12.

<sup>155</sup> *Centre for Child Law v Media 24 Limited* 2018 2 SACR 696 (SCA) para 10.

<sup>156</sup> *Centre for Child Law v Media 24 Limited* 2018 2 SACR 696 (SCA) para 14.

<sup>157</sup> Refer to fn 35 above for a description of the test used by the courts when confronted with claims of unfair discrimination.

<sup>158</sup> *Centre for Child Law v Media 24 Limited* 2018 2 SACR 696 (SCA) para 27.

the outcome of any appeals to the Constitutional Court arising from the judgment.<sup>159</sup>

It is furthermore of value to note that the Supreme Court of Appeal, per Swain JA, despite its ruling expressed sympathy with the objective of the appellants in seeking to protect the anonymity of children as victims, witnesses and offenders of crime, once they reach adulthood. However, whether the law requires amendment and if so the nature and extent of such an amendment, Swain JA indicated, is a task more appropriately left to the Legislature.<sup>160</sup>

It is submitted by the writer hereof that an amendment to the law may not only be advisable but may be received with wide support. The Minister of Justice has already expressed support for an extension to the protection of the anonymity of children.<sup>161</sup> Such an extension would also be in line with the protection afforded to child witnesses in other Commonwealth countries.<sup>162</sup> Moreover, as highlighted by Willis JA,<sup>163</sup> to do otherwise would not only violate that person's constitutional right to dignity, but the knowledge, as a child, that one's identity as a victim of crime may be revealed upon attaining of one's majority, may haunt that child, causing her considerable emotional stress. In his opinion, which opinion is supported by the writer hereof, it verges on cruelty to sanction torment as such.<sup>164</sup>

Section 16 of the *Constitution* guarantees everyone, including children, the right to freedom of expression.<sup>165</sup> This includes the freedom of the press and media, freedom to receive or impart information and ideas, artistic creativity and academic freedom and scientific research. Of particular importance to the child witness is the freedom to receive or impart information and ideas.<sup>166</sup>

Currie and De Waal contend that as section 16(1) protects free expression, in principle one could argue that every act by which a person attempts to express some emotion, belief or grievance should qualify as "expression".<sup>167</sup> According to them, the wide, almost unlimited conception

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<sup>159</sup> *Centre for Child Law v Media 24 Limited* 2018 2 SACR 696 (SCA) para 34.

<sup>160</sup> *Centre for Child Law v Media 24 Limited* 2018 2 SACR 696 (SCA) para 33. Also see the dissenting minority judgment of Willis JA (Mocumie JA concurring) paras 36-104 supporting the ongoing protection of child victims and child witnesses after they reach adulthood.

<sup>161</sup> *Centre for Child Law v Media 24 Limited* 2018 2 SACR 696 (SCA) para 27.

<sup>162</sup> *Centre for Child Law v Media 24 Limited* 2018 2 SACR 696 (SCA) para 37.

<sup>163</sup> *Centre for Child Law v Media 24 Limited* 2018 2 SACR 696 (SCA) para 83.

<sup>164</sup> *Centre for Child Law v Media 24 Limited* 2018 2 SACR 696 (SCA) para 83.

<sup>165</sup> Milo, Penfold and Stein "Freedom of Expression" 42-30.

<sup>166</sup> Section 16(1)(b) of the *Constitution*.

<sup>167</sup> Currie and De Waal *Bill of Rights Handbook* 341.



of expression in section 16 means that protection is accorded to many problematic forms of speech that would be left out of constitutional consideration in other jurisdictions.<sup>168</sup> In the context of the child victim and child witness, one could accordingly argue that this provision guarantees the child witness the right to express himself or herself in a variety of ways, including in a non-conventional, novel or creative manner.<sup>169</sup> This correlates with section 161(2) of the *Criminal Procedure Act*, which states that in the case of a witness under the age of eighteen years evidence shall be deemed to include "demonstrations, gestures or any other form of non-verbal expression".

In addition, child witnesses should be able to express themselves "freely" when giving testimony in the criminal justice setting.<sup>170</sup> The possibility of doing so for children in an adversarial criminal justice system has been questioned by professionals and academics.<sup>171</sup> Empirical evidence has in fact shown that the confrontational setting decreases the child's willingness and ability to give an accurate description of the events he or she has to testify about. Children are more likely to say "I don't know" or may even refrain from answering at all.<sup>172</sup>

Section 170 of the *Criminal Procedure Act* recognises the context within which a child complainant or child witness has to testify. It accepts that testifying in court carries with it a certain degree of mental stress or suffering for the child. Its objective is to reduce to the minimum the degree of stress experienced by the child and to create an atmosphere that is conducive to allowing the child to speak freely about the events relating to the offence committed against the child. The provision of an intermediary is intended to create this atmosphere for the child.<sup>173</sup> One could therefore argue that, in order to ensure that a child has full realisation of the right to freedom of expression, the presiding officer should give serious consideration to the desirability of appointing an intermediary when exercising his discretion on whether or not to appoint an intermediary.<sup>174</sup>

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<sup>168</sup> Currie and De Waal *Bill of Rights Handbook* 342.

<sup>169</sup> Milo, Penfold and Stein "Freedom of Expression" 42-33. Children may therefore express themselves in a manner that takes their childhood into account, for example by way of anatomic dolls or with the aid of drawings.

<sup>170</sup> Section 161(2) of the *Criminal Procedure Act*.

<sup>171</sup> Schwikkard 1996 *Acta Juridica* 158

<sup>172</sup> Schwikkard 1996 *Acta Juridica* 158.

<sup>173</sup> *DPP v Minister of Justice and Constitutional Development* para 96.

