SECTION 15 AND 16 OF THE CRIMINAL LAW (SEXUAL OFFENCES AND RELATED MATTERS) AMENDMENT ACT 32 OF 2007; LESSONS FROM THE TEDDY BEAR CLINIC CASE

BY

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SUBMITTED IN FULFILMENT OF THE REQUIREMENTS OF THE DEGREE OF MASTERS OF LAWS IN THE SCHOOL OF LAW OF THE UNIVERSITY OF KWAZULU-NATAL

DECEMBER 2016

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DECLARATION

I, Yolynn Rutanya Nicolette Denness, hereby declare that the work contained herein is entirely my own, except where indicated in the text itself and that this work has not been submitted in full or partial fulfilment of the academic requirements of any other degree or qualification at any other University.

I further declare that this dissertation reflects the law as at the date of signature hereof.

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ACKNOWLEDGEMENTS

I wish to express that undertaking such an intense task is never possible without the contribution of many people and divine intervention. I would never have thought such an achievement was within my reach until now. However one can never say that this was a single handed approach without the support, patience and encouragement of everyone around me. I hereby wish to express my heartfelt thanks and appreciation to the people without whom such an achievement was but a dream.

Firstly, I am indebted to my supervisor, Professor Shannon Hoctor for his assistance and guidance. Professor Hoctor, you have been my inspiration and my motivation to see the light at the end of the tunnel. To my co-Supervisor, Mr. Khulekani Khumalo for your skills and meticulously scrutinising my drafts and correcting my errors, I am truly appreciative of your assistance and care. Moreover, I am so grateful for the time and effort that was undertaken by my supervisors to help me understand my expectations and set me on the path of success. I can candidly say that it is impossible without supervisors of your calibre.

I am truly grateful and indebted to Robynne Louw from the University of KwaZulu-Natal for always being willing and able to respond to my emails and equipping me with the tools to complete this project.

I must acknowledge all my family and friends for just being who they are and their constant encouragement and love. I mention the following: my mother, sister, Brads and Pheeds, Thirusha Moodley, Kersi Pillay and Doctor Rakesh Mohanlall.

Finally to my husband, Warren Denness, thank you for your unconditional love, support, motivation and encouraging me to believe in myself. This dissertation is dedicated to my daughter Tyler Tamia Denness who inspired such the topic. Thank you for your constant prayers for me, patience and love and for helping your technologically challenged mother. Take note that all things are possible with God and family.

“God has perfect timing, never early, never late; it takes a little patience and faith but always worth the wait”

STRUCTURE OF THE DISSERTATION

This dissertation is structured to analyse the amendments to sections 15 and 16 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 dealing with consensual underage sexual activity. Moreover this dissertation examines the judgement in *Teddy Bear Clinic for Abused Children and Another v The Minister of Constitutional Development and Others* 2014 (2) SA 168 (CC) in order to fully appreciate South Africa's position with regard to decriminalising the aforementioned sections and how the ruling lead to a new amended Act. A further aim of the writer is to evaluate some of the changes contained in the amendment Act and to determine its alignment with the ruling of the Constitutional Court.

Chapter one of the dissertation is entitled "*introduction."* The chapter comprises of a broad outline of the purpose of the present study. The topic that follows thereafter provides a background of the study.

The second chapter is entitled the "*Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007* (herein referred to as the 'SORMA')." The chapter comprises of a discussion on sections 15 and 16 in context. Thereafter the chapter proceeds into a detailed critical analysis of the above mentioned sections. The chapter closes with the defences available and gives the reader an insight into the reasons for civil society raising concerns about these specific provisions which caused the matter to be taken to the courts in the Teddy Bear Clinic case.

The third chapter is entitled "*The Teddy Bear Clinic* case*".* The case under discussion reflects upon the important orders of the Constitutional Court and the decriminalisation of the impugned provisions. The chapter discusses the facts of the case, the arguments made by the applicant, the response from the deponents, the High Court findings, the Constitutional court findings and the orders made to Parliament to correct the defects.

The fourth chapter is entitled "*Criminal law (sexual offences and related matters) Amendment Act 5 of 2015* and it comprises the climax of the dissertation whereby the Constitutional Court in the *Teddy Bear Clinic* case declared sections 15 and 16 unconstitutional and the defects were cured by the enactment of the said amended Act. The chapter mentions the changes to SORMA and how these changes align with the constitutional court ruling. The chapter also comprises the mandatory reporting obligations of the health professionals.

The final chapter, chapter five is entitled "*summary of arguments, conclusions and recommendations".* I refer back to the previous chapters in order to extract arguments and this final chapter is brought together by such arguments and observations to create a comprehensive conclusion.

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Chapter 1

INTRODUCTION

1.1 Purpose of the study

Child rights advocates have welcomed the ruling overturning parts of the Sexual Offences Act, which they say "was out of step with reality". [1] In the year 2013, most parents' fears became reality when consensual sex between teenagers was decriminalised. The consent to sex for children between the ages of 12-16 years has been a hotly debated topic throughout the media, non-government organisations and even the courts of law.[2]

Both the High court and the Constitutional court held in the *Teddy Bear Clinic* [3] case that the criminalisation of sections 15 and 16 of SORMA was invalid and inconsistent with the Constitution. [4] This dissertation examines the aftermath of the ruling in *Teddy Bear Clinic* case in order to fully appreciate South Africa's position with regard to decriminalising the aforementioned sections. The ruling lead to a new amended Act. A further aim of the writer is to evaluate some of the changes contained in the amendment Act and to determine its alignment with the ruling of the Constitutional Court.

1.2 Background to the study

Section 14 of the Sexual Offences Act 23 of 1957, [5] criminalised sexual intercourse with a child under the age of 16 years ('statutory rape'). The Sexual Offences Act was originally the Immorality Act which prohibited prostitution, keeping of a brothel and also criminalised consensual sexual intercourse with a child younger than 16 years of age.[6] Burchell[7] stated that it was offence under the act for any male to have or attempt to have intercourse with a girl under the age of 16 years and for any female to have or attempt to have unlawful carnal intercourse with a boy under the age of 16 years.

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1 JA Du Preez 'Decriminalising consensual sex' (2013) available at http://www.sajbl.co.za/article-consensualsex; accessed on 5 April 2015.

2 See (note 1).

3 *The Teddy Bear Clinic for Abused Children and Another v Minister of Constitutional Development and another* 2014 (2) SA 168 (CC); http://www.saflii.org/za/cases/ZAGPPHC/2013: Accessed on 2 April 2016.

4 The Constitution of the Republic of South Africa, 1996; the relevant sections pertaining to the rights to dignity (s10), privacy (s12) and the 'best interest of the child'(28(2) enshrined in the Bill of Rights that if adversely affected results in a violation of Constitutional Rights and subsequently this is inconsistent with the Constitution. The discussion in chapter 3 and 4 relates.

5 23 of 1957, s14.

6 5 of 1927, s1.

7 JM Burchell *Principles of Criminal Law* 5ed (2016) 627.

Kemp[8] indicates that the most notable offences in this category of ('statutory rape'), includes acts of indecency by a male with under aged males, acts of indecency by females with under aged females and immoral or indecent acts with under aged persons. Section 14(1) (b) of the Sexual Offences Act provided that it was an offence for a male person to attempt or have unlawful carnal intercourse [9] with a boy under the age of 19 years. It was also an offence for a female person to attempt or have unlawful carnal intercourse with a boy under the age of 16 years, or to commit an immoral or indecent act with a girl under the age of 19 years.[10] Effectively this set the age of consent to sexual intercourse at 16 years for both males and females in a heterosexual context. However with regards to a homosexual context the age limit was 19 years. This inconsistency with regards to the age to consent in the Sexual Offences Act was highlighted by the South African Law Commission (SALC), [11] in their 2002 report, together with the following aspects of defences. The Commission final proposal on the age of consent to sexual penetration was that it should be set at 16 years of age, irrespective of its heterosexual or homosexual context.

The Sexual Offences Act also identified defences that would have excluded the unlawfulness of the accused's conduct. This included defences such as implying that the child was a prostitute at the time of the offence or that the accused was a first time offender and was younger than 21 years was raised.[12] The accused could have also raised the defence of being deceived by the guardian of the victim into believing that the child was over 16 years.[13]

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8 G Kemp… et al *Criminal Law in South Africa* 2ed *(*2015) 368-369.

9 23 of 1957, s14 (1) (b) defines unlawful carnal intercourse as; sexual intercourse otherwise than husband and wife.

10 23 of 1957, s14 (1); the penalty was imprisonment for a period not exceeding six years with or without a fine not exceeding R12 000 in addition to such imprisonment in the context of 'immoral or indecent' acts in a homosexual context, the age limit was set at 19 years of age.

11 The South African Law Commission Report on Sexual Offences Project 107 (December 2002) para.3.7.4; available at http://www.dog.gov.za/salc/reports.htm accessed on 3April 2016.

12 Kemp (note 8; 369), first time offender gets some leniency depending on age meaning no involved in criminal activities.

13 Ibid, 8, many parents or caregivers allow such behaviour if in 'financial need'.

SALC wanted to retain the essence of section 14 of the Sexual Offences Act, however proposed that the defences should be limited in respect of criminal conduct of sexual penetration of a person under the age of 16 years against criminal conduct of an indecent act with a person under 16 years.[14] However SALC recommended that the defence of the accused being deceived into believing the child between the ages of 12-16, was over the age of 16 years still remained available.[15] The SALC was cognisant of the reality of teenage sexual experimentation thus opted for criminalisation of the conduct of an accused who was more than three year older than the under- age person of 16 years with whom he committed an indecent act not an act of sexual penetration.[16] In 2004, the SALC drafted the Sexual Offences Bill which proposed two options regarding sexual conduct with under-age children namely: (i) criminalising acts of sexual penetration and sexual violation with children below the age of 16; or (ii) criminalising acts of sexual penetration and sexual violation with children under 18 years.[17]

The draft Bill became the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (SORMA), [18] after the Sexual Offences Act was repealed and replaced. The writer will now focus on the SORMA with specific reference to sections 15 and 16.

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14 See note 11; at para.3.7.4

15 If the victim is under 12 then the conduct is rape even if the accused is also under 12; SALC Project 107 note 11 at para. 3.4.7, also see note 12 and 13.

16 Ibid 11

17 see note 11, at para. 3.7.5-3.7.7.

18 32 of 2007.

Chapter 2

Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007

SORMA [19] defined criminal behaviour in the context of children as follows:

> "Consensual sexual acts with certain children, sexual exploitation and sexual grooming of children, exposure or display of or causing exposure or display of child pornography or pornography to children and using children for pornographic purposes or benefiting from child pornography, compelling or causing children to witness sexual offences, sexual acts or self-masturbation and exposure or display of or causing exposure or display of genital organs, anus or female breasts (flashing)".[20]

Chapter 3 of SORMA comprised of sections 15-22 which dealt with sexual offences against children.[21] The unique aspect of SORMA was the comprehensive chapters dealing with sexual offences against children only.[22] The focus of this discussion following will deal specifically with the provisions of sections 15 and 16 of SORMA.

2.1 Section 15 of Act 32 of 2007

Section 15 of SORMA dealt with acts of consensual sexual penetration prior to the new Amendment Act 5 of 2015. [23] Section 15 of SORMA is defined as; "a person who commits an act of sexual penetration with a child, under 16 years of age, is guilty of a crime, even though the child may have consented to the act being performed."

It is important for the purposes of clarity at this stage to define the word 'child' in the definition. [24] Section (1) (1) of SORMA defines the word child as follows: 'Child' means, a person under the age of 18 year and with reference to section 15 and 16 respectively, a person 12 years or older but under 16 years of age. Snyman[25] reiterates that perhaps the most important of sexual offences is sexual intercourse with children under the age of 16 years even when they consent.

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19 32 of 2007, s15.

20 Kemp (see note 8, 369) and see also chapter 3 of Act 32 of 2007, 'flashing' defined by Urban Dictionary as 'revealing your private parts to anybody'.

21 see note 18, chapter 3, s15-22 dealt purely with sexual offences against children.

22 see note 18, unique in terms of any legislation to have a chapter dealing with specific offence in an act.

23 see note 19, s15 before enactment of Amendment Act 5 of 2015.

24 note 18, s(1)(1) defines the word child; and see also note 4, s28(2).

25 CR Snyman *Criminal Law* 6ed (2014) 383.

The elements required to satisfy a crime in this regard was, the unlawful and intentional commission of an act of sexual penetration with a person between the ages of 12- 16 years.[26] Snyman[27] indicated that this is a very important crime and emphasised that the crime under section 15 of SORMA was usually referred to as 'statutory rape.' Snyman, submitted that sexual penetration of a child between the ages of 12-16 years was criminalised, because such a child was not mature enough properly to appreciate the consequences of sexual acts, especially sexual penetration of a female by a male.[28] Section 15 stretched much further than a mere sexual intercourse due to the wide definition covered in SORMA with respect to 'sexual penetration'.[29]

SORMA included penetration of the child's vagina, anus or mouth. [30] The penetration also included being performed with any other part of the body such as a finger, toe or sex toy, a stick or the genital organs of an animal.[31] Section 15 of SORMA thus criminalised all consensual forms of sexual penetration between adults and children as well as amongst themselves.[32]

2.2 Section 16 of the Act 32 of 2007

Prior to the enactment of SORMA , 'consensual indecent assault' of children was not a specific offence.[33] The common-law crime of 'indecent assault' did exist to be used in prosecutions that pertained to children under 12 years of age.[34] Under SORMA the crime of 'indecent assault' was repealed and the statutory offence of 'sexual assault or sexual violation' was introduced.[35] Sexual violation is defined in section 5 of SORMA as follows: 'conduct of a sexual nature, short of sexual penetration, which would have fallen under the definition of 'indecent assault' under the common law.[36]

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26 Snyman (note 25, 384).

27 supra note 26,384.

28 note 26, 384, although the child offered consent, the child was incapable to understand his/her actions therefore regarded as 'incompetent' to do so.

29 note 18, 'penetration of the child's vagina, anus, mouth,' as stated in the act amounts to penetration and also includes by means of fingers , toes and or objects even animal genitalia not only human genitals.

30 note 28 above

31 supra note 30

32 supra note 30

33 Snyman (note 25,371); sexual violation' whereby it says the following: a person ('(A') who unlawfully and intentionally sexually violates a complainant ('B') without the consent of B, is guilty of an offence of sexual assault.

34 supra note 33

35 note 33, the crime of 'indecent assault' not used again but instead sexual violation or sexual assault was instituted.

36 Snyman (note 25,371) ,See Snyman commentary on sexual assault; 'the previous crime of indecent assault' crime was created in section 5 of the Act replaces the previous common-law crime of indecent assault, this latter crime is repealed by section 68(1)(b).

The crime of sexual assault or sexual violation includes non-consensual sexual conduct in respect of children.[37] However section 16 of SORMA was intended to criminalise all acts of consensual sexual violation committed by adults with children aged between 12-16 years. Section 16(1)[38] creates the offence as follows; 'a person (A) who commits an act of sexual violation with a child (B) is despite the consent of B to the commission of such an act, guilty of the offence of having committed an act of consensual sexual violation with a child.' Snyman indicated that the perpetrator must have met the following elements namely; the act must be an act of sexual assault or sexual violation, committed against a person aged 12-16 years, with an unlawful intention.[39] There must be a written authorisation from the Director of Public Prosecution to clarify the institution of criminal prosecution if both parties involved were children at the time of the alleged commission of the offence of sexual penetration or sexual violation.[40]

2.3 Critical Analysis of Section 15 and 16

All legislation pertaining to children are enacted with the best interest of the child being paramount.[41] The main purpose of sections 15 and 16 was to protect children against sexual exploitation.[42] Children however are vulnerable to undue influence by adults and significantly older children with respect to sexual conduct. The protection of children against adults and not protection of children against themselves is the solution.[43] Civil society and the public reacted to the implementation of the law and found it unreasonable as studies have shown that a quarter of South African adolescents are sexually active by the time they are 15 years of age.

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37 see note 18; s16.

38 supra note 18; s 16, defines the crime of sexual violation or sexual assault.

39 Snyman (see note 25, 387)

40 Burchell (see note 7,630), the legislative amendment dealing with the situation where both parties are children which will be discussed further under(2.4.) under critical analysis of sections 15 and 16 and also see *J v National Director of Public Prosecutions* 2014 (2) SACR 1 (CC), The Director of public Prosecutions makes a decision on prima evidence (on face value) evidence, available at: http://www.childjustice.org.za-protecting-child-offenders-testing-the-National-Register-of-sex-offeners-htm accessed on 18 May 2016.

41 see note 4, s28 (2).

42 see note 18, s15 and 16.

43 C du Toit 'Protection of children against adults '(unpublished article for the Centre of Child and Family Law, 2013), available at http://www.bhekisisa.org/article/2013-05-31-00-sexualoffences accessed on 17 May 2016.

While the legislation could be said to be honourable and noble, confusion reigned amidst the bizarre anomalies within its provisions. A specific anomaly which arises related to the situation where one of the parties was below the age of 16 years whereas the other was over 16 years but only the older party is prosecuted. The criminalisation of intercourse between two consenting children between 12-16 years has been criticised on the grounds that it is not abnormal for adolescents in this age group to experiment with sex and that such conduct is developmentally significant and normative.[44] Child right's activists such as 'RAPCAN' and CHILDLINE echoed these sentiments acclaimed by Snyman.[45] Snyman was convinced that punishing adolescents for such conduct was incompatible with human rights enshrined in the Constitution. He further reiterated that, "children's rights to dignity, privacy, body and psychological integrity as well as the constitutionally recognised principle that a child's best interest are of paramount importance in every matter concerning the child."[46]

The implementation of SORMA, section 15 and 16 respectively had been met with mixed feelings by advocacy groups whereby on the one hand some applauded the provisions while on the other hand many raised concerns.[47] In light of this statement, it becomes necessary to highlight the major practical problems that the provisions proposed for consensual sexual activity in children between the ages of 12-16 years. Firstly, where two children where older than 12 years but younger than 16, engaged in consensual sexual activity, both the children were arrested and charged by the police.[48] Section 15 criminalised the sexual intercourse between children who were over 12 years of age but younger than 16 years.[49] Section 16 criminalised any sexual activity other than penetrative sex between children who were 12 years but younger than 16.[50] This meant that a 16 year old girl that had sex with her 15 year boyfriend would be prosecuted alone whilst if the pair were both 15 years at the time of the commission of the offence, both would be prosecuted.[51]

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44 Snyman (see note 25,384), Children's behaviour that is meaningful and regular or standard when they reach puberty to become sexually active as their bodies develop, feelings develop. This leads to holding hands, kissing and petting.