<sup>174</sup> In terms of s 170A of the *Criminal Procedure Act* the appointment of an intermediary is subject to the discretion of a judicial officer presiding over a criminal proceeding. The judicial officer has to determine whether the services of an intermediary are required, based on an assessment of whether the child will suffer undue mental stress or suffering if the child testifies at such a proceeding. This test or threshold for eligibility has been criticised for being too vague, too stringent, and excluding many

### 3 Section 28: Specific children's rights

Section 28 of the Bill of Rights<sup>175</sup> affords children specific protection such as the right to a name and a nationality from birth;<sup>176</sup> to family care or parental care, or to appropriate alternative care when removed from the family environment;<sup>177</sup> to be protected from maltreatment, neglect, abuse or degradation;<sup>178</sup> as well as the right to have regard to the fact that a child's best interests are of paramount importance in every matter concerning the child.<sup>179</sup>

A perusal of section 28 reveals that the section does not afford the child victim and child witness a specific right to protection as a victim or witness. Nevertheless, the right not to be subjected to neglect, abuse or degradation as set out in section 28(1)(d) as well as the principle that a child's best interests are of paramount importance in every matter concerning the child are of particular importance to the child victim and child witness. These rights will accordingly be discussed in more detail below.

#### 3.1 *The right not to be subjected to neglect, abuse or degradation*

Section 28(1)(d) of the *Constitution* provides that a child has a right to be protected from maltreatment, neglect, abuse or degradation. This right reflects society's belief that children are vulnerable. According to Bekink and Brand, section 28(1)(d) imposes a constitutional duty on private persons, as well as the State, to refrain from these forms of treatment, and in addition imposes a positive obligation on the State to prevent harm to children.<sup>180</sup>

The second obligation is of particular importance in two possible instances. Firstly, the state is required to put an end to situations of on-going maltreatment, neglect, abuse and degradation in the family or any other context by means such as removing the child from such a situation.<sup>181</sup> This

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who might benefit, such as a complainant with little stress but serious communication difficulties. See *S v Mokoena* para 79; *Muller and Tait* 1999 *THRHR* 247-248.

<sup>175</sup> See fn 9 above.

<sup>176</sup> Section 28(1)(a) of the *Constitution*.

<sup>177</sup> Section 28(1)(b) of the *Constitution*.

<sup>178</sup> Section 28(1)(d) of the *Constitution*.

<sup>179</sup> Section 28(2) of the *Constitution*.

<sup>180</sup> Bekink and Brand "Constitutional Protection of Children" 188. The authors point out that the fact that the right is phrased as a right to be *protected* against maltreatment, abuse, neglect or degradation whereas a comparable right in the interim *Constitution* (s 30(1)(d)) said only that a child should not be *subjected* to such treatment underscores the fact that s 28(1)(d) imposes a positive obligation to protect children against such treatment. This view is held also by Friedman, Pantazis and Skelton "Children's Rights" 47-24. Also see s 7(2) of the *Constitution*, which states that "[t]he state must respect, protect and fulfil the rights in the Bill of Rights".

<sup>181</sup> Bekink and Brand "Constitutional Protection of Children" 188.

duty is given specific legislative effect in the *Children's Act*.<sup>182</sup> For instance, Chapter 7 of the *Children's Act* provides special measures for reporting cases of abuse or neglect of children,<sup>183</sup> while Chapter 9 of the *Children's Act* provides the legal machinery to intervene when a child is in need of care and protection, such as the removal of the child to temporary safe care.<sup>184</sup>

Bekink and Brand point out that, in order to meet this positive constitutional duty to intervene in situations of on-going abuse to protect a child, the State in many instances acts in conflict with the child's right to family or parental care. They argue that this creates the need for a flexible test against which to decide whether the decision by the State to intervene in a situation of abuse may be constitutionally sound.<sup>185</sup> Kruger<sup>186</sup> maintains that this infringement of the child's right to family or parental care is probably justified in terms of the limitation clause in situations of on-going abuse.

The second context within which the State must act to prevent the neglect, abuse, maltreatment and degradation of children is the general context of the legislative and policy protection of rights. In this regard the State is under a constitutional duty to create legislative and other measures to protect children against potential maltreatment, neglect, abuse and degradation. Examples of such legislation include the *Children's Act*<sup>187</sup> as well as the *Sexual Offences Act*,<sup>188</sup> which introduces a whole range of new offences aimed at protecting children from violence. These statutory instruments bear witness to an increasing awareness of and concern on the part of the legislature for the need to ensure that children are protected against the increasing prevalence of violence that is engulfing our society.<sup>189</sup>

Of particular consequence to the child victim or child witness are the various amendments made by the latter Act to the *Criminal Procedure Act* to provide for special measures for children to testify, such as testifying "in camera"; the prohibition of the publication of information that might reveal the identity of the child victim or witness, and the use of an intermediary.<sup>190</sup> In so doing

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<sup>182</sup> *Children's Act* 38 of 2005 (hereinafter referred to as the *Children's Act*).

<sup>183</sup> See s 110 of the *Children's Act*.

<sup>184</sup> See ss 151-152 of the *Children's Act*.

<sup>185</sup> Bekink and Brand "Constitutional Protection of Children" 189.

<sup>186</sup> Kruger 2007 *THRHR* 256.

<sup>187</sup> Chapters 7 and 9 of the *Children's Act*. The National Child Protection Register serves as an example of a measure to protect children against potential abuse or maltreatment. See ss 111-128A of the *Children's Act*.

<sup>188</sup> Chapter 6 of *Criminal Law (Sexual Offences and Related Matters) Amendment Act* 32 of 2007.

<sup>189</sup> *S v Mokoena* para 41.