45 C Nomdo 'Criminalising consensual sexual activities in SA' 2014 16(1) *Children's Rights Project Journal 3* available at http://www.mg.co.za/article/2013-01-16-grren-light-for-healthy-sexual-development, accessed on 02 July 2016.

46 Snyman op cit note 44, 384 and also see note 4, s28 (2) indicates that all children have inherent human rights ie, rights to Privacy, s14 dignity, s10 but most importantly 'best interest of the child s28 (2)' must be upheld.

47 S Nair *A critical evaluation of SORMA provisions* (unpublished LLM Assignment, Nelson Mandela Metropolitan University, 2015) 13, available at http://www.nmmu.co.za/thesis/2013-05-30-critical-evaluation-of-sexual-offences-act accessed on 5 May 2016.

48 Snyman (see note 25,384-385).

49 See note 18, s15.

50 See note 18, s16.

51 See note 18, s15 together with 56(2); 'It must be remembered that in s15, which creates this crime, provides in subs 2(a) that if both X and Y are children, i.e. between 12-16 both must be charged with contravening s15.'

The provisions also appeared contradictory when juxtaposed with certain sections of SORMA.[52] A case in point of the contradiction is evidenced where an obligation is placed on any person with knowledge that a sexual offence has been committed to immediately report such knowledge to the police.[53] A legal framework that provided adolescents with a right to access reproductive medication including contraceptives at age 12, however had to report underage consensual sexual activity to the police. Strode [54] stated that, "these conflicting branches of law placed doctors and the police in an invidious position as they had a duty to provide a service but had to report all sexual acts involving children." Society in the form of doctors, teachers and priest would then be prosecuted if they knew this information and failed to report. Child rights experts agreed that children were already uncomfortable with discussing their sexuality, so therefore children would now refuse to divulge any information on their sexuality for fear of being sent to the police.[55]

The effects of sections 15 and 16 of SORMA and the mandatory reporting provisions in sections 54 (1) violated children's constitutional rights in particular, the best interest of the child principle.[56] Our courts have also pronounced this principle in the *Minister for Welfare and Population Development v Fitzpatrick and Others,* [57] where Goldstone J, stated; "section 28 requires that a child's best interests have paramount importance in every matter concerning the child." However as the principle is broad it can only be given substance upon the discretion of the court. The test applied is where the court weights the good and bad factors and arrives at a decision. Section 7 of the Children's Act however provided a standard and open-ended list of factors which would guide any person or organ of State involved in making decisions regarding a child. [58] SORMA was therefore automatically bound to apply these factors listed in section 7 of the Children's Act. Section 7 placed an obligation on any person or organ of State applying the best interest of the child principle to protect the child from physical or psychological harm caused by abuse, violence or exploitation.[59]

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52 See note 47.

53 A Strode…et al "Amendments to the Sexual Offences Act dealing with consensual under-age sex, implications for Doctors" 2016, 6, 3 *Bioethics and the Law*, 256 -259.

54 Strode (see note 53,256-259).

55 J van Niekerk 'the aftermath of the Teddy Bear Clinic case' *You Magazine'* 12 May 2013, 15

56 32 of 2007; ,s 54(1).

57 2000 (7) BCLR 713 (CC) at para.18.

58 38 of 2005, s7 available at http://www.gov.za/sites/www.gov.za/files/a38-05-3-pdf accessed 10 December 2015.

59 D Smythe…et al *Sexual Offences Commentary Act 32 of 2007* (2011) 9-7.

How did SORMA, with specific reference to section 54, play out against the rights of the best interest of the child? In respect of section 54, the consensual sexual act is reported by the health professional to the police. This requires that the child be interviewed by the police and a statement obtained.[60] Moreover the child would have to undergo a medical examination in which a Sexual Assault Evidence Collection Kit (SAECK), is used to extract forensic evidence in the form of semen or spermatozoa for deoxyribonucleic (DNA) profile testing.[61] This does lead to tension between the child's right to be protected from harm and the fact that the formal justice system may not be in the child's best interest as a way of exercising his or her right to participate in decisions concerning themselves. This is suggested in instances where the child refuses to make a statement to the police or testify in court and the child is forced into doing this as arrest and prosecution could not be avoided in respect of the provisions of section 15 and 16 of SORMA.[62]

SORMA as discussed in the former paragraph is bound by the Children's Act and the Constitution specifically sections 28(2), the best interest of the child principle.[63] It further seeks to give effect to the rights enshrined in international law as the United Nations Charter on the Rights of the Child (UNCRC) [64] was ratified by South Africa in order to protect children from sexual violence through recognising the unlawful sexual acts against children and criminalising them. However sections 15 and 16 of SORMA failed to honour this obligation by criminalising regular or standard adolescent sexual behaviour. The child's right of being involved in all decisions pertaining to their wellbeing was infringed by the arrest, detention and prosecution as children do not have a final say in deciding whether an offence against them is prosecuted. As a result of exposure to the criminal justice system children were left ashamed, embarrassed, stressed, angry and regretful because their sexual activity was revealed to everyone.

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60 see note 18; s54; Discussion on this by myself as an experienced detective within the FCS unit of the South African Police for 20 years. I investigated many cases under this legislation and unfortunately all victims have to make a statement personally or else the case docket cannot be opened. Medical exam also compulsory for all sexual offences cases either at provincial hospital if under 14 years and over 14 at the District Surgeons.

61 supra note 60, all police stations stock this sexual assault kit. The Medical Doctor examines the child and completes the J88 medical form and takes specimens of semen for analysis. This is dispatched to the Forensic Science Laboratory in Pretoria.

62 Smythe (see note 59, 9-8); discussion: where children refuse to be involved in the case, the court will decline to prosecute and divert the matter to social workers or alternate dispute resolution avenues for example NICRO.

63 Smythe (see note 59, 9-7) and also see 38 of 2005, s7 (note 58).

64 supra note 59, The United Nations Convention on the Rights of the Child(UNCRC) is the most widely ratified human rights treaty in the world. The UNCRC was ratified by South Africa in 1995. One of the core provisions of the UNCRC is Art 3 which deals with the best interest of the child principle.

Another contradiction that arose from these provisions of SORMA was the comparison with the Children's Act.[65] The Children's Act provides that a child of the age of 12 and above may access condoms and contraceptives in confidence. However this was in contrast with the provisions in SORMA, whereby a child between the ages of 12-16 was prohibited from consensual sex, then why the need to access condoms and contraceptives when this behaviour is reported by health care givers to the police.[66] In addition sections 15 and 16 offered no confidentiality to children engaging in sexual conduct as their sexual history was widely discussed amongst parents, police and prosecutors when they were exposed.[67]

There were also two special defences available for sections 15 and 16. Firstly where the alleged 'victim'[68] deceived the alleged perpetrator[69] about his or her actual age. Section 56 (2) (a) of SORMA; provided a valid defence for a person, ('accused') [70] charged with this crime. Child ('Y') would have deceived person ('X') into believing that ('Y') was 16 years or older at the time of the alleged commission of the crime. Primarily ('X') must have 'reasonably believed' this.[71] However this provision does not apply if ('X') is related to the 'victim'.[72] The second defence illustrated in section 56 (2) (b) of SORMA is that both the person's charged with the alleged crime were both children at the time of the alleged incident.[73] This meant that both were between the ages of 12-16 years or that the age difference was not more than two years at the time of the offence.[74]

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65 38 of 2005, s134, part 3 of chapter 7, deals with access to contraceptives.

66 supra (see note 19), s 15 and 16 criminalised consensual sexual conduct in children aged 12-16 years and yet Children's Act children in that age group to access contraceptives. Children are then reported if sexually active and requesting 'condoms' in confidence….see note 45, where activists realised this discrepancy and said children now don't want to disclose underage sex for fear of being charged.

67 Nomdo (note 45, 3).

68 note 18, s56 (2) (a) and (b); also see Snyman (note 25,385).

69 Perpetrator' as defined by 'Oxford Dictionary'…'A person who commits a crime or does something that is wrong or evil, the person who commits the act against the child. Perpetrators called a suspect when detained or accused in court standing trial.

70 see note 69.

71 See Snyman (note 25, 385) Words 'reasonably believed' test is objective in the sense that a reasonable person in that circumstance would have had a belief that 'Y'was at least 16 years at time of offence…behaved in that same way, not merely looked like 16 years.

72 See note 18, s56 (3) for the meaning of the words: prohibited incest degrees of blood, affinity or an adoptive relationship not apply if related to the child.

73 Burchell (see note 7, 630).

74 supra note 73.

Burchell[75] criticised the scope of section 15 and 16 with regards to section 56 (2) (b) of SORMA. Section 56 (2) (b) regarded the fact that both children were under 16 year and the age difference between them was no more than two years at the time of the alleged commission of the sexual violation as a defence to the charge of sexual assault (violation) under section 16.[76] In other words, the age difference or 'close-in-age', [77] defence was only applicable to sexual assault (s16) and not made applicable under SORMA to sexual penetration (s15). It is submitted that the writer is in agreement with Burchell's criticism of the provisions as children are experimental when they reach puberty therefore sexual conduct can occur from mere kissing and petting to full on sexual intercourse. Therefore the defence should have been applicable to both provisions as sexual assault can lead to sexual penetration and should not be treated in isolation.

The element of unlawfulness and intention had to be present to result in a criminal offence. However, Snyman informs us that the element of 'intention'[78]; is not specifically mentioned in the definition as an element of crime, although he indicates that it is implied in the words, whereby the accused 'reasonably believed' that the child was 16 years and older.[79] The use of the word 'reasonable' brings an objective element into the inquiry which is purely subjective.[80] The decision rests with the court on how the latter was interpreted. It was suggested by Snyman, that a wide interpretation of the word should be preferred because such an interpretation would have enabled the court to have reached a conclusion compatible to the general principles applied to intention.[81]

Sections 15 and 16 of SORMA read with above provisions were subjected to a constitutional challenge in the high court based on the infringement of fundamental rights of children to dignity, privacy, integrity and upholding the best interest of the child.[82] In essence, the criminalisation of consensual child sexual experimentation was the central issue before the high court.[83] Having said that, it was not a surprise when child right's activist took the matter to court to challenge the constitutionality of the aforementioned provisions. The upcoming chapter will discuss the proceeding of the *Teddy Bear Clinic* case from the High Court all the way to Constitutional Court.

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75 Burchell (see note 7,630 at para D (1).

76 see note 68 above.

77 Burchell,(note 7,630); 'close-in-age gap' is a single age gap which can be a year or 2 older than the younger child at the time of the alleged sexual conduct'. Consensual or non-consensual sexual penetration or sexual violation of children under 12 years and an adult is clearly and justifiably punishable. This form of criminality was subject of challenge in the *Teddy Bear c*ase.

78 Snyman (see note 25,386 at para. 2(i).

79 supra note 25,386 at para. 2(j).

80 see note 25,387.

81 supra note 80.

82 see chapter 2 at 2.3. for discussion.

83 *The Teddy Bear Clinic for Abused Children and Another v Minister of Constitutional Development* 73300/10(2013) ZAGPPHC 1 available at http://www.saflii.org/za/cases/ZAGPPHC/2013 accessed on 4 April 2015.

Chapter 3

The Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development 2014 (2) SA 168 (CC)

3. Introductory Remarks

The decision in the *Teddy Bear Clinic* [84] case is of particular importance as it the first decision where section 15 and 16 of SORMA was interpreted within a constitutional framework. This chapter discusses the salient facts of the case, the arguments made by the applicants and the respondents respectively, the High court Findings and finally the ruling held by the Constitutional court.

3.1 The facts of the case

The applicants, the Teddy Bear Clinic for Abused Children and RAPCAN together with *amicus curiae* ; Women's Legal Centre Trust, Tshwaranang Legal Advocacy Centre and Justice Alliance of South Africa made an application against the Minister of Justice and Constitutional Development and The National Director of Public Prosecutions (the respondents) challenging the constitutional validity of certain sections of SORMA.[85] The sections in particular were, section 15 of SORMA, titled; consensual sexual penetration with certain children ('statutory rape), section 16; titled consensual sexual violation with certain children ('statutory sexual assault) and section 56(2) dealing with defences in respect of sections 15 and 16 of SORMA.[86]

The application arose from an incident that occurred at a high school involving four adolescents.[87] Three males persons aged between 14-16 years were charged for alleged rape on a 15 year old female. The adolescents filmed themselves via their cell phones having sexual intercourse on the sports grounds at the high school in Johannesburg.[88] The adolescents were all charged under section 15 of SORMA after the 15 year old female had claimed to be drugged and ganged raped by the males.

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84 *Teddy Bear Clinic* supra note 83
85 supra note 83, at para. 3-9
86 supra note 83, at para. 1.1-1.3
87 supra note 83, para.10-12
88 supra note 83, para.13

The National Director of Public Prosecutions (NDPP) decided to change the initial charge of 'rape' to 'statutory rape' under section 15 when it was established that the adolescents had engaged in consensual sexual conduct.[89] The NDPP later withdrew all charges and referred the matter for a diversion programme.[90] The constitutional validity of sections 15, 16 and 56 was then challenged by the applicants in the North Gauteng High Court.

3.2 Arguments made by the applicants

The applicants challenged the provisions of sections 15 and 16 of SORMA on the basis that criminalising sexual conduct violated their constitutional rights to dignity, privacy, integrity and the best interest of the child.[91] RAPCAN's [92] view was that the provisions destroyed any prospect of confidentiality through its mandatory reporting obligations. [93] Moreover RAPCAN professed that children's normal healthy sexual experimentation was fundamentally violated when they are put through the criminal justice system and forced to divulge intimate details of their conduct.[94] The argument of consequential reporting of children's sexual activity to the police directly violated their constitutional rights.[95]

A further argument raised by the applicants was the entry of the child offenders name in the National Register for Sex Offenders under s 50(1)(a)(i) of SORMA.[96] This was claimed to be a further direct violation of the accused rights to be treated in a cruel, inhumane and degrading manner in terms of section 12(1)(e) of the Constitution.[97] Adolescents faced the reality of being imprisoned with paedophiles and other hardened criminals which resulted in the adolescent 'perpetrators' being overwhelmed with shame and humiliation.[98]

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89 supra note 83, at para. 10-1-10.3

90 supra note 83 at para. 92; Diversion programmes are available for children who enter the justice system and Act 75of 2008 allows the child to divert into a programme where reasonable to obtain useful skills. However this is not always possible as the system is inundated and shortage of social workers available to run these programmes. A further discussion will be undertaken later in chapter 4 and 5.

91 see note 83, at para. 83, where the court mentions many case law namely; *MEC for Education, Kwa-Zulu Natal* v *Pillay* (2008(1) SA 474 (CC), stating it was held in this case that adolescents are bearers of all rights no less than adults. It further said that courts recognise children's rights to autonomy , particularly in the case of adolescents.

92 Nondo (see note 45) …*RAPCAN* is an non-government organisation that stands for 'Resources Aimed at the Prevention of Child Abuse and Neglect registered in 1973 and their work include primary, secondary and tertiary prevention approaches to child abuse; see also note 83, at paragraph 4-4.1 to 4.2 full discussion by the court on second applicant.

93 supra note 83, at para 4.

94 supra note 83, at oara. 50.

95 supra note 83, at para. 54.

96 supra note 83, at para. 60.

97 supra op cit note 96 and also see note 4

98 see note 83, para.60; see also SS Terblanche 'Child Justice Act,Detailed consideration of Section 68 as a Point of departure With respect to sentencing young offenders' 2013 *Potchefstroom Electronic Law Journal.*

The applicant's further challenged the provisions with regards to the reporting obligations on health care professionals to report consensual sexual conduct of children age 12-16 to the police.[99] The provisions made it mandatory for any person who had knowledge that adolescents were engaging in consensual under-age sex to be reported to the police and failure thereof meant prosecution.[100] It was submitted that children then lost faith in health care professionals because intimate details of their sexuality were exposed which resulted in the child being ashamed and embarrassed.[101]

The applicants argued that this provision was in contrast with the aims and objectives of an Act that claimed to help, support and protect children and enforce their best interests.[102] The applicants relied on the evidence from two experts, Professor Alan Flisher[103] who was a child and adolescent psychiatrist at the University of Cape Town and Ms. Gevers,[104] a clinical psychologist specialising in child and adolescent mental health in strengthening their arguments before the court. Their opinion was that intimate relationships between adolescents are developmentally normative and that it is usually within these relationships that adolescents explore a wide range of sexual behaviour.[105] The experts concluded that the provisions of SORMA lead to feelings of fear, anxiety and regret which would discourage them seeking help and advice for sexual conduct.[106]

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99 see note 83, at para. 24-26.

100 see note 83, at para. 24-26, this topic is going to be discussed in more detail under- Mandatory Reporting Obligations in the following chapter 4.

101 supra op cit note 100.

102 supra note 83, at para. 26.