<sup>190</sup> Refer to ss 153, 154, 158 and 170A of the *Criminal Procedure Act*. S 170A was inserted by s 3 of the *Criminal Law Amendment Act* 135 of 1991. This amendment came into operation on 30 July 1993. Subs (1) was later replaced by s 68 of the *Criminal Law (Sexual Offences and Related Matters) Amendment Act* 32 of 2007 by

the legislature has tried to ameliorate, if not eradicate, those aspects of the criminal process that tend to expose the child to secondary psychological trauma or emotional harm.<sup>191</sup>

In *S v Mokoena*<sup>192</sup> Bertelsmann J emphasised that in the light of the occurrence of this secondary trauma (the child's having to give evidence in court about his or her experience), it is incumbent upon the criminal law and criminal procedure and upon the courts along with their functionaries and practitioners to administer the criminal justice system in such a fashion that children who are caught up in its workings are protected from further harm and are treated with proper respect. Testifying "in camera" as well as the appointment of an intermediary goes a long way to ensuring that this right not to be subjected to (further) harm or abuse is accomplished.<sup>193</sup> This view is particularly apposite if one takes into account that the definition of "abuse" in the *Children's Act* is broad and includes the prevention of "exposing or subjecting a child to behaviour that may harm the child psychologically or emotionally".<sup>194</sup>

In *DPP v Minister of Justice and Constitutional Development*<sup>195</sup> the Constitutional Court acknowledged that for a child witness to testify about the details of abusive acts may cause severe harm to the child's psychological and emotional wellbeing and may lead to secondary traumatisation.<sup>196</sup> To subject the child to the normal adversarial process of testifying in court may accordingly fall squarely within the definition of abuse in the *Children's Act*.

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the insertion of the words "biological or mental" before "age of eighteen years", making it clear that it is not only chronological age that is contemplated. S 158 was enacted in 1996 by s 7 of the *Criminal Procedure Amendment Act* 86 of 1996.

<sup>191</sup> *S v Mokoena* para 63.

<sup>192</sup> *S v Mokoena* paras 49-50.

<sup>193</sup> *S v Mokoena* paras 50, 87.

<sup>194</sup> Section 1 of the *Children's Act*. Also see *YG v S* 2018 1 SACR 64 (GP), where the High Court (recently) dealt with the right (among others) not to be subjected to maltreatment, neglect, abuse or degradation in a case dealing with the corporal punishment of children in private settings. The High Court pointed out that the Constitution is very explicit in its exposition of rights. It gives protection from "all forms of violence", whether from "public or private sources", in s 12(2) thereof. The High Court accordingly found that as even "reasonable" physical chastisement involved a measure of violence, the permission of the reasonable chastisement defence clearly violated children's right to bodily and psychological integrity under s 12 of the *Constitution*.<sup>194</sup> The High Court furthermore, found that the defence violated a child's right to dignity under ss 10 and 28(1)(d) of the *Constitution* in relation to two aspects. Firstly, that conduct that breaches a child's right to physical integrity inevitably involves a measure of degradation or loss of dignity for the child. Secondly, that where an adult would be protected from a level of violence and the child not, the child is effectively treated as a second-class citizen by the law in this regard.

<sup>195</sup> *DPP v Minister of Justice and Constitutional Development*.

<sup>196</sup> *DPP v Minister of Justice and Constitutional Development* para 108.

The Constitutional Court has dealt with the right (among others) not to be subjected to maltreatment, neglect, abuse or degradation in two cases dealing with the corporal punishment of children in public settings.<sup>197</sup> Although the two cases were brought on grounds that included the right to be protected against maltreatment, neglect, abuse or degradation as stipulated in section 28(1)(d), the court did not make any significant pronouncements on the meaning of the subsection in either of the two judgments.<sup>198</sup>

In *S v Williams*<sup>199</sup> the court declared the section of the *Criminal Procedure Act* that allowed for the corporal punishment of juvenile delinquents to be invalid, owing to its being a violation of the right to be protected from cruel and degrading punishment. The court unfortunately did not find it necessary to examine the right in any detail.

The second case, *Christian Education SA v Minister of Education*,<sup>200</sup> was decided after the promulgation of the *South African Schools Act*,<sup>201</sup> which banned corporal punishment in schools. In dealing with the matter the Constitutional Court did not decide whether corporal punishment was in violation of the Bill of Rights, but instead focussed on the right to freedom of religion, and subjected the infringement of the right to a limitations analysis in terms of section 36 of the *Constitution*.<sup>202</sup> The court came to the conclusion that although the parents' right to freedom of religion was being violated by the ban on corporal punishment, the limitation was justifiable.<sup>203</sup>

Of value, however, for the child victim and child witness is the emphasis placed in both *S v Williams*<sup>204</sup> and *Christian Education SA v Minister of Education*<sup>205</sup> on the fact that the State has a constitutional obligation to protect all people and especially children from maltreatment, abuse or degradation. Sachs J in *Christian Education SA v Minister of Education* added that by ratifying the *Convention on the Rights of the Child* the State undertook to take all appropriate measures to protect the child from violence, injury or abuse and stated that one of the reasons for the

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<sup>197</sup> *S v Williams* 1995 3 SA 632 (CC); *Christian Education SA v Minister of Education* 2000 4 SA 757 (CC).

<sup>198</sup> Skelton "Children" 613.

<sup>199</sup> *S v Williams* 1995 3 SA 632 (CC).

<sup>200</sup> *Christian Education SA v Minister of Education* 2000 4 SA 757 (CC).

<sup>201</sup> *South African Schools Act* 84 of 1996.

<sup>202</sup> Skelton "Children" 613.

<sup>203</sup> Skelton "Children" 613.

<sup>204</sup> *S v Williams* 1995 3 SA 632 (CC) para 47.

<sup>205</sup> *Christian Education SA v Minister of Education* 2000 4 SA 757 (CC) para 40.

provisions banning corporal punishment was "to protect the learner from physical and emotional abuse".<sup>206</sup>

Although the focus of this paper is not on the international protection of child witnesses and victims it is perhaps of value in the light of the above dictum to consider article 19 of the *Convention on the Right of the Child (CRC)*.<sup>207</sup> It encapsulates the CRC's central and most comprehensive conceptualisation of the protection of children against all forms of violence.<sup>208</sup> In doing so it clearly places a legal obligation on States Parties to the CRC to establish measures for the protection of children against all forms of violence. Such protective measures should include a range of interventions, namely legislative, administrative, social and educational measures as well as social programmes of support for the child and the child's caregivers, proactive prevention against the experience of violence and maltreatment for those who have been the victims of violence.<sup>209</sup>

In its comments on article 19, the Committee on the Rights of the Child (the Committee) gives recognition to the fact that child victims and witnesses find the judicial process particularly onerous.<sup>210</sup> The Committee furthermore draws special attention to the fact that child victims and witnesses are in need of special protection, assistance and support appropriate to their age, level of maturity and unique needs in order to prevent possible hardship and trauma that may result from their participation in the criminal justice process. The Committee fittingly calls on all those involved in the judicial process to assist children in all possible ways in the unfortunate situation where those children have been the subject of victimisation.<sup>211</sup> In this regard the Committee emphasises that:<sup>212</sup>

- the protection and further development of the child and his or her best interests must form the primary purpose of any decision making;
- children and their parents should be promptly and adequately informed of the judicial process;

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<sup>206</sup> *Christian Education SA v Minister of Education* 2000 4 SA 757 (CC) para 50. Own emphasis added.