103 supra note 83, at para. 48 until 62; The criminalisation of intercourse between two consenting children 12-16 years has been criticised on the grounds that it is not normal for adolescents in this age group to experiment with sex and that such conduct is developmentally significant and normative.' In the judgement the court refers to expert evidence of Flisher and Gevers which reiterated and demonstrated that it is "developmentally normative for adolescents to between ages 12-16 to engage in intimate relationships where their evidence discussed on behalf of applicants.

104 supra note 103.

105 see note 83, at para. 55.

106 supra note 105, at para.55-60.

3.3 Arguments of the Respondents

The respondent's main arguments in opposition to the applicants were that the impugned provisions did not violate any constitutional rights of children.[107] The respondents also specifically contended that the provisions of sections 15 and 16 had to be considered against the backdrop of the Children's Act as well as the Child Justice Act .[108] It was submitted that one of the aims of the Children's Act was to prevent children from being exposed to the negative effects of the criminal justice system by using processes more suitable to the needs of children and in line with the Constitution, one of which was the process of diversion.[109] According to the respondents, the provisions of sections 15 and 16 did not create offences but merely conferred upon the National Director of Public Prosecution (NDPP) or the Director of Public Prosecutions (DPP), the sole discretion as to whether or not to institute a prosecution where adolescents engaged in conducted that was provided for in the sections.[110] As such the discretion conferred would determine whether a prosecution in fact ensues and accordingly the exercise of such prosecutorial discretion would be done in line with the provisions of the Constitution, the Children's Act and the Child Justice Act whilst upholding the 'best interest of the child'.[111]

The respondents relied on experts such as a gynaecologist, sexologist and a principal of a school who testified that sexually active adolescents should be protected against others and themselves.[112] It was further submitted that adolescents faced the above risks due to their immaturity, irresponsibility, susceptibility to peer pressure and generally poor decision making.[113] The respondent's argued that it was necessary to have the deterrent of criminal law to protect adolescents from psychological harm as well as the risk of social ills in the form of unwanted pregnancies, HIV and other sexually transmitted diseases.[114] In addition it was contended that decriminalisation would send out the message that sex between children was acceptable with no repercussions.[115]

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107 see note 83, at para. 56-63.

108 supra note 107, at para. 62.

109 see note 83, at para.62; the court mentioned that Act 75 of 2008 allows the Prosecutor to divert the matter involving a child who is alleged to have committed an offence if : a) the child acknowledges responsibility for the offence; b) the child has not been unduly influenced to acknowledge responsibility and c): there is a prima facie case against the child and d) if the parent is present and consents to diversion and finally e) the prosecutor indicates that the matter can be diverted.

110 see para. 67

111 see para. 68.

112 see para.56.

113 see para.57, where the respondents put forward this response but the court although diversion can take place there is still the early process of arrest, detention, questioning that already exposes adolescent to the justice system.

114 see para.63, the use of the criminal justice system as a weapon to deal with sexuality would further marginalise children and effect them psychologically and their sexuality was the response of the court to the respondents.

115 see para.44.

3.4 The High Court Findings

The impugned provisions which were consequently challenged in this application was those that criminalised consensual sexual activity between adolescents, the consequential reporting and registration as a sex offender requirements.[116] The court agreed with the applicants submission that section 16, 'sexual violation' was broadly defined in that it included every form of physical contact such as kissing and petting. [117] The court further stated that the wide definition of sexual violation under section 16 criminalises moderate sexual acts that children are involved in and therefore undermines the child's best interest.[118]

In response to the respondent's submission that children are not prosecuted for these crimes but are rather diverted, the court stated that children were still exposed to the criminal justice system by early processes involving the arrest, questioning by the police, statement taking and even detention that had already negatively labelled the child and infringed on his or her dignity.[119] The court stated that the use of the criminal justice system as a weapon to deter consensual sexual conduct would further marginalise children and they will be harmed psychologically.[120]

Moreover the court agreed with the applicants that the criminalisation of consensual conduct had no influence on protecting children from adult sexual abusers.[121] In essence the court held that the provisions ought to be interpreted as implying that an adult who engages in consensual sexual penetration or sexual violation with a child aged 12-16 will be guilty of an offence.[122] The court further held that the age of 16 will remain the age of consent.[123]

The respondents relied on prosecutorial discretion and submitted that a bad decision could be submitted for a judicial review.[124] The respondents submitted that the bad decision should not be a subject of constitutionality. The court referred to *S v Zuma*[125] which held that 'the presumption of innocence cannot depend on the exercise of discretion.' The court held further that judicial review or prosecutorial discretion would seldom protect children from the infringements of constitutional rights.[126]

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116 see para.24.
117 see para. 26.
118 see para. 84-85.
119 see para. 65 and again later in judgment para. 106.
120 Ibid
121 see para. 105.
122 supra note 121
123 see para. 107.
124 see para. 89.
125 1995 (2) SA 642 (CC), para. 28.
126 see para. 90.

There is no legislative guideline available for prosecutors to decide to prosecute or not. In addition the task in opening a case docket is in fact the duty of the police. Further the court disagreed that prosecutorial discretion could save the constitutionality of the impugned provisions because there was no legislative guideline for sections 15 and 16 in place assisting prosecutors to prosecute or not.[127]

The high court attempted to remedy the provisions by introducing a 'close-in-age' defence to sexual penetration committed between children who are younger than 18 years or had an age difference of two years or less.[128] The court affirmed the age differential proviso to section 16 (statutory sexual violation) contained in section 56(2) (b).[129] This considers taking into account the definition of a child, which is common under the age of 18 years.[130] The purpose of such an age differential was to distinguish a youthful sexual predator from an innocent youthful participants and cover situations where there is an abuse of power in sexual realtions.[131]

Further the court paid attention to the respondent's submission that the impugned provisions must be read against the backdrop of the Children's Act and the Child Justice Act. According to the respondents the general principles under the Children's Act, which govern the implementation of the impugned provisions included the following namely that all proceedings, actions, or decisions in a matter concerning a child must respect, promote and fulfil the child's fundamental rights and the best interest of the child, subject to lawful limitation.[132] This they said can be regarded as a constitutional safeguard and therefore it would be incorrect to consider that the impugned provisions criminalise the sexual conduct of children without acknowledging the presence of these safeguards.[133] However the court referred to section 28(2) of the Constitution, which provides that a child's best interest are of paramount importance in every matter concerning a child.[134] In the *Minister of Welfare and Population Development v Fitzpatrick and Others*,[135] the Constitutional Court held that section 28 protects children against undue exercise of authority.

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127 see note above, at para. 90.

128 see note 18, s56 (2) b) provides that whenever an accused person is charged with an offence under section 16, it is a valid defence to such charge to contend that both the accused persons were children and the age difference(gap) between them is not more than two years at the time of the alleged commission of the offence; see also note 77, discussion under chapter 2, 2.3, see also para.36-37.

129 Ibid

130 32 of 2007(see note 18, s1).

131 see para. 36-37.

132 see para. 63-63.1-63.4.

133 see para. 64.

134 supra op cit not above.

135 2000 (3) SA 422 (CC), at para. 17; see also note 77.

The court held that in this regard, the evidence presented in this matter clearly indicated that the impugned provisions may cause the child harm as they constitute an unjustified intrusion of control into intimate and private relationships of children.[136]

Rabie J, held as follows:
"To subject intimate personal relationships to the coercive force of the criminal law is to insert state control into the most intimate area of adolescents' lives, namely their personal relationships. Any legislation which does so must be carefully and narrowly crafted to infringe on these vital; constitutional rights as little as possible. Analysis of sections 15 and 16 shows that these provisions do not properly balance children's rights to autonomy ,dignity and privacy with the state's interest in encouraging responsible sexual behaviour by children.[137]

Finally the court found that criminal offences which applied to consensual sexual conduct in previous cases have been found to be inconsistent with the fundamental right to dignity.[138] Namely in *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others,*[139] the Constitutional court considered the validity of criminalisation of sodomy and held that, " the criminal punishment of consensual sexual conduct is a form of stigmatisation which infringes the dignity of those targeted." The court held hereto that those findings by the Constitutional Court are equally true of the criminalisation of consensual sexual conduct between children and that the impugned provisions also stigmatised and degraded children on the basis of their sexual conduct.[140]

The High court upheld the contentions that were raised by the applicants and declared that sections 15 and 16 were invalid and inconsistent with Constitution insofar as they criminalised consensual acts between children ages 12-16 years.[141]

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136 see para.64.
137 see para.65 and later in judgment at para.105.
138 see para.75.
139 2000 (2) SA 1 (CC) at para. 28, see para. 76.
140 see para. 77.
141 see para.105-106.

The following orders were made by Rabie J:

"Section 15, section 16 and 56(2) (b) of SORMA are inconsistent with the Constitution as they criminalised consensual sexual conduct between the ages of 12-16 years. Further the court gave orders as to how the defects of the relevant sections 15 and 16 should be corrected respectively and declared how they should read. Section 15 should read as follows, a person ('A') who commits an act of sexual penetration with a child('B') is, despite the consent of B to the commission of such an act, guilty of the offence of having committed an act of consensual sexual penetration with a child, unless at the time of sexual penetration (i) 'A' is a child; or (ii) 'A' is younger than 18 years old and 'B' is two years or less younger than 'A' at the time of the such conduct. In addition, section 16 should read as follows, a person ('A') who commits an act of sexual violation with a child ('B') is, despite the consent of 'B' to the commission of such an act, guilty of the offence of having committed an act of consensual sexual violation with a child, unless at the time of the sexual violation A is a child."[142]

The application then went to the Constitutional Court for confirmation whereby the Constitutional Court interrogated the constitutional validity of criminalising consensual sexual acts between children.

3.5 The Findings of the Constitutional Court

The application for confirmation for a declaration of unconstitutionality came before the Constitutional Court in May 2013.[143] Khampepe J commenced by making it clear that the court views children as individual bearers of all fundamental rights entrenched in the Constitution.[144] The court further reiterated that children will experience unhealthy sexual behaviour but does that behaviour need to be punished in all instances?[145]

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142 see para.117.

143 *The Teddy Bear Clinic for Abused Children and Another v Minister of Constitutional Development* 2014 (2) SA 168 (CC) available at www.google.com/search?CCT12/13(2013)ZACC35,2013(12)BCLR1428; accessed on 10 April 2015.

144 see note 143, para.55

145 see note 143, para. 78., Khampepe J, indicates that in terms of s172 (1) of the Constitution obliged to declare the impugned provisions to the extent of inconsistency with the Constitution i.t.o. remedy in paragraph 72 of ruling.

The court ruled that when adolescents are publicly exposed to criminal investigation and prosecutions they are stigmatised and disgraced.[146] The court found that it had to agree with the applicants that even a prospect of diversion could not save the impugned provisions.[147] It was held that although this might be the case, the child still has to disclose with various state institutions when they engaged in 'normative developmental conduct,'[148] which left children humiliated and ashamed.

The court rejected the trial's court approach of 'reading in' an extension of the 'close-in-age' defence of section 15 and regulating the wording to cover an under 18 years old. [149] The court had insufficient evidence to decide that sections 15 and 16 of SORMA had the same constitutional implications for 16 and 17 year olds as they did for adolescents and was therefore not prepared to read in a 'close-in-age' defence or confirm the high court's judgement in this respect.[150] The Constitutional court proposed in this respect that the legislature should 'reconsider the close-in-age defence' and whether it should be applied to sexual penetration as advocated by the applicants.[151]

The Constitutional Court decided unanimously in favour of the judgement rendered by Khampepe J, that sections 15 and 16 of SORMA had unjustifiably and unreasonably infringed the constitutional right to dignity, privacy and 'best interest of the child.'[152] An analysis of the impugned provisions proved that there was an insertion of state control into the intimate areas of adolescents lives therefore this did not balance the rights to autonomy, privacy and dignity. The court held that sections 15 and 16 was therefore inconsistent with the Constitution to the extent that they criminalised consensual conduct of children between the ages of 12-16 years and therefore accordingly invalid.[153]

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146 see note 143, at paragraph 118

147 see para. 119.

148 see para. 98, 'normative developmental conduct'; the criminalisation of intercourse between consenting children 12-16 years has been criticised on the grounds that it is not normal for adolescents in this age group to experiment with sex and that such conduct is developmentally significant and normative. In the high court judgment the court referred to expert witnesses Flisher and Gevers that it is developmentally normative for adolescents to engage intimate relationships, the court even gave statistics.

149 see para. 50 where the court mentions this and says; 'discuss later' and does so in para.78-109, the court did not accept the high court decision in this regard and refused to confirm it.

150 supra note 149.

151 see para. 78.

152 see para. 78.

153 see para.117.

The court held that:

- Sections 15 and 16 of the SORMA was declared invalid to the extent that they imposed criminal liability for sexual offences on children under 16 years of age;[154]
- The declaration for invalidity was suspended for a period of 18 months from the date of the judgement to allow Parliament to correct the defects;[155]
- From the date of the judgement there was to be a moratorium on all investigations into, arrests made, prosecutions of and criminal and ancillary proceedings;
  regarding sections 15 and 16 offences, inclusive of the duty to report such sexual conduct between children 12-16 years under section 54 of SORMA, until Parliament had corrected the act;[156]
- Convictions or diversions orders made as a result of such offences committed by children 12-16 years in terms of sections 15 and 16 were to be expunged from the National Sex Offender Register.[157]

The Constitutional Court ruling instructed the lawmakers to correct the above legislation whereby after much time had passed, the Amendment Act 5 of 2015 came into operation in July 2015. The following chapter follows this enactment and puts forth a relevant analysis on the amended Act and how its aligns with Constitutional Court ruling.

154 see para. 117(1).
155 see para. 117(2).
156 see para. 117(3).
157 see para. 117(4); consulted P Stevens 'Recent Developments in Sexual Offences against children-A Constitutional perspective' 2013 *Potchefstroom Electronic Journal* 47* for commentary on the processers of the case only until the High Court ruled.

Chapter 4

Criminal Law (Sexual Offences and Related Matters) Amendment Act, Amendment Act 5 of 2015

4.1 Introductory Remarks

In July 2015, the Criminal Law (Sexual Offences and Related Matters (Amendment Act, Amendment Act 5 of 2015[158] (herein referred to as the Amendment Act) came into operation with the aim of amending SORMA, following the Constitutional Court judgment in the *Teddy Bear Clinic* case.[159] The court had ordered Parliament to amend certain provisions in SORMA and bring it in line with the Constitution and this was done with the birth of the above legislation.[160] This chapter evaluates some of changes contained in the Amendment Act to determine its alignment with the ruling of the Constitutional Court. In addition it will consider how the changes will impact the reporting obligations of health providers by decriminalising consensual sexual conduct between adolescents aged 12-16 years.

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158 5 of 2015 See also (note 18); See *also* all academic writers who commented on the new legislation in Burchell (note 7,632), and Kemp(note 8, page 370, paragraph 28.14.3.1 and P Mahery 'Reporting sexual offences involving child patients: What is current law following the Constitutional Court judgement?' (2014) 1 *South African Journal of Bioethics and the Law* 26-29 available on http://www.gov.za/sites/www.gov.za/files/38977-act-5-of-2015-criminal-law accessed 10 February 2016.

159 see note 143, paragraph 117(1-5)

160 supra note 143

4.2 Amendment Act 5 of 2015

The Preamble to the Amendment Act provides that the primary objective of sections 15 and 16 of SORMA is to protect children who are between the ages of 12-16 from adult sexual perpetrators. This provision remains unaffected by the Constitutional Court judgement and consequently also does not lower the age of consent in respect of sexual acts to 12 years.[161]

The amended section 15(1)[162] of SORMA define 'statutory rape' as follows:

(1) A person ('A') who commits and act of sexual penetration with a child ('B') who is 12 years of age or older but under the age of 16 years is, despite the consent of B to the commission of such an act, guilty of the offence of having committed an act of consensual sexual penetration with a child, unless A, at the time of the alleged commission of such an act, was –

a) 12 years of age or older but under the age of 16; or
b) Either 16 or 17 years of age and the age difference between A and B was not more than two years.

The amended section 16(1)[163] of SORMA defines the crime of statutory sexual assault as follows:

(1) A person ('A') who commits and act of sexual violation with a child ('B') who is 12 years of age or older but under the age of 16 years is, despite the consent B to the commission of such an act, guilty of the offence of having committed an act of consensual sexual violation of a child, unless A, at the time of the alleged commission of the act, was-

a) 12 years of age or older but under the age of 16 years: or
b) Either 16 or 17 years of age and the age difference between A and B was not more than two years.

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161 see note 123 a full discussion under chapter 3 above on the High Court's finding and Note 143 on the CC. findings i.e. age of consent not lowered to 12 but remains at 16 years.

162 see note 158, s15 (1); new amended definition.

163 see note 158, s16 (1).

4.3 Analysis of the amendments contained in the Amendment Act

First and foremost in amending the legislation the starting point was the definition of the word 'child' in section (1) of the Amendment Act.[164] Section(1) of SORMA had two different definitions of a 'child'. Firstly a 'child' is defined as a person under the 18 years old and secondly for the purposes of sections 15 and 16 was considered a person older than 12 but younger than 16 years.[165] The Amendment Act removed the latter part of the definition and created a comprehensive definition to cover any person under the age of 18 years. Strode [166] concurs that there is a similarity between SORMA and the Amendment Act namely where the age of consent to sex or sexual activity remains 16 years. Mahery[167] says that by inserting the age requirement directly into the relevant sections of 15 and 16, the lawmakers made it easier for professionals and state institutions to understand and apply. Firstly with regards definition of a 'child' the writer is in agreement with Mahery in that the SORMA was a difficult piece of legislation to read and to the understand. Having a different definition to the Children's Act created some confusion for state institutions. The amendment allows for one plain and simple definition, that any person under the age of 18 years is regarded as a 'child,' thus making it easy for children, parents, police and caregivers to understand.