<sup>207</sup> *United Nations Convention on the Rights of the Child* (1989). The text of the Convention appears in Mtshaulana *et al Documents on International Law* 266. South Africa ratified the CRC on 16 June 1995.

<sup>208</sup> Own emphasis added.

<sup>209</sup> Article 19 of the CRC. Also see Committee on the Rights of the Child *General Comment No 13: The Right of the Child to Freedom from All Forms of Violence* UN Doc CRC/C/GC/13 (2011) (hereinafter referred to as the GC).

<sup>210</sup> GC 13 paras 36, 54.

<sup>211</sup> GC 13 paras 37-56.

<sup>212</sup> GC 13 para 54.

- child victims should be treated in a child-friendly and sensitive manner;
- judicial involvement should be prevented where possible; and
- in all proceedings involving child victims, the celerity (speed/haste) principle must be applied, while respecting the rule of law.

Mindful of the aforementioned aspects, child-sensitive measures, such as special interview rooms, modified courtrooms, CCTV, limiting the number of interviews and protecting the child from being interviewed by the alleged perpetrator should be used. All questioning should be conducted in a child-sensitive manner, for example by using testimonial aids or appointing psychological experts such as intermediaries or communicators to assist with the questioning of child victims and witnesses.<sup>213</sup>

It is accordingly submitted by the writer hereof that, in order to give full recognition to the right of child victims and child witnesses not to be subjected to neglect, abuse or degradation, it is imperative that all measures be taken to provide protection, assistance and support to these children in order to prevent possible hardship and trauma that may result from their participation in the criminal justice process.

The abovementioned amendments made to the *Criminal Procedure Act*<sup>214</sup> that provide for child friendly-measures in the criminal justice system as well as the abovementioned jurisprudence that gives recognition to the obligation of the State to undertake and implement appropriate measures to protect children from harm and or secondary harm is much welcomed, in that it demonstrates a progressive commitment by the State and the courts to realising a child victim's and witness's constitutional right to security and freedom from abuse.

### **3.2 The paramountcy of the child's best interests**

The best interests principle was established in South African law in the 1940s.<sup>215</sup> Its influence was, however, previously limited to family law proceedings. In emulation of international instruments,<sup>216</sup> the application of the best interests of the child principle has been expanded to all aspects of the law affecting children. In *Minister of Welfare and Population*

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<sup>213</sup> See GC 13 para 54 as well as the reference therein to the *United Nations Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime* (2005).

<sup>214</sup> Refer to ss 153, 154, 158 and 170A of the *Criminal Procedure Act*.

<sup>215</sup> *Fletcher v Fletcher* 1948 1 SA 130 (A).

<sup>216</sup> Article 3 of the CRC, a 4 of the *African Charter on the Rights and Welfare of the Child* (1990) (ACRWC).

*Development v Fitzpatrick*<sup>217</sup> Goldstone J pointed out that section 28(1) is not exhaustive of children's rights, but that:

... section 28(2) requires that the child's best interests have paramount importance in every matter concerning the child. The plain meaning of the words clearly indicates that the reach of section 28(2) cannot be limited to the rights enumerated in section 28(1) and section 28(2) must be interpreted to extend beyond those provisions. It creates a right that is independent of those specified in section 28(1).

This makes it clear that section 28(2) should not be limited to the rights enumerated in section 28(1), but that section 28(2) is a right on its own.<sup>218</sup> It should therefore not be regarded as a mere guideline.<sup>219</sup> In addition to being an independent right, this right also reinforces other rights.<sup>220</sup> The best interests principle has furthermore been used to determine the ambit of, as well as to limit, other competing rights.<sup>221</sup> The Constitutional Court, for example in *De Reuck v Director of Public Prosecutions*,<sup>222</sup> has found that although the law banning child pornography limits the applicant's rights to privacy and freedom of expression, this limitation is justifiable in view of the importance of the purpose of protecting the child's best interests.

It should be noted, however, that despite the use of the emphatic word "paramount" coupled with the far-reaching phrase "in every matter concerning the child" in section 28(2), this right does not automatically trump all other rights. In *De Reuck v Director of Public Prosecutions*<sup>223</sup> the *Constitution* held that to say that "s 28(2) of the Constitution 'trumps' other provisions of the Bill of Rights ... would be alien to the approach adopted by this Court that constitutional rights are mutually interrelated and interdependent and form a single constitutional value system". The court therefore stated that "s 28(2), like the other rights enshrined in the Bill of Rights, is subject to limitations that are reasonable and justifiable in compliance with s 36."<sup>224</sup> It follows, then, that the fact that the best interests of the child are paramount does not mean that they are absolute.<sup>225</sup> They are capable of limitation by section 36 of the Bill of Rights.<sup>226</sup>

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<sup>217</sup> *Minister of Welfare and Population Development v Fitzpatrick* 2000 3 SA 422 (CC) para 17.

<sup>218</sup> *S v M* 2008 3 SA 232 (CC) para 14.

<sup>219</sup> As was done in *Du Toit v Minister of Welfare and Population Development* 2003 3 SA 198 (CC).

<sup>220</sup> Skelton "Children" 620.

<sup>221</sup> *Sonderup v Tondelli* 2001 1 SA 1171 (CC); *De Reuck v Director of Public Prosecutions* 2004 1 SA 406 (CC).

<sup>222</sup> *De Reuck v Director of Public Prosecutions* 2004 1 SA 406 (CC) paras 88-91.

<sup>223</sup> *De Reuck v Director of Public Prosecutions* 2004 1 SA 406 (CC) para 55.

<sup>224</sup> *De Reuck v Director of Public Prosecutions* 2004 1 SA 406 (CC) para 55.

<sup>225</sup> *DPP v Minister of Justice and Constitutional Development* para 72.

<sup>226</sup> *S v M (Centre for Child Law as Amicus Curiae)* 2007 2 SACR 539 (CC) para 26.



The concept of the best interests of the child has in the past been criticised as being inherently indeterminate, providing little guidance to those given the task of applying it to matters concerning children.<sup>227</sup> This was partly due to the absence of a statutory checklist of factors to be taken into account when assessing what is in a child's best interests.<sup>228</sup> This was accordingly included in the *Children's Act*. Section 7 of the *Children's Act* sets out a list of fourteen factors<sup>229</sup> that must, where relevant, be considered by every

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<sup>227</sup> Boezaart "General Principles" 2-6; *S v M (Centre for Child Law as Amicus Curiae)* 2007 2 SACR 539 (CC) para 23.

<sup>228</sup> Note, however, that a comprehensive list of factors was proposed in *McCall v McCall* 1994 3 SA 201 (C) 205B-G, which identified 13 factors in an open-ended list specifically designed for resolving custody disputes.

<sup>229</sup> Section 7(1) of the *Children's Act* states as follows:

Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely -

- (a) the nature of the personal relationship between -
  - (i) the child and the parents, or any specific parent; and
  - (ii) the child and any other care-giver or person relevant in those circumstances;
- (b) the attitude of the parents, or any specific parent, towards -
  - (i) the child; and
  - (ii) the exercise of parental responsibilities and rights in respect of the child;
- (c) the capacity of the parents, or any specific parent, or of any other care-giver or person, to provide for the needs of the child, including emotional and intellectual needs;
- (d) the likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from -
  - (i) both or either of the parents; or
  - (ii) any brother or sister or other child, or any other care-giver or person, with whom the child has been living;
- (e) the practical difficulty and expense of the child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents or any specific parent on a regular basis;
- (f) the need for the child -
  - (i) to remain in the care of his or her parent, family and extended family; and
  - (ii) to maintain a connection with his or her family, extended family, culture or tradition;
- (g) the child's -
  - (i) age, maturity and stage of development;
  - (ii) gender;
  - (iii) background; and
  - (iv) any other relevant characteristics of the child;
- (h) the child's physical and emotional security and his or her intellectual, emotional, social and cultural development;
  - (i) any disability that a child may have;
  - (j) any chronic illness from which the child may suffer;
- (k) the need for a child to be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment;

decision maker who applies this principle. Boezaart<sup>230</sup> points out that regrettably the list provided in the Act is a closed list in that it does not provide for "any other factor that may be relevant" as was the case in *McCall v McCall*<sup>231</sup> and that this may prove to be a limitation in practice. However, she underscores, judicial officers can and should use their judicial discretion to consider any other factor where relevant.<sup>232</sup> Although no checklist can fully eliminate the indeterminate nature of the best interests of the child standard, the use of the checklist helps to ensure that relevant considerations are taken into account and that the decision-making process follows a rational and structured approach.

In *S v M*<sup>233</sup> the Constitutional Court acknowledged the difficulties with the indeterminate nature of the standard of the best interests. Sachs J noted that the very expansiveness of the paramountcy principle creates the risk of appearing to promise everything in general while actually delivering little in particular. The court pointed out, however, that it is precisely this contextual nature and inherent flexibility of section 28 that constitutes the source of its strength.<sup>234</sup>

As stated previously, the best interests principle also plays an important role in jurisprudence relating to the testimony of child victims and child witnesses in criminal trials. In *S v Mokoena*<sup>235</sup> Judge Bertelsmann declared section 170A(1) of the *Criminal Procedure Act* to be unconstitutional in that the subsection grants a discretion to a court to appoint or not to appoint an intermediary when a child witness has to present testimony in a criminal trial. Bertelsmann J relied on section 28 of the *Constitution*, which demanded that a child should be exposed to as little stress and mental anguish as possible, particularly in the case of a child witness who has been the victim of a sexual attack.<sup>236</sup> The learned judge noted that it was difficult to understand why the legislature should insist that the child victim should

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- (l) the need to protect the child from any physical or psychological harm that may be caused by -
    - (i) subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour; or
    - (ii) exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards another person;
  - (m) any family violence involving the child or a family member of the child; and
  - (n) which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child.

<sup>230</sup> Boezaart "General Principles" 2-8.

<sup>231</sup> *McCall v McCall* 1994 3 SA 201 (C) 205B-G.

<sup>232</sup> Boezaart "General Principles" 2-8.

<sup>233</sup> *S v M (Centre for Child Law as Amicus Curiae)* 2007 2 SACR 539 (CC).

<sup>234</sup> *S v M (Centre for Child Law as Amicus Curiae)* 2007 2 SACR 539 (CC) para 23.

<sup>235</sup> *S v Mokoena*.

<sup>236</sup> *S v Mokoena* para 78.

be exposed to undue stress and suffering before the services of an intermediary may be considered. In his view, this threshold provision places a limitation upon the best interests of the child that is neither rational nor justifiable when weighed up against the legitimate concerns of the accused, the court and the public interest. In his view, to demand an extraordinary measure of stress or anguish before the assistance of an intermediary can be called upon clearly discriminates against the child and is constitutionally untenable. In addition, according to him, this section infringes upon the child victim's right to equal treatment, dignity and a fair trial.<sup>237</sup>

However, in *DPP v Minister of Justice and Constitutional Development*<sup>238</sup> the Constitutional Court refused to confirm the order of invalidity. The Constitutional Court dealt with the matter by looking at four interrelated questions:<sup>239</sup>

- the object of section 170A(1);
- the proper meaning of the phrase "undue mental stress or suffering";
- whether this subsection is capable of being implemented in a manner that is consistent with the Constitution;
- whether this subsection is unconstitutional to the extent that it gives discretion to the judicial officer whether or not to appoint an intermediary.

Firstly, the Constitutional Court confirmed that the object of section 170A(1) is to protect child complainants in sexual offence cases and other child witnesses from undergoing the undue mental stress or suffering that may be caused by testifying in court. This object is consistent with the principle that the best interests of children are of paramount importance in criminal trials involving child witnesses. The court pointed out that section 170A(1) recognises the context in which a child complainant testifies in court and aims to prevent a child from undergoing undue mental stress or suffering while giving testimony by permitting the child to testify through an intermediary. Section 170A(1) must therefore be construed so as to give effect to this object, namely to protect child complainants from the hardship and trauma that may result from their participation in the criminal justice system.<sup>240</sup>

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<sup>237</sup> *S v Mokoena* paras 79-80.

<sup>238</sup> *DPP v Minister of Justice and Constitutional Development* para 132.

<sup>239</sup> *DPP v Minister of Justice and Constitutional Development* para 92.

<sup>240</sup> *DPP v Minister of Justice and Constitutional Development* para 98.

Secondly, with regard to the meaning of the phrase "undue mental stress or suffering", the Constitutional Court stressed that, as the phrase is not defined, the meaning of the phrase must be understood in the context of the objectives of section 170A(1)<sup>241</sup> as informed by section 28(2) of the *Constitution*, and the atmosphere in which a child is testifying in court.<sup>242</sup> The court observed that courts have come to accept that the giving of evidence in cases involving sexual offences exposes complainants to further trauma that may be as severe as the trauma caused by the crime. In addition the Constitutional Court pointed out that it is accepted by the court that a child complainant in a sexual offence case who testifies without the assistance of an intermediary faces a high risk of exposure to undue mental stress or suffering. The object of section 170A(1) read with section 170A(3) is precisely to prevent this risk of exposure.<sup>243</sup>

Thirdly, the Constitutional Court emphasised that this risk of exposure was also the reason why, contrary to the reasoning of the High Court, the subsection does not require that the child first be exposed to undue mental stress or suffering before the provision may be invoked. Such an interpretation of the *implementation* of section 170A(1) would be inimical to the objectives of both section 28(2) and section 170A(1) as well as article 3(1) of the CRC. What subsection 170A(1) contemplates is that the child should be assessed prior to testifying in court in order to determine whether the services of an intermediary are required. If such an assessment reveals that the services of an intermediary are needed, then the State must see to it that an application for the appointment of an intermediary in terms of section 170A(1) is made before the child testifies.<sup>244</sup>

According to the Constitutional Court this procedure should be followed in all matters involving child complainants in sexual offence cases and should

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<sup>241</sup> The Constitutional Court in *DPP v Minister of Justice and Constitutional Development* paras 94-97 lists the objectives of s 170A(1) as:

- aiming to prevent a child from undergoing undue mental stress and suffering while giving evidence;
- recognising the context in which a child witness testifies in court;
- aiming to reduce to the minimum the degree of stress or mental suffering and creating an atmosphere that is conducive for a child to speak freely about the events;
- recognising that children are often intimidated by the court environment, especially if they must confront their alleged abuser;
- recognising the role of an intermediary in fulfilling the objectives.

<sup>242</sup> *DPP v Minister of Justice and Constitutional Development* para 100.

<sup>243</sup> *DPP v Minister of Justice and Constitutional Development* paras 108-109. Also see the court's description from para 101 onwards of the difficulties experienced by the child witness and child victim while testifying. These include multiple interviews, an imposing court atmosphere and severe cross-examination.

<sup>244</sup> *DPP v Minister of Justice and Constitutional Development* paras 110-112. This is precisely what was done in the matter of *S v Mokoena*.

become a standard pre-occupation of our criminal courts dealing with complainants in sexual offence cases. In applying the best interests principle, judicial officers should therefore consider how the child's rights and interests are, or will be, affected if the child complainant in a sexual offence case has to testify without the aid of an intermediary. Where the prosecutor fails to raise this matter it follows that the judicial officer must, of his or her own accord, raise the need for an intermediary to assist the child in giving testimony.<sup>245</sup>

Furthermore, it should be noted that, according to the Constitutional Court,<sup>246</sup> the nature of an enquiry into the need for an intermediary is not akin to that of a civil trial, which attracts a burden of proof, as was found in the case of *S v F*.<sup>247</sup> Rather, it is an enquiry which is conducted in the interests of a person (the child) who is not a party to the proceedings but who possesses constitutional rights.<sup>248</sup> What is required of the judicial officer is therefore to consider whether, on the evidence presented to him or her, viewed in the light of the objectives of the *Constitution* and section 170A(1), it is in the best interests of the child that an intermediary be appointed.<sup>249</sup>

Fourthly, in considering the question whether the discretion given to judicial officers to appoint intermediaries renders section 170A(1) unconstitutional, Ngcobo J stated that the conferral of a discretion on judicial officers "cannot be unconstitutional simply because some judicial officers may exercise the discretion incorrectly".<sup>250</sup> Ngcobo J emphasised the importance of judicial discretion and stated that "what is required is individualised justice, that is, justice which is appropriately tailored to the needs of the individual case".<sup>251</sup> Moreover, Ngcobo stated, discretion is a flexible tool which enables judicial officers to decide each case on its own merits. In the context of the appointment of an intermediary the conferral of judicial discretion recognises the existence of a wide range of factors, such as the age, gender, disability and level of maturity of a specific child and the nature of the offence that could influence the appointment of an intermediary in a

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<sup>245</sup> *DPP v Minister of Justice and Constitutional Development* paras 112-113.

<sup>246</sup> *DPP v Minister of Justice and Constitutional Development* para 114.

<sup>247</sup> *S v F* 1999 1 SACR 571 (C). In the said case, the court equated an enquiry into the desirability of appointing an intermediary with a trial in which the State bears the burden of proof to establish the need for the appointment of an intermediary on a balance of probabilities.

<sup>248</sup> *DPP v Minister of Justice and Constitutional Development* para 114. It is precisely for this reason that the need for separate legal representation for the child victim has been advocated – see for example Iyer and Ndlovu 2012 *Obiter* 72.

<sup>249</sup> *DPP v Minister of Justice and Constitutional Development* para 115.

<sup>250</sup> *DPP v Minister of Justice and Constitutional Development* para 119.

<sup>251</sup> *DPP v Minister of Justice and Constitutional Development* para 120.

particular case.<sup>252</sup> The exercise of this discretion is, however, circumscribed in that it must be exercised with due regard to the objective of protecting the child from the undue stress or suffering that may arise from testifying in court and the principle that the child's best interests are of paramount importance in criminal proceedings concerning a sexual offence against a child.<sup>253</sup> The exercise of this discretion must therefore be so construed as to give effect to the aforementioned objective and the principle of the best interests of the child. The Constitutional Court therefore intertwines the test of undue mental stress or suffering with the best interests test.<sup>254</sup> This approach was also followed in *Kerkhoff v Minister of Justice and Constitutional Development*<sup>255</sup> where Southwood J stated with reference to *DPP v Minister of Justice and Constitutional Development* that "[i]t is clear that the enquiry has a narrow focus: to determine whether it is in the best interests of the child that an intermediary be appointed."

The Constitutional Court concluded that, if section 170A(1) fails to meet the objective of section 28(2), the fault lies not in the provision itself but in the manner in which it is interpreted and implemented. In the words of Ngcobo J an incorrect interpretation or implementation of the provision does not render it unconstitutional. The solution, according to the Constitutional Court, does not lie in making the appointment of an intermediary compulsory in every sexual offence case in which a child complainant is involved, but in making judicial officers and prosecutors aware of their constitutional obligations to ensure that the best interests of children are of paramount importance in criminal trials involving child complainants. In this context judicial education and the training of prosecutors and other officials who deal with victims of sexual offences are of vital importance.<sup>256</sup>

Although it may be argued, which argument is supported, that by issuing the above-mentioned dictum the Constitutional Court has effectively reduced the best interests of the child principle to essentially a matter of statutory interpretation,<sup>257</sup> the importance of the role of the best interests principle

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<sup>252</sup> *DPP v Minister of Justice and Constitutional Development* paras 122-124. Refer also to Heaton 2009 *JJS* 1 for a discussion of an individualised, contextualised and child-centred determination of the child's best interests. She submits that an individualised, contextualised and child-centred determination of the child's best interests is one that takes into account the cultural and religious circumstances, interests and needs of the individual child. She concludes that all factors that are relevant because they have or could have either a negative or positive impact on the individual child should be taken into account when assessing a child's best interests.

<sup>253</sup> *DPP v Minister of Justice and Constitutional Development* paras 126-128.

<sup>254</sup> Bekink 2014 *CARSA* 41.

<sup>255</sup> *Kerkhoff v Minister of Justice and Constitutional Development* 2011 2 *SACR* 109 (GP) para 7.

<sup>256</sup> *DPP v Minister of Justice and Constitutional Development* paras 131-132.

<sup>257</sup> Prinsloo 2012 *CARSA* 75.

and the objective of section 170A(1), namely to prevent children from being exposed to undue mental stress or suffering while testifying, have been reaffirmed by the Constitutional Court beyond any doubt.

In *Kerkhoff v Minister of Justice and Constitutional Development*<sup>258</sup> Southwood J stated with regard to the inquiry into what is in the best interests of the child when deciding on the appointment of an intermediary that the inquiry:

... is not concerned with whether the child is competent to give evidence or whether the child's evidence is admissible, credible and reliable. These are issues which will arise in the trial and will be decided by the court in the light of all the evidence. It is significant that section 170A makes provision for a simple procedure for the appointment of an intermediary and essential jurisdictional fact: i.e. when it appears to the court that the relevant witness would be exposed to undue mental stress and suffering.

This places an enormous responsibility on the courts and those dealing with child victims and child witnesses in the criminal justice system to ensure that section 170A is correctly interpreted and implemented, as an incorrect interpretation or implementation might result in a child who is in need of assistance being left out in the cold.

It is therefore not surprising that the Constitutional Court's view that section 170A(1) is not unconstitutional simply because it confers a discretion to appoint an intermediary on the courts has been the subject of some criticism. Freedman<sup>259</sup> points out that the Constitutional Court's reasons for rejecting the High Court's view that section 170A(1) is unconstitutional because it confers a discretion to appoint an intermediary are not entirely convincing, at least in so far as sexual abuse cases are concerned. He points out, and rightly so, that while it is true that some child complainants may want to confront their abusers, it is very unlikely that the majority of child complainants will want to. Given this fact he finds it difficult to understand why a right that may be claimed by a small minority of child complainants should outweigh the danger that conferring a discretion on the court to appoint an intermediary poses for the majority of child complainants. He stresses that in this respect it is important to bear in mind that it was the High Court that misinterpreted section 170A(1) and diluted the protection it confers on child complainants.<sup>260</sup> With reference to Schwikkard<sup>261</sup> he furthermore argues that the flawed approach adopted by the High Court towards section 170A(1) appears to have arisen out of a bias in favour of

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<sup>258</sup> *Kerkhoff v Minister of Justice and Constitutional Development* 2011 2 SACR 109 (GP) para 7.

<sup>259</sup> Freedman 2010 SACJ 305.

<sup>260</sup> Freedman 2010 SACJ 305.

<sup>261</sup> Schwikkard 1996 *Acta Juridica* 162.

the accused's right to confront and to cross-examine the child witness, and it is not entirely clear whether this bias can be overcome through a process of judicial education, as the Constitutional Court suggested. In addition, the Constitutional Court gives no indication of who should take responsibility for developing and implementing such a programme. Freedman points out, and rightly so, that the Constitutional Court's suggestion has simply been left hanging in the air.<sup>262</sup>

Similarly, Matthias and Zaal<sup>263</sup> are of the opinion that the High Court's approach is preferred for a society in which (as was generally agreed in both cases, according to them) the problems of insufficiently motivated and sensitised prosecutors and magistrates are extensive. The High Court's approach would have compelled prosecutors and magistrates to supply a cogent justification for the avoidance of intermediaries. Bertelsmann J states that the substantial reason qualification<sup>264</sup> in fact creates the flexibility which the Constitutional Court holds to be so vital.<sup>265</sup>

After considering the aforementioned arguments, the approach of the High Court is preferred in that it sets a standard norm for the appointment of intermediaries which can be departed from in the event that a child witness so wishes or cogent reasons can be found by the presiding judicial officer for not appointing an intermediary. This not only simplifies the process while allowing for flexibility but in addition ensures a more consistent interpretation and implementation of section 170A(1). Both the High Court and the Constitutional Court clearly accept as a point of departure the fact that testifying as a complainant in a criminal trial is stressful.<sup>266</sup> It is therefore difficult to imagine how the interests of justice will not be best served by allowing for the appointment of an intermediary as a standard norm.

## 4 Conclusion

It is common knowledge that the rights of children have not been adequately recognised in the past and that many legal systems have failed to fulfil this objective. Prior to the 1980s very few countries in the world recognised children's unique characteristics, such as their innocence, naivety, lack of maturity, language and cognitive development, in relation to those of adults. The need for an individualised approach when dealing with child victims and

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<sup>262</sup> Freedman 2010 SACJ 305.

<sup>263</sup> Matthias and Zaal 2011 *Intl J Child Rts* 265.

<sup>264</sup> What is required according to this principle is that the appointment of an intermediary should be subject to a standard norm which could be departed from only for a good reason found and reported.

<sup>265</sup> Matthias and Zaal 2011 *Intl J Child Rts* 265.

<sup>266</sup> *S v Mokoena* para 77; *DPP v Minister of Justice and Constitutional Development* para 108.



witnesses in the criminal justice system was not acknowledged. The emphasis was placed on the child's responsibility as victim and/or witness to assist the criminal judicial system, with little attention being afforded to the child's needs.<sup>267</sup>

This is also true of the child victim and witness in the South African criminal justice system. In *DPP v Minister of Justice and Constitutional Development*,<sup>268</sup> the Constitutional Court acknowledged that in the past South African law did not pay much attention to the anxiety and stress that child victims and child witnesses suffered when entering the criminal justice system, especially while testifying.<sup>269</sup>

Since becoming a democracy in 1994, the South African government has committed itself through the *Constitution* to address and improve the situation of children, including that of child victims and witnesses. Owing to their particular vulnerability and the difficulties experienced by child victims and witnesses when having to testify, it is of immense importance that they receive the necessary protection. It is hence heartening to note that the evaluation of the constitutional protection of child victims and child witnesses in the criminal justice system clearly illustrates that their rights, such as the right to dignity, equality, individual autonomy, and freedom from violence, and the standard of the paramountcy of the best interest of the child, lie at the heart of the *Constitution*. The evaluation also reflects the constitutional obligation of the State and its institutions, including the courts, to respect and safeguard these rights.

The jurisprudence referred to above, such as *DPP v Minister of Justice and Constitutional Development*<sup>270</sup> and *Centre for Child Law v Media 24 Limited*,<sup>271</sup> demonstrates an enlightened and general dedication by the courts to realising these rights for child victims and witnesses in real-life situations. In this regard the courts can be commended for recognising children's' vulnerability and for acknowledging the right of child victims and child witnesses not only to be treated with dignity and compassion but also to be protected from the hardship and trauma that may result from their participation in the criminal justice system.<sup>272</sup> The recognition given by the courts to the importance of the application of special measures such as testifying "in camera"; the prohibition of the publication of information that may reveal the identity of the child victim or witness; and especially the provision of an intermediary in alleviating undue mental stress or suffering

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<sup>267</sup> Bala 1990 *Queen's LJ* 3; Van der Merwe "Children as Victims and Witnesses" 563.

<sup>268</sup> *DPP v Minister of Justice and Constitutional Development* para 1.

<sup>269</sup> Müller and Tait 1999 *THRHR* 242.

<sup>270</sup> *DPP v Minister of Justice and Constitutional Development* para 1.

<sup>271</sup> *Centre for Child Law v Media 24 Limited* 2018 2 *SACR* 696 (SCA).

<sup>272</sup> *DPP v Minister of Justice and Constitutional Development* para 108.

7for the child victim and witness while giving testimony is moreover greatly welcomed.<sup>273</sup> It is submitted, however, that the appointment of an intermediary as a standard norm, as argued above,<sup>274</sup> would further enhance the protection of child victims and witnesses.

The application of the best interest principle by the courts in the aforementioned judgments resoundingly demonstrates a commitment by the courts towards a child-centred and child-sensitive dispensation when dealing with child victims and witnesses. The courts can be complemented for recognising the inherent worth of children<sup>275</sup> and for treating these victims and witnesses as individuals with a distinctive personality and not merely as miniature adults. By applying and developing the law in such a manner, namely one that favours protecting and advancing children's rights, recognition is given to "the right [of children] as far as possible to live in a secure and nurturing environment free from violence, fear, want and avoidable trauma."<sup>276</sup>

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<sup>273</sup> *DPP v Minister of Justice and Constitutional Development*.

<sup>274</sup> Refer to para 2.3 above.

<sup>275</sup> *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* 2014 2 SA 168 (CC) para 52.

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## List of Abbreviations

ACRWC	African Charter on the Rights and Welfare of the Child
CARSA	Child Abuse Research in South Africa
CRC	United Nations Convention on the Rights of the Child
Crim LR	Criminal Law Review
DOJ&CD	Department of Justice and Constitutional Development
DSD	Department of Social Development
DWCPD	Department of Women, Children and People with Disabilities
Intl J Child Rts	International Journal of Children's Rights
JJS	Journal for Juridical Science
Namibia LJ	Namibia Law Journal
Queen's LJ	Queen's Law Journal
SACJ	South African Journal of Criminal Justice

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SAJHR	South African Journal on Human Rights
SALC	South African Law Commission
THRHR	Tydskrif vir Hedendaagse Romeins- Hollandse Reg
UNICEF	United Nations Children's Fund