Moreover section 56(2) (b) of SORMA had significantly impacted on the course of the amendments in the Amendment Act.[168] Section 56(2) (b) was one of two defences available under SORMA. Snyman[169] explains that according to the aforementioned section this was a valid defence for somebody charged under section 16(sexual violation), to allege that both the persons involved were children i.e. ages 12-15 years and or the age difference between them was not more than two years at the time of the alleged commission of the offence.[170] In the *Teddy Bear Clinic* case, the court called this the 'close-in-age' defence.[171]

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164 See note 18, s (1) (1) defines a 'child', the preamble defines the child.

165 see note 18 whereby the 'child' is defined as being under 18 years and for the purposes of S15 and 16 any person under 16 years

166 Strode (see note 53, 256-259).

167 P Mahery 'Reporting sexual offences involving child patients: What is the current law following the Constitutional Court judgment?' (2014) 1 *South African Journal of Bioethics and the Law* 26-29.

168 see note 73, initial discussion under 2.3 critical analyses of section 15 and 16 inclusive of defences and Rabie J, declared this section inconsistent with the Constitution under note 123.

169 Snyman (note 25) 385-386.

170 Snyman (note 25), 385-386, the second defence under SORMA, (note 19) indicated that reasonably believed test is objective in the sense that a reasonable person in that circumstance would have had the belief that Y was at least 16 at the time of offence.

171 see note 83, para.36. (Close in age disparity).

The original section 56(2)(b) of SORMA created an age gap defence for a perpetrator who was 16 or 17 years old at the time of committing a sexual 'violation' against a consenting adolescent who was not more than two years younger than the perpetrator.[172]

The Amendment Act makes fundamental changes to the position of the 16 and 17 year old in this regard. [173] The change means that it is no longer an offence if a 16 or 17 year old engages in a sexual act, either sexual penetration or sexual violation, with an adolescent aged between 12-15 years, provided they are not more than two years older than the younger partner.[174] Strode [175] submits that this intrusion is in line with the proposal made by the applicants in the *Teddy Bear Clinic* case, who argued that adolescents aged 15-17 are part of the same peer group given they complete grades 10-12 together. The peer group scenario would insinuate that the relationship was normal thus should not be criminalised. Strode and Mahery were in agreement that the amendment is broader than its original provision as it now covers both sexual violation and sexual penetration. [176] Strode further explains that the inclusion of the 'close-in-age' defence brings our law in line with the approaches adopted in the UK, Canada and the USA.[177] Under SORMA, this defence did not serve as an automatic withdrawal of the charge, since the Public Prosecutor had a discretion. The Amendment Act works differently in that when this defence is raised, no prosecution would ensue. However if that person is over that age gap then they have to be charged for the offence.

The writer reiterates Strode's submission and it is agreed upon that 16 or 17 year olds are still children and often children find themselves in the same grades as learners who are two years older or younger than them. This also occurs in the sports field, children two years older or younger are placed in the same team. In addition as a country that ratified international treaties it is fundamental to be aligned to international laws.

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172 Snyman (note above 25, 385-386) and see also Burchell (note 7,630).

173 see note 158, s15 (1) (b).

174 see note 158, and also see Mahery note 158, page 5 and Kemp note 8, 373.

175 See Strode note 53, 257; and also see note 83, at para. 44 where the 2nd applicant, shared same sentiments that children in that are younger than 2 or over 2 years apart in age can be categorised in same age bracket .

176 see Strode (note 53, 211 and 257) and Mahery (note 158, 5), the second significant change introduced by the Amendment Act is that it replaces the original age gap defence with an age gap exception. Both agreed that this change is very significant.

177 Strode (note 53, 257), while in some countries close-in-age defences are used to impose lighter penalties on adolescents in others such as SA such defences decriminalise the activity altogether. In recognition that the age of majority is 18, this defence helps protect 16-17 year olds(who are still legally children) from prosecution, as long as they are not more than 2-years older than their younger sexual partners. SA s party to the UNCRC so aligned with international law is vital.

Finally the Amendment Act did not change the age of consent for sex or sexual activity as it still remains at age 16 years.[178] Moreover non-consensual sexual intercourse with a child under 12 years still remains an offence as the child has no capacity to consent.[179]. It is submitted by the writer that the amendment to respond to the Constitutional Court ruling and remove the defects of the impugned provisions is applauded because it did not lower the age of consent and give adolescents' free reign in respect of sexual activity. Instead it created a more open and honest relationship in families and society. This allows adolescents to make truly informed choices on when to start exploring with their sexuality. It further re-affirmed the faith of children in the justice system that human rights are paramount and safeguarded and if infringed or violated, there is a right of recourse.

The mandatory obligations regarding the reporting of any sexual offence against a child remains in place. Section 54 of SORMA, has not been amended and therefore there is still an obligation to report the commission of sexual offences against children.[180] The following section will deal with the latter in more detail.

4.4 Mandatory obligations in reporting the offence

Strode [182] submits the following that consensual but underage sex was a criminal offence that had to be reported to the police. This was contradictory to the fact that other legislation provided that children from the age of 12 could access contraceptives and have termination of pregnancies yet consensual sex between adolescents remained a criminal offence.[183] "These conflicting approaches placed doctors, researchers and practitioners working with adolescents in and invidious position where they had a duty to provide adolescents with sexual and reproductive services but were required to report all sexual acts including consensual sexual activity between children."[184]

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178 see Kemp (note 8), par. 28.14.3; 'this development in criminal law does not mean that the state encourages premature Consensual sexual conduct.

179 See Kemp op cite note, 178; 'a person younger than age of 12 is irrebuttably presumed to be incapable of consenting to a sexual act; see s57(1) , see also 1(3)(a)(iv)' notwithstanding anything to the contrary in any law contained a male

or female person under the age of 12 is incapable of consenting to a sexual act.

180 see note 83, at para. 54, the High Court held that section 54 was not brought in as a challenge by the applicants in the case but the court could foresee that this matter would be challenged in the near future due to its implications and the court left it as is.

181 supra note 180 above.

182 see note 53, 257.

183 see note 58, s134. and also see note 83, para. 62.1.1-62.1.3

184 Strode (see note 53, 257).

McQuoid-Mason[185] instantaneously declared that doctors and health professionals no longer needed to report consensual sexual conduct of adolescents below the age of 16 years to authorities in terms of the Amendment Act. He drew this conclusion from the Constitutional Court judgement in the *Teddy Bear Clinic* case.[186]

However this submission was vehemently criticised by Strode and Bhamjee [187] where an alternative approach was submitted by Strode and Bhamjee in that, McQuoid-Mason's argument failed to recognise the nuances of the approach taken by Rabie J in the *Teddy Bear Clinic* case and also that section 54 of SORMA was not amended.[188] The argument raised by the above experts was that if the above submission was to be accepted then there would be no recognition given for certain forms of consensual sexual activity that is still illegal. Firstly in a matter where sexual activity is taking place between an adult and a child aged 12-15 years, secondly if the child is under the age of 12 years and if there is more than a two year 'close-in-age' gap between both adolescents, these instances should be reported.[189]

The relaxed provisions provided for after the *Teddy Bear Clinic* case still faces challenges as the judgement had raised many complexities. Namely, many adolescents aged between 12 and 15 may have to disclose that they are sexually active with persons over the age of 18 years.[190] Moreover, younger adolescents that are between 12-15 may reveal sexual involvement with adolescents partners who are older by more than two years, for example, a 13 year old with a 16 year old.[191] In addition, older adolescents, 16 or 17 year old may have to inform the health care worker that they are involved with children who are younger by more than two years.[192] Health workers who do not take cognisance of the above, may well create the same harmful consequences that were identified in the case.[193]

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185 D McQuoid-Mason 'Decriminalisation of consensual sexual conduct between children; what should doctors do regarding the reporting of sexual offences under the Sexual Offences Act until the Constitutional Court confirms the judgement of the Teddy Bear Clinic Case? (2013); 6(1); *South African Journal on Bioethics and the Law*, 10-12. This conclusion was drawn from the High Court, however the Khampepe J ruled that Parliament had 18 months and ordered a moratorium on all reporting obligations.

186 see note 185 above.

187 S Bhamjee…et al 'Reporting underage consensual sex after the Teddy Bear case: A different perspective' (2013); 6(2); *South* African Journal of Boiethics and the Law 3of 3; http://www.sajbl.org.za/index.php/sajbl/article/view/289/312 ; Accessed on 16 March 2016 .

188 see note 83 and 143, para 45 and 46.

189 see discussion in the introduction of this section, all provisions of the amended act purpose is to protect children against adult perpetrators therefore if the person is over the two year gap for example 19 years then he/she must be charged for a crime.

190 Z Essack, S Slack, A Strode 'Sex, lies and disclosures: Researchers and reporting of underage sex' ;(2009); 10(2); *South African Journal of HIV Medicine*; 8-10. Available at http://dx.doi.org/10.7196/SAJBL.289 accessed on 20 November 2015.

191 Essack (see note above).

192 supra op cit note 191.

193 A Strode…et al 'Child consent in South African law: Implications for researchers, service providers and policy-makers' (2010) 100(4) *South African Medical Journal* 247-249.

Strode and Bhamjee submit that both researchers and health care providers still have a legal duty to report consensual sexual activity in certain circumstances and they have not been accorded any discretion in this regard, as opposed to McQuoid-Mason's interpretation that 'no duty' rests on health care workers since the ruling by the Constitutional Court.[194]

The writer fully supports the submission of Strode and Bhamjee in that health care givers are required to still report certain sexual behaviour of children.[195] State institutions are bound by Article 19 of the UNCRC[196] whereby they have to take all appropriate legislative and social measures to protect children against any kind of abuse or degrading and inhumane treatment or punishment. Furthermore they are under a duty to protect children from sexual abuse or exploitation as per Article 27.[197] Health care providers are subject to the above legislation but have to be mindful of the cases that are reported. Section 54 is now less mandatory but creates a difficulty as all situations that present themselves before the caregiver might appear suspicious. Additionally it is not the caregivers' task to conduct an investigation but the job of the trained detective from the Sexual Offences Unit.[198] Moreover Rabie J specifically found that there was no need to address the constitutionality of section 54 (1)(a) of SORMA dealing with mandatory reporting of sexual offences against adolescents and thus this section was to remain in force.[199] In light of the court's submission on this provision, it is an indication that this provision had not passed constitutional muster and will in the near future be challenged due to the difficulties that it poses.

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194 D McQuoid-Mason 'Mandatory Reporting of sexual abuse under the Sexual Offences Act and the best interest of the child' (2011);4(2); *South African Journal on Bioethics and the Law;*74-79 available at http://www.sajbl.org.za/index.php/sajbl/article/view/289/312 accessed on 16 March 2016.

195 see note 193.

196 see note 59; Art.19.

197 see note 59, Art 27.

198 see discussion in chapter 2, FCS Unit is a specialised unit within the SAPS that investigate sexual offences. All matters that present at a hospital or district surgeons rooms get reported to that unit of SAPS who can conduct an investigation. However the argument is that it means child is faced with justice system again on the contrary not for consensual sex but non-consensual which is punishable by the Act.

199 see note 83, para. 45 and 46 where the court indicates that matter not going to be addressed but will be a challenge in the future.

Chapter 5

Summary of Arguments and Conclusion

5.1 Introductory Remarks

It has become abundantly clear throughout this dissertation that the writer is dealing with significant changes in legislation through the years due to defects in certain provisions. The writer has taken a journey through the Sexual Offences Act, which was repealed and replaced by SORMA. SORMA came into operation in 2007 with an ambition to cure the defects of the Sexual Offences Act; however the lawmakers were again mistaken as provisions namely section 15 and 16 of SORMA pertaining to sexual penetration and sexual violation respectively, were challenged in court for its constitutionality and validity. *The Teddy Bear Clinic* case then arrived and threw the concept of consensual sexual conduct between adolescents aged 12-16 (Sections 15 and 16), into the spotlight and challenged the criminalisation of such conduct in the Constitutional Court and successfully achieved the defects to be corrected by amending legislation and this lead to the Amendment Act of 2015. This final chapter deals with the way forward now that the Amendment Act is law.

5.2 Summary of arguments

In this section, I recap on the previous chapters in order to bring it all together to emphasise that the new Amendment Act has aligned itself with the Constitutional Court's ruling.

Legislation plays a crucial role in reacting to sexual violence in society. It is vital that the legislation governing sexual offences enables the criminal justice system to be more sensitised especially for child victims of sexual violence. SORMA was unique in that it paid attention to the most vulnerable population of the country, our children, in a whole chapter. Everyone applauded this legislation which extended the common law and professed to offer protection to all regardless of age or sex from criminal sexual acts however certain sections were flawed.[200]

In chapter two, specific focus is placed on these sections 15 and 16 of SORMA that criminalised consensual sexual activity between adolescents aged 12-16 years. Sexual offences legislation should be based on the rights of victims, as enshrined in the Constitution and likewise this would ensure that the rights are entrenched in legislation. The provisions was critically analysed and the following outcomes were made. Sections 15 and 16 allowed state control into the intimate areas of adolescent's lives which

violated the rights to autonomy, privacy and dignity.[201] Bearing this in mind, the writer is of the view that the provisions infringed on the rights of children.

Child Right Activist then challenged the constitutionally of sections 15 and 16 of SORMA. Chapter 3 elaborates on the landmark case. The judgment was met with mixed feelings from parents and criticised by members of society. Parents were of the opinion that the court had lowered the age of consent and had encouraged promiscuity, notwithstanding the reality that sexual activity was common behaviour in growing up. It had become abundantly clear from all the research consulted in the form of academic writers, studies of the judgement and feedback received from the applicants (RAPCAN and Teddy Bear Clinic For Abused children), that the fears were unfounded. The judgment maintained that the age of consent remain at 16 years but decriminalised sexual activity that was deemed to be standard and regular behaviour of adolescents.

The Constitutional Court ruling was sound and in line with the basic premises that the best interest of the child remains paramount in any decision concerning children. The writer agreed with the court's referral to *The Minister of Welfare and Population Development v Fitzpatrick and Others* where the Constitutional Court held that section 28(2) protects children against undue exercise of authority. The manner in which the previous legislation was promulgated gave adults a right to 'police' and regulates young people's sexual activity. The court had the writer's full admiration and support when it held that it was fundamentally irrational to state that adolescents did not have full capacity to make choices about their sexuality.

Chapter 4 lead the discussion on the implementation of the Amendment Act. The Amendment Act received much support from various civil society groups. The drafters could be commended for effectively decriminalising consensual sexual activity between adolescents in accordance with the Constitutional Court ruling. Strode states that "the Amendment Act is a significant step forward for children's rights."[203] The writer's view is that it had eased the tension between the Children's Act and SORMA by curing the defects with regards to section 134of the Children's Act and sections 15, 16 and 56(2) of SORMA.

In summation what conclusions can be drawn?

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200 Discussion under 2.3

201 see discussion under 4.4.

203 see note 53.

5.3 Conclusion

The Constitutional Court judgment should be commended for protecting the rights of children. Section 28(2) provides that a child's 'best interests are of paramount importance in all matters concerning children. In *Minister of Welfare v Fitzpatrick*, the Constitutional Court held that section 28 protects children against the undue exercise of authority. This section of the Constitution read together with Flisher and Gevers, the expert witnesses, clearly indicated that the impugned provisions caused harm to children as they constituted an intrusion into the private relationships of children and subsequently violated fundamental constitutional rights. An analysis of sections 15 and 16 showed that the provisions did not balances children's rights to autonomy, dignity and capacity and for this reason was declared unconstitutional.

The task of the lawmakers was then to ensure that they drafted a law aligned with the ruling. The amendments repealed sections 15 and 16 and replaced them with revised versions ensuring that the invalidity was limited to consensual sexual activity of adolescents between the ages of 12-15 years. The criminalisation of non-consensual sex such as unhealthy sexual behaviour that is behaviour that is unwanted, violent and unsafe was not affected. This is relevant to the fear that the age of consent had been lowered can be laid to rest as the age of consent remains 16 years in section 1 of the Amendment Act. Additionally the amendments do not encourage sexual promiscuity amongst children but says when they do they will not be treated as criminals.

Moreover the lawmakers deserve equal applause for involving the situation of the 'close-in-age gap' into the equation. The Constitutional Court did not rule on this and left it to the discretion of the Executive. They complied and improved on the position of 16 and 17 year olds who engage in consensual sexual conduct with an adolescent between the ages of 12-15 years, by limiting the offence and reporting obligation to when there is more than a two year age gap between them.

In addition, the Amendment Act, however left the reporting obligations of health care professionals weighed in the balance and found wanting. Health care workers have been eased of some responsibility but not in its entirety. The requirement to report the child's behaviour isolated the child and also made it impossible for the caregiver to perform his or her duty of giving advice. When matters are presented to them, they have to still interview children to establish if the matter requires reporting and they have to be vigilant against finding themselves in the same situation prior to the court case. So although the drafters of this legislation went over and above the ruling, this aspect would surely face challenges and will inevitably land up before the courts.

It is my view that upon analysis of the amendments as discussed in chapter 4, that the relevant impugned provisions were amended in accordance with the constitutional requirements. This chapter ends with recommendations that I feel with pave the way for further research in this regard.

5.4 Recommendations

In light of the above paragraph under the conclusion, the following is recommended. Health care providers and the police investigating sexual offences and social workers have and should continue to work closely together. The reason is that all these role players should assist when a situation of alleged abuse or unsafe sex, or unwanted sex arises and is presented at the hospital. The policy that all come on board as a multi-sectoral entity so that the child can receive professional help rather than just be ‘shoved’ into the system. It is suggested that the health professional await information from the police if a case docket is too opened or not.

Everyone agrees that the need to be open and honest about teenage sexuality and to allow young people to make truly informed choices as to when they will start exploring and eventually have sex. We therefore cannot use the justice system as a ‘weapon’ to control our children’s sexuality when we do not approve of their relationships as this will marginalise them. It is suggested that more education be introduced into schools life orientation classes and workshops by the police and health departments to increase children’s knowledge on their sexuality.

